IN THE SUPREME COURT OF GIBRALTAR

Claim No. 2026/MISC/

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

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

Claimant

-and-

SIR PETER OPENSHAW, DL

Defendant

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

References herein in the style **[FPx/y]** are to the Exhibits to the First Witness Statement dated 4 February 2026 of the Claimant where **x** is the Exhibit number and **y** is the page number internal to that exhibit. References herein in the style **[para number]** are to paragraph numbers in the Report at **[FP1]**.

Structure and length: This claim relates to multiple findings and comments of the Chairman in the Report, each of which is challenged on one or more judicial review grounds. Because the grounds relied on arise principally from the absence or insufficiency of evidence to sustain a finding, findings arrived contrary to the evidence, inconsistencies and contradictions between findings, the "facts" in this claim are the findings/comments themselves and the evidence available to the Inquiry. The extent of this material is such that, if all grounds were set out first, followed by all "facts", it would be very difficult for the court and the Defendant to relate grounds to particular facts, and vice versa. Accordingly, this document is structured and laid out as follows in relation to each challenged finding/comment:

(i) Identification of the finding/comment
(ii) Statement of Facts relating to that finding/comment
(iii) Statement of Grounds relating to that finding/comment

Given the extent of the material required to be set out to comply with the applicable procedural rules, it has not been possible to limit this document to 40 pages. Permission to exceed has been sought and granted.

A. NATURE OF CLAIM, BACKGROUND FACTS AND PROCEDURAL MATTERS

Nature of claim and background facts

1. This is a claim to judicially review certain findings, decisions and comments (together, "**Challenged Findings**" or "**findings**" and individually, whether a finding, decision or a comment, "**finding**") of the Defendant, as Chairman (and sole panel member) ("**the Chairman**") relating to the Claimant in the Final Report dated 6 November 2025 ("**the Report"**) of the Inquiry into the reasons and circumstances leading to Mr Ian McGrail ceasing to be the Commissioner of Police in June 2020 by taking early retirement ("**terms of reference**") convened by Legal Notice 2022/034 dated 4 February 2022 ("**the Inquiry**").

2. The Grounds for the challenge are that the Challenged Findings are unlawful by reason of, variously, irrationality or unreasonableness ("**irrationality**"), illegality and procedural unfairness. The Challenged Findings relate to:
   2.1 Attempted Interference in an RGP Op Delhi investigation (Section B of this document).
   2.2 Other improper conduct in relation to the RGP investigation (Section C of this document).
   2.3 Misleading of or concealment from the Gibraltar Police Authority ("**GPA**") (Section D of this document).
   2.4 The sequence of events leading to Mr McGrail's retirement (Section E of this document).

3. The evidence in support of this claim is the Witness Statement dated 4 February 2026 of The Honourable Fabian Picardo KC MP ("**Claimant**" or "**Chief Minister**" or **Mr Picardo**"), Chief Minister of His Majesty's Government of Gibraltar ("**FPWS**"). The Report is at **[FP1]** and the terms of reference are at **[FP2]**.

4. A process (known as "Maxwellisation") has taken place after the end of the hearings and the initial drafting of the Report whereby the Chairman gave the Claimant notice of intended criticism of the Claimant in the Report. This was contained in the Inquiry Solicitor's letter dated 4 July 2025 to the Claimant's solicitors **[FP26]** and the latter's reply dated 8 August 2025 **[FP28]**.

5. To discharge the terms of reference the Chairman identified a list of issues (collectively, "**Issues**", individually "**Issue**") that he intended to investigate **[FP3]** to each of which he devoted at least one Chapter in the Report. In so far as concerns this claim, the relevant Issues to which the Challenged Findings relate are "*Operation Delhi – the Conspiracy Investigation*" (hereafter "**the Investigation**") by the RGP (issue 5, dealt with in Chapters 10 and 11 of the Report, commencing at **[FP1/268]**) and "*The Sequence of Events Leading to Mr McGrail's Retirement*" (Issues 8-10, dealt with in Chapter 12 of the Report commencing at **[FP1/495]**). The Chairman's conclusion as

to the factors which cumulatively resulted in the retirement of Mr McGrail are set out in **[para 12.389]** of the Report **[FP1/605]**.

6. The terms of reference delimit the scope of the Inquiry and the powers of the Chairman. This is the case both at common law[1] and under the Inquiries Act[2] . The Chairman rightly acknowledged this limitation in his Provisional List of Issues by stating therein that his investigation of the Issues would be limited "*to the extent that he considers necessary and appropriate to address the matter under inquiry*". **[para 1.8]**

Amenability to Judicial Review

7. The Report is judicially reviewable (even though it does not determine the Claimant's civil or criminal legal rights or obligations) if it is reached in a procedurally defective or otherwise unlawful way.[3] Findings and comments in the Report are "decisions" for the purposes of susceptibility to judicial review even though they be only statements of opinion.[4] This is especially so because the Challenged Findings damage the reputation of the Claimant, a person directly concerned in the inquiry[5]. The reason for exercising the power of judicial review is stronger if the reputation of a person directly concerned in the inquiry is damaged.[6] *Both* the public interest and the interests of the Claimant require that any criticism of the Claimant that damages his reputation is *made upon a proper legal basis.* [7] These principles have recently been confirmed by the Privy Council.[8]

---

[1] A commission "*is not a roving Commission of a general character authorising investigation into any matter that the members of the Commission may think fit to inquire into…the ambit of the inquiry is limited by the terms of the instrument of appointment of the Commission*." *Re Royal Commission on Licensing* [1945] NZLR 665 (New Zealand Court of Appeal).

[2] Section 7 Inquiries Act 2024: "*Functions conferred by this Act on an inquiry panel, or a member of an inquiry panel, are exercisable only within the inquiry's terms of reference*".

[3] See headnote in *Mahon v Air New Zealand* [1984] AC 808 (Privy Council from New Zealand)

[4] *Peters v Davison* [1999] 2 NZLR 164 (Court of Appeal of New Zealand) at 186, lines 25-30.

[5] *Peters v Davison* [1998] NZAR 309 (HC) at p166.

[6] *Peters v Davison* [1999] 2 NZLR 164 (Court of Appeal of New Zealand), at Headnote and page 193 line 25, page 199 line 29, page 210 line 11.

[7] *"in some situations condemnation of a person in a commission report will be scarcely distinguishable in the public mind from condemnation by a court of law… where a report calls a person's reputation into question in a direct way, both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis. It would be contrary to the public interest if the courts were not prepared to protect the right to reputation in such a context."* *Peter v Davison* at p 186.

[8] *Pyaneandee v Lam Shang Leen and Others* [2024] UKPC 27 at [53] (from the Supreme Court, Mauritius) "*In the Board's view, 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. 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*."

8. There is a common law right to respect for a person's reputation, which is protected by the law of defamation. The Chairman is immune from suit in respect of defamation to the same extent as a court.[9] The Claimant has a right, both at common law and under the Constitution not to have his reputation injured without sufficient justification. At common law, every citizen has a right not to be defamed without justification. Severe criticism in a public inquiry accompanied by wide publicity affects that right.[10] Accordingly, judicial review proceedings is the only 'access to the courts' required by Art 6 ECHR to protect Art 8 rights.

9. Section 7(1) of the Constitution, reflecting Article 8 of the European Convention of Human Rights ("**ECHR**") protects every person's right to respect for his *private* life, which includes the right to respect for a person's reputation.[11] The right to respect for a person's reputation is therefore a human right. The Chairman (like the courts) is a public authority for the purposes of the ECHR and it is therefore unlawful for him to act in a way which is incompatible with a ECHR (or Constitutional) right of the Claimant without proper legal justification.

10. The court may, on judicial review quash findings of fact (including decisions, comments and criticisms) in the Report where (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.[12]

11. The human rights context (such as the right to respect for reputation under Article 8 ECHR/s.7 Constitution) 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.[13] "It is not open to the decision-maker to risk interfering with fundamental rights in the absence of **compelling justification**".[14] "The more finality there is in the conclusions reached by a commission and reflected in its inquiry report and the greater the strength of their expression, the more that is required to be done by the commission to ensure that the process is fair; and vice versa"[15]. The reason for exercising the power of review is the stronger if the error damaged the reputation of any person directly concerned in the inquiry.[16]

---

[9] Section 29(3) of the Inquiries Act 2024.
[10] *Mahon v Air New Zealand* [1981] 1 NZLR 618 at 627 (In the New Zealand Court of Appeal, where the case is reported under the name "*Re Erebus Royal Commission; Air New Zealand v Mahon (No.2)")*, cited in *Peters v Davison* [1999]2 NZLR 164 (Court of Appeal of New Zealand) at 186, line 5.
[11] *Gunnarson v Iceland* (app no. 4591/04) 20 Oct 2004: *Chauvy v France* (App No. 64915/01) 29 Sept 2004 (ECtHR)
[12] *Mahon v Air New Zealand*, [1984] AC 808 at p 832H -833A (Privy Council)
[13] *R v MOD ex p Smith & Others* [1996] QB 517 per Lord Bingham. Confirmed by the Court of Appeal in *R v Lord Saville of Newdigate*, [2000] 1 WLR 1855 at [34].
[14] *R v Lord Saville of Newdigate* ibid, at [37]
[15] *Pyaneandee v Lam Shang Leen and Others*, supra, at [70]
[16] *Peter v Davison*, supra, headnote and page 193 line 25, page 199 line 29; page 210 line 11.

12. It is "essential" that the Court should be prepared to exercise its well-recognised role on applications for judicial review of an Inquiry Report regardless of the distinction of the decision-maker[17] (i.e. Sir Peter Openshaw, DL, who is a respected and experienced judge). As with appeals from judgments of respected and experienced judges in civil litigation, this does not impugn the Chairman himself or his reputation.[18]

13. In an investigative jurisdiction (as is the case of a public inquiry) the rules of natural justice require[19]:

    13.1 That the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value. This requires that the decision to make the finding **must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory**. In other words, there must be probative evidence of fact to sustain a finding, at least by inference, before it can be made. There must be material of probative value upon which to base the finding (hereafter "**the First Mahon Rule of Natural Justice**"); and

    13.2 That he must listen fairly to any relevant evidence conflicting with the finding. This requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result (hereafter "**the Second Mahon Rule of Natural Justice**").

Standing of the Claimant

14. The Claimant is and was at all material times the Chief Minister of Gibraltar whose conduct has been central to the matters inquired into by the Inquiry, and who gave both written and oral evidence to the Inquiry. The Report makes several harshly worded, critical findings and comments in relation to the Claimant, without any or sufficient legal justification, that seriously impugn his integrity and the propriety of his conduct and which have severely and unlawfully injured his reputation both professionally as a politician and a lawyer, and personally, and

[17] *R v Lord Saville of Newdigate* [2000] 1 WLR 1855 at [31]
[18] *Mahon v Air New Zealand*, [1984] AC 808, at 838C-F (Privy Council from New Zealand)
[19] *Mahon v Air New Zealand*, ibid, at 820F -821C

accordingly have interfered with both his constitutional/ECHR and common law right to respect for his reputation.

15. The Claimant is therefore directly affected by the Challenged Findings and comments in the Report and has a sufficient interest in the matter to which the Claim relates to bring this claim.

B. CHALLENGE TO FINDINGS RELATING TO INTERFERENCE IN THE INVESTIGATION

16. The Challenged Findings relating to interference in the Investigation are findings relating to:

    16.1 Attempted interference in the Investigation at the meeting with Mr McGrail on the 12th May 2020 ("12 May Meeting") (paras 17 to 22 below) (**the First Challenged Findings**);
    16.2 Rejection of the Claimant's explanation as to why he was concerned that the RGP had obtained a search warrant and called the 12 May Meeting, which the Chairman calls 'the jurisdiction argument' (paras 23 to 28 below) (**the Second Challenged Finding**);
    16.3 Interference with the Investigation by referring Mr Baglietto (Mr Levy 's lawyer) to the Police (Discipline) Regulations) (paras 29 to 34 below) (**the Third Challenged Findings**);
    16.4 Interference in the Investigation by requesting the Attorney General to take over and discontinue the warrant proceedings (paras 35 to 40 below) (**the Fourth Challenged Finding**);
    16.5 Interference in the Investigation by 'unexplained' contacts with Mr Levy (paras 41 to 45 below), (**the Fifth Challenged Finding**),

    each of which findings are dealt with separately below.

The First Challenged Findings: relating to attempted interference in the Investigation at the meeting with Mr McGrail on the 12th May 2020 ("12 May Meeting")

Identification of the First Challenged Findings

17. The Claimant challenges the following findings of the Chairman in the Report (**"the First Challenged Findings"**):

    17.1 "*However, there is a point when criticism risks becoming interference; that point is easier to recognise than to define. In my opinion, this is the first point at which Mr Picardo plainly crossed that line.*" **[para 11.85] and [para 0.100]**

    17.2 "*I find that the meeting on 12 May was a grossly improper attempt to interfere in a legitimate police investigation and operation. That Mr Picardo still seeks to defend his actions, that he thinks that he was within his rights, is not mitigation. Indeed, it makes it much worse*." **[para 11.87] and [0.101]**

Statement of facts relating to the First Challenged Findings

18. On 12 May 2020, the RGP attended at the offices of Hassans International Law Firm and home of Mr James Levy CBE KC ("**Mr Levy**") to execute a search warrant against him that had been granted by the Stipendiary Magistrate in relation to the Investigation. Shortly after the RGP officers arrived at the offices of Hassans to do so, Mr McGrail sent a WhatsApp message to the Claimant informing him that "*detectives are executing a search warrant at Hassans for (JL)*". The Claimant responded (9 minutes later) that "*I think that is a bad decision. A search warrant should only have been sought if you believed that the person in question was not going to cooperate and will try to destroy evidence*." The full exchange of messages is in **[para 11.2]** and **[para11.3]** . The Claimant then called Mr McGrail to a meeting **[para 11.28]** i.e. the 12 May Meeting at which (what the Chairman has found to be) the 'berating' of Mr McGrail by the Claimant took place.

19. In relation to the First Challenged Findings the Claimant relies on the facts of the evidence before the Inquiry and/or on other findings made by the Chairman, as follows:

    19.1 "*……he saw fit to call Mr McGrail as he wanted more information, 'because this was jurisdictionally important: Gibraltar's reputation was potentially going to be tarnished by this action…*' [T/16/175.4]". **[para 11.28]**

    19.2 "*He told Mr McGrail that he believed that 'the RGP had not acted properly in the execution of a search warrant in respect of a senior lawyer like Mr Levy', and said that he was not making the point because he was close to Mr Levy, as he would make the same point about other senior lawyers (Picardo 1 paras 44, 47 [A191-2]). Mr Picardo accepted that he made '[his] strength of feeling very clear…' [T/16/177.13] and that he used 'firm and forthright language' (Picardo 1 para 44 [A191]); he even concedes that his statements were 'robust' and 'very likely laced with expletives' (Picardo 1 para 51 [A193]).*" **[para 11.30].** The Chairman found that this amounted to "berating" Mr McGrail.

    (It was the Claimant's unchallenged evidence that his criticism of the RGP in the 12 May Meeting was not that the RGP should not investigate Mr Levy and obtain access to his electronic devices if necessary, but that the RGP should have sought and obtained a *production order* against Mr Levy in order to do so, and not a *search warrant*.)

    19.3 "*Mr McGrail alleges that Mr Picardo said there would be 'consequences' if he was right, in that the RGP had not conducted themselves properly [B75]. Mr McGrail took this to be more than just putting pressure upon him, amounting to a threat (McGrail 1 para 34 [A11]). Mr Picardo said by referring to 'consequences', he meant that there would be possible legal action by Mr Levy and Hassans against the RGP on the grounds that the warrant had been granted unlawfully, with consequences to the taxpayers of Gibraltar (Picardo 2 para 13 [A226]). When questioned about this at the Inquiry, Mr McGrail said he thought this meant that his 'head was on the line' [T/6/196.20]..*" **[para 11.58]**

    19.4 *"Mr McGrail felt that Mr Picardo was questioning what he considered to be operational decisions taken by the RGP, in the course of an ongoing criminal investigation, which he did*

not think to be appropriate (McGrail 1 para 33 [A10]). Indeed, he thought that it amounted to an inappropriate interference with the operational independence of the Police, designed to cause me to halt the actions of Superintendent Richardson and his team' (McGrail 5 para 119 [A167]). **[para 11.68]**

19.5 "*Indeed, he even thought that Mr Picardo was suggesting that he should recall Mr Richardson and his team from Hassans offices*". **[para 11.69]**

19.6 He was asked: '*… did the Chief Minister or the Attorney-General make any attempt whatsoever on 12 May to stop the RGP doing as it pleased in relation to the execution of the search warrant?*' He replied: '*They did, in my interpretation, by applying the pressure that they did, with the threat included. I took it to mean that I should call back the officers from the offices of Hassans, that I should stop the activity against* [Mr Levy]' **[para 11.73]**

19.7 "*If Mr McGrail's understanding was right, this would represent a very serious attempt to interfere with the investigation. I do not accept this interpretation. In my judgement, if Mr Picardo had seriously intended to require the recall the RGP officers from Hassans offices, he would have said so: his manner is usually to speak bluntly*." **[para 11.74]**

19.8 "*Moreover, in his email to himself [B75] prepared on 12 May 2020, Mr McGrail gave a detailed account of the events of that day; he said, in terms, that he 'felt the CM was questioning an operational decision on a live criminal matter and that this was not appropriate', but he makes no mention that he interpreted what happened to be an attempt to persuade him to call back the officers and abandon the execution of the warrant*".**[para 11.75]**

19.9 "*Furthermore, Mr McGrail has filed seven witness statements. It was not until his fifth affidavit in August 2023 that he made this allegation ('I took their rebuke to be … designed to cause me to halt the actions of Superintendent Richardson and his team': McGrail 5 para 119 [A167]), having in his previous witness statements dealt at length with the 'berating', without having made any allegation that he should recall the officers*". **[para 11.76]**

19.10 "*Mr Richardson gave evidence that whilst he was still at Hassans offices, dealing with Mr Levy, he received a call from Mr McGrail which he left the room to take: 'Mr McGrail had said that he had the dressing down of his career by a Chief Minister and wanted me to come back to brief him [i.e. Mr McGrail]…' [T/5/11.24]. So, according to Mr Richardson, he was called out by Mr McGrail to hear his complaints about the 'berating', not to hear complaints that Mr Picardo was seeking his recall. Indeed, he said, in terms, that he 'wouldn't say that that was an interference though in the investigation' [T/5/15.7]. Indeed, he confirmed that 'The execution of the search warrant or non-execution of the search warrant as it happened, did go as we had planned' [T/5/11.15] – that is to say, without interference*". **[para 11.77]**

19.11 "*I conclude that Mr Picardo did not do, or say, anything at that meeting that could reasonably be interpreted as a request, instruction or threat, to recall the RGP officers from Hassans. I, therefore, reject this specific allegation* **[para 11.78].**

19.12 "*I accept that the Chief Minister is entitled to be critical, even highly critical, of the RGP's decisions, and even of their operational decisions. That is part of the democratic process*. ***However, there is a point when criticism risks becoming interference; that point is easier to recognise than to define. In my opinion, this is the first point at which Mr Picardo plainly crossed that line***. *I reject Mr Picardo's defence of his actions. I do not think that he was*

protecting the reputation of Gibraltar; I think it far more likely that he was moving to protect Mr Levy, his life-time friend and 'mentor', from the likely consequences of the warrant being executed or his phones being interrogated." **[para 11.85]** (Bold type added to show the finding comprising the First Challenged Findings)

19.13 "***I find that the meeting on 12 May was a grossly improper attempt to interfere in a legitimate police investigation and operation. That Mr Picardo still seeks to defend his actions, that he thinks that he was within his rights, is not mitigation. Indeed, it makes it much worse***." **[para 11.87]** ((Bold type added to show the finding comprising the First Challenged Findings)

19.14 " *I conclude that, however improper it was to summon Mr McGrail, and however improper it was to 'berate' him, neither action in fact interfered with the visit of the RGP to Hassans; they carried on precisely as had been planned. I conclude that there was no actual interference with the RGP's actions on 12 May*." **[para 11.90]**

Statement of Grounds relating to the First Challenged Findings

20. **Ground 1 - Irrationality**. The Chairman's findings in **[para 11.85]** (para 17.1 above) that the Claimant's conduct in the 12 May Meeting *"plainly crossed* [the] *line"* from criticism to interference and in **[para 11.87]** (para 17.2 above) that "*the meeting on 12 May was a grossly improper attempt to interfere in a legitimate police investigation and operation"* are unreasonable or irrational because:

20.1 <u>The 'berating' was not about interfering with the execution of the warrant</u>.

(i) Mr McGrail evidence was that he thought that the purpose of the "berating" of him by the Claimant in the 12 May Meeting was to bring about the abandonment of the execution of the search warrant against Mr Levy, then in progress:

(a) "*Mr McGrail alleges that Mr Picardo said there would be 'consequences' if he was right, in that the RGP had not conducted themselves properly"* (i.e., in obtaining and "executing" a search warrant instead of a production order") **[para 11.58]** (para 19.3 above)

(b) *"……he thought that it amounted to an inappropriate interference with the operational independence of the Police, designed to cause me to halt the actions of Superintendent Richardson and his team'* **[para 11.68]** (para 19.4 above)

(c) "*Indeed, he even thought that Mr Picardo was suggesting that he should recall Mr Richardson and his team from Hassans offices*". **[para 11.69]** (para 19.5 above).

(ii) But the Chairman <u>specifically rejected</u> this allegation. The Chairman found that the Claimant did not even attempt to *interfere* with the investigation at the 12 May Meeting by

the abandonment of the execution of the search warrant against Mr Levy, then in progress **[para 11.74]** (para 19.7 above) and [**para 11.78**] (para 19.11 above).

(iii) Nor did the Chairman make any finding in the Report, nor cite and accept any evidence by Mr McGrail to the effect that the Claimant attempted to interfere with the investigation in the 12 May Meeting to any other end or for any other purpose or of any other kind. Indeed:

(a) The Chairman rejected ("*I do not accept this interpretation")* **[para 11.74]** (para 19.7 above) Mr McGrail's evidence that he "*took it to mean……that I should stop the activity against* [Mr Levy]' **[para 11.73]** (para 19.6 above). He also concluded "*that there was no actual interference with the RGP's actions on 12 May*." **[para 11.90]** (para 19.14 above).

(b) The Chairman has therefore found that the 'berating' on the 12th of May was not designed to recall the officers from executing the warrant or to "*stop the activity against Mr Levy*" but has made no finding as to how else it could have been, still less was, an attempt to interfere in the Investigation. He has simply and arbitrarily asserted that it was.

(c) The Chairman accepted the Claimant's evidence and assessment that Mr McGrail was '*not a shrinking violet'* in respect of his ability to withstand abuse. The Chairman's finding was that "*However, such language should not nowadays be directed at anyone in the workplace; it cannot be justified simply on the grounds that it was directed at an experienced Commissioner of Police*". **[para 11.31]** The Chairman accordingly found that the "*language*" used by the Claimant "*should not nowadays be directed at anyone in the workplace*". This is a very long way from a finding to the effect that the Claimant interfered with the Investigation in the 12 May Meeting to any other end or for any other purpose or in any other way. The berating was in the nature of the language used and the style and manner in which it was delivered. It was not about 'content' of what was said. As to content of the berating (search warrant v production order, which is a debate as to method or process not as to whether or not an investigation should proceed or not) the Chairman found, rightly, that the Claimant was entitled to express criticism (see paragraph 20.2, below).

(iv) Furthermore, the finding appears to be based on an incorrect factual and evidential premise, namely, the Chairman finds **[para 11.39]** that "*Mr Picardo confirmed that Mr McGrail had said that the DPP had advised that Mr Levy should be treated as a suspect*." That premise is incorrect and in error. The Chairman relies for that premise on the Claimant's oral evidence at [T/16/206.25] **[FP20/52]**, but far from sustaining the premise it demonstrates

its incorrectness and error.[20] The Chairman mischaracterises and misquotes the Claimant's evidence. At no time has Mr Picardo said in evidence "*that Mr McGrail had said that the DPP had advised that Mr Levy should be treated as a suspect*." His evidence was the opposite, namely that he did ***not*** do so and that Mr McGrail did **not** mention or refer to Mr Levy being a suspect. This reversal of the factual evidence before the Inquiry is a fatal flaw in the Chairman's reasoning which robs it of its logical integrity and renders the findings flowing from it unfair and evidentially unsupportable.

(v) Confirmation of the Chairman's erroneous factual and evidential basis, if further were required, is to be found in relation to the supposed evidence of Mr Llamas also (mis)quoted by the Chairman to the same effect at **[para 11.49]** where he says "*Mr Llamas said that Mr McGrail specifically referred to a 'warrant', not 'intervention' [T/11/213.24, 214.8], and not just whether to treat Mr Levy as a suspect [T/11/214.10]*." But his evidence was to the contrary. Asked whether Mr McGrail could have said the DPP had advised on whether to treat Mr Levy as a suspect, Mr Llamas answered 'No' [T/11/214.10-11] **[FP15/54]**.

20.2 As to the Claimant's entitlement to criticise RGP, but there being a point at which criticism 'risks' becoming interference:

(i) The Chairman found that "*I accept that the Chief Minister is entitled to be critical, even highly critical, of the RGP's decisions, and even of their operational decisions. That is part of the democratic process"* **[para 11.85]** (para 19.12 above). In the First Challenged Findings the Chairman *also found that "However, there is a point when criticism risks becoming interference; that point is easier to recognise than to define."* **[para 11.85]** (para 17.1 above).

(ii) First, the finding that "*there is a point when criticism risks becoming interference; that point is easier to recognise than to define*" is a nebulous criterion unlikely to produce any result other than an arbitrary or whimsical one. It is also incorrect. Interference is a concept well known to the law (not least in the context of the offence of interference with witnesses or jurors) and easily defined. It has an ordinary meaning in the English language, which is also its legal meaning. Conduct either amounts to interference or it does not.

(iii) Second, the terms and way in which criticism is levelled cannot of itself convert criticism into interference. Criticism cannot and does not cease to be a democratic process entitlement on the part of the Claimant (as found by the Chairman) to become interference, still less a grossly improper attempt at interference, in a police investigation simply because

[20] FP: "***But he certainly didn't use the word "suspect" because that would have stood out like a sore thumb to me and he didn't use that word…"*** Chairman: "*But he was a suspect."* FP: "***But I wasn't told he was"***. The full text of this evidence is at **[FP20/52]**.

it is delivered in manner and language that is thought to be inelegant and inappropriate or angrily. Criticism (which the Chairman believes the Claimant was entitled to level) cannot and does not become (undefined, and supposedly undefinable) "interference" by virtue merely of the language, stridency and manner in which it is delivered. A "berating" style and manner cannot and does not logically or rationally be thought to convert criticism (that is otherwise legitimate) into improper (attempted) interference in the Investigation.

(iv) Third, the findings have no regard whatsoever to the fact that the content of the berating, namely, that recourse to a production order rather than a search warrant was the proper course to have followed, is a perfectly legitimate view, regardless of whether the Claimant's view in that respect may have been correct or incorrect. The difference is not capable of converting such criticism into interference (still less improper interference). Furthermore, the Chairman rightly found that, as an important part of the democratic process, the Claimant was entitled to be "highly critical" of the RGP.

(v) Fourth, for the reasons stated in para 20.1 above, the notion that the "berating" found by the Chairman constitutes the "*point when criticism risks becoming interference"* (and in the case of the 12 May Meeting became) attempted interference in the Investigation is based on an error of fact and reasoning, relying on an inversion of the evidence before the Chairman , which robs the decision of logical integrity and factual basis.

(vi) Fifth, it is impossible to reconcile the findings that (i) the Claimant's criticism (which he was entitled to make) became an *attempt* at interference with the Investigation (despite the finding that nothing that occurred in that meeting was pressure or interference to bring about the ending of the warrant execution) and (ii) the absence of a finding as to any other possible manner of interference. Accordingly, the First Challenged Findings contradict and are inconsistent with these other findings and absence of finding of the Chairman.

20.3 The First Challenged Findings are also irrational for the reasons set out in paragraph 46 below, which are repeated here for this purpose.

21. **Ground 2 – Natural Justice**. The First Challenged Findings have been arrived at in breach of the applicable principles of natural justice, namely the First Mahon Rule of Natural Justice (as to which see para 13.1 above) because there is no probative fact found by the Chairman to sustain the First Challenged Findings, namely some way (other than attempting to interfere with the execution of the search warrant on 12 May, which the Chairman explicitly found did NOT occur) that was capable of constituting and constituted an attempt to interfere with the Investigation. The First

Challenged Finding also failed to have regard to the evidence to the contrary and was therefore arrived at in breach of the Second Mahon Rule of Natural Justice (as to which see para 13.2 above).

22. **Ground 3 - Illegality**. The Chairman's findings in **[para 11.87]** (para 17.2 above) that *"Mr Picardo still seeks to defend his actions, that he thinks that he was within his rights, is not mitigation. Indeed, it makes it much worse*" is fatally tainted by illegality because:

    22.1 It is gratuitously critical comment completely irrelevant to and unnecessary to discharge the terms of reference and accordingly outside the scope of his commission and ultra vires the Chairman. The Inquiry's terms of reference and thus its scope are limited to reasons and circumstances "*leading to*" Mr McGrail's retirement. The Inquiry's terms of reference did not extend to an inquiry 'at large' about the propriety of the Chief Minister's conduct.

    22.2 The findings also interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

<u>Second Challenged Finding: rejection of the Claimant's 'jurisdictional argument' in relation to 12 May Meeting</u>

Identification of the Second Challenged Finding

23. The Claimant challenges the following findings of the Chairman in the Report ("**the Second Challenged Finding**):

"*I reject Mr Picardo's defence of his actions. I do not think that he was protecting the reputation of Gibraltar; I think it far more likely that he was moving to protect Mr Levy, his life-time friend and 'mentor', from the likely consequences of the warrant being executed or his phones being interrogated*." **[para 11.85] and [para 0.100]**

"*I specifically reject the 'jurisdictional' argument on which Mr Picardo relies. I do not entirely accept the submission put forward by Mr Wagner (closing submissions, para 34.2). However, I do accept that to equate the personal interests of a small circle of rich, powerful and influential individuals in Gibraltar, many of whom are professional colleagues (or former professional colleagues), and even friends, with the interests of Gibraltar itself, may tend to encourage or to conceal misconduct or inappropriate and improper interference in official business or public affairs. Otherwise, any action taken to protect those individuals, or their interests, could then be justified as protecting 'the jurisdiction'. This cannot be right, because then the ends will always justify the means, and those individuals and their interests, will always be protected*." **[para 11.86]**

Statement of Facts relating to the Second Challenged Finding

24. The Chairman noted the Claimant's evidence that he had asked Mr McGrail to come to the 12 May Meeting "*as he wanted more information, 'because this was jurisdictionally important: Gibraltar's reputation was potentially going to be tarnished by this action…'*" **[para 11.29].** The Chairman also noted Mr McGrail's evidence to similar effect: "*Mr Picardo was also concerned about reputational damage to Gibraltar, since the news that a warrant had been executed at the offices of Gibraltar's most senior silk would get out*" **[para 11.67].**

Statement of Grounds relating to the Second Challenged Finding

25. The Chairman's decision to reject the "jurisdictional argument" for the reason and in the manner of the Second Challenged Finding is unreasonable or irrational (**Ground 1**), arrived at in breach of the principles of natural justice (**Ground 2**) and ultra vires the Chairman's terms of reference and thus illegal (**Ground 3**).

26. **Ground 1 – Irrationality**. The Second Challenged Finding is unsupported by evidence, contrary to the evidence, lacking in logical integrity, arbitrary and contradictory of other findings by the Chairman and therefore unreasonable or irrational because:

    26.1 First, there is no evidence whatsoever that the Claimant ever said, believed or believes that "*the personal interests of a small circle of rich, powerful and influential individuals in Gibraltar"* (whether friends or professional colleagues or not) should be "equated" with the interests of Gibraltar. This finding is wrongly and unfairly predicated on the basis that he did and is therefore entirely in the nature of an 'aunt sally' point or a "straw man argument".

    26.2 Second, the fact that the purported defence of a legitimate public interest is open to be abused in the manner that the Chairman describes, does not mean either that there is no such public interest nor that it cannot be lawfully advocated for and protected for fear of the possibility of abuse. That is true of all powers and responsibilities. The Chairman has fallen into error in this respect by equating ("to equate") one thing with the other.

    26.3 Third, it is irrational to base a decision on the illogical assumption that the public interest of Gibraltar cannot coincide with the interests of a "a small circle of rich, powerful and influential individuals", and even of friends and/or past or present professional colleagues of the Chief Minister. They often do. If the finding were rational and correct, it would never be possible for a Chief Minister to protect Gibraltar's public interests where "*the personal interests of a small circle of rich, powerful and influential individuals in Gibraltar, many of whom are professional*

colleagues (or former professional colleagues), and even friends" are involved and might also be protected. That is plainly wrong.

26.4 Fourth, the findings are also contrary to the evidence, because:

(i) Mr McGrail himself acknowledged that the RGP's execution of the warrant against Mr Levy and Hassans engaged the public interest. When Mr McGrail sent the WhatsApp message to the Claimant on 12 May alerting him to the fact that the RGP were then already executing the search warrant, he did not do so because of any personal connection or potential personal embarrassment because of the personal connection between the Claimant and Mr Levy or Hassans. He did so because of the significance and public impact of the action. He sent the same message to the Minister for Justice and the Attorney General, thereby acknowledging the width of the public interest engaged. In the email to himself supposedly sent on 12 May 2020, Mr McGrail said that he would be informing the CM, AG and Min Justice of this action "*given the delicate nature of the intervention*".

(ii) In oral evidence to the Inquiry, Mr McGrail said **[FP10/48]**:

(a) "*I informed the Chief Minister at the latest possible opportunity, in his capacity as Chief Minister, not as a friend or because of his personal relationship with Mr Levy*". [T/6/191.1-4]

(b) "Q: *Why did you feel the need to update the Attorney General?*
A: Again, for the same reasons that I've alluded to in terms of the Chief Minister. It's a high-profile individual, Mr Levy, and it was going to have an impact so best hear it from me than get it from another source. I did the same with the Minister of Justice who was at the meeting with me." [T/6/192.10-16]

26.5 Fifth, the Chairman found at **[para 11.150]** of the Report that at the time of the 12 May Meeting the Claimant could not and did not know that Mr Levy was then a suspect. That finding is logically contradictory of the finding that rather than protecting the jurisdiction "*it is far more likely that he was moving to protect Mr Levy, his life-time friend and 'mentor', from the likely consequences of the warrant being executed or his phones being interrogated*". Since Mr Picardo is found by the Chairman not to have known that Mr Levy was a suspect, there is no logical basis or grounding in probative evidence for the Chairman's finding that the Claimant considered that Mr Levy needed protection.

26.6 The Second Challenged Finding is also irrational for the reasons set out in paragraph 46 below, which are repeated here for this purpose.

27. **Ground 2 – Natural justice**. Simply choosing to disbelieve the Claimant that he was motivated by concern for the public interest without evidence to show a logical basis for such disbelief and

preferring instead a hypothesis for which there is no evidence (i.e. that he was moving to protect Mr Levy) is not a finding of fact properly open to the Chairman rationally or in accordance with the First Mahon Rule of Natural Justice or the Second Mahon Rule of Natural Justice (as to which see para 13 above).

28. **Ground 3 – Illegality**. The findings are fatally tainted by illegality because:

28.1 The public interests of Gibraltar, and the manner and extent to which they can and should be lawfully protected, is a matter for the Chief Minister (the Claimant), not the Chairman, to identify and decide. It is not for the Chairman to usurp the functions of the Chief Minister or to put himself in the Chief Minister's mind in this respect. The Chairman has found that the Claimant was not seeking or attempting to affect the execution of the warrant at that meeting. The Second Challenged Finding is irrelevant to the reasons or circumstances leading to Mr McGrail's retirement and thus outside the scope of his terms of reference, and thus ultra vires.

28.2 The finding also interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Third Challenged Findings: Interference with the Investigation by referring Mr Baglietto to the Police (Discipline) Regulations

Identification of the Third Challenged Findings

29. The Claimant challenges the following findings of the Chairman in the Report ("**the Third Challenged Findings**):

29.1 "*Mr Picardo explained that, as he well knew, those Regulations do not apply to the Commissioner of Police. He said that he was not here writing about removing Mr McGrail, he was referring to removing Mr Richardson [T/16/255.8].* **[para 11.301] and [para 0.112]**

29.2 *"I find Mr Picardo's explanation that this message was targeted at Supt Richardson unconvincing. Even though now everyone including Mr Picardo agrees that the Regulations do not apply to the Commissioner [T/16/258.24], I think it far more likely that he was referring to Mr McGrail. It shows that he firmly had Mr McGrail in his sights.* **[para 11.303] and [para 0.112]**

29.3 *"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 Supt 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 Supt 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 Supt Richardson, as the Senior Investigating Officer, this was a grossly improper attempt by Mr Picardo at interference with the investigation." **[para 11.304]**

Statement of Facts relating to the Third Challenged Findings

30. The Third Challenged Findings are based entirely on a WhatsApp message at 16:55 on 14 May 2020 by the Claimant to Lewis Baglietto in which the Claimant said: *'The last limb refers: Dismissal with total loss or reduction 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.'* **[para 11.297].** The Third Challenged Findings are the Chairman's findings in relation to this message.

31. As relevant to this Claim, the Chairman referred to the supposed evidence and commented upon it in the Report, as follows:

    31.1 "***Mr Picardo explained that, as he well knew, those Regulations do not apply to the Commissioner of Police. He said that he was not here writing about removing Mr McGrail, he was referring to removing Mr Richardson*** *[T/16/255.8]. He said that Mr Levy's view was that Mr Richardson was conducting the investigation in bad faith, having been induced by Bland, and had secured employment with Bland on lucrative terms. Mr Picardo said that Mr Levy was so distressed by the visit of the police with the abusive warrant that he was not thinking straight and, as a result, made this 'fanciful' allegation [T/17/89.1]. Mr Picardo stated he 'took the view that [the allegation] was nonsensical, that there was nothing to support that suggestion' [T/16/255.23], suggesting that he held this view even at the time. Mr Picardo seeks to defend his action in sending this message; he says Mr Baglietto was aware that Mr Levy believed that Mr Richardson was about to be employed by Bland [T/16/255.8] and set out what could happen in the event it was true [T/16/258.9]".* **[para 11.301]**

    31.2 "*Following this completely unexpected suggestion, Mr Richardson filed a statement entirely denying this allegation (Richardson 4 para 2 [A1551]), and no one suggests that the allegation was true. Mr Gibbs (on behalf of Mr Richardson) called it 'fantastical' (closing submissions para 35). I observe that there is no mention of this explanation in any of Mr Picardo's written statements. Mr Levy made no mention of this rumour himself, either in his statements or when he gave evidence, nor was it even suggested to him that he had originated this baseless untruth about Mr Richardson. Nor was it mentioned by Mr Baglietto in his evidence*." **[para 11.302]**

Statement of Grounds relating to the Third Challenged Findings

32. The Third Challenged Findings are unlawful on the grounds of irrationality (**Ground 1**) and illegality (**Ground 2**).

33. **Ground 1 – Irrationality**. The Third Challenged Findings are arrived at in the absence of any or adequate evidence and logical integrity, are contrary to the evidence before the Inquiry and are therefore unreasonable or irrational for the following reasons:

33.1 First, the findings are based on an entirely false evidential and factual premise:

(i) namely, that the message was about the "removal" of one or other of Mr McGrail or Mr Richardson, or indeed about the 'removal' of anyone, still less of Mr Richardson while he remained the investigator of Op Delhi.

(ii) That premise is manifestly incorrect and in error, namely that Mr Picardo said those things in evidence. The Chairman relies for that premise on the Claimant's oral evidence at [T/16/255.8], but far from sustaining the premise that demonstrates its incorrectness and error **[FP20/64]**.

(iii) Nor was there any evidence or probative fact before the Inquiry from which the Chairman could infer that the Claimant was speaking of the removal or one or other of Mr McGrail and Mr Richardson. Nor in fact does the Chairman even purport to make any such finding by inference. The Chairman has simply, again, fallen into factual error by mischaracterising and misstating the Claimant's evidence and then making the Third Challenged Findings based that error. The finding is therefore, once again, in the nature of an "Aunt Sally point" or a "Straw Man argument".

33.2 Second, the Chairman does not say on what basis he *"think[s] it far more likely that he was referring to Mr McGrail"*. There is no evidence to sustain this finding. There is no evidence before the Inquiry to that effect, nor any probative fact from which the Chairman could infer it. It is an entirely arbitrary opinion of the Chairman unsupported by and ungrounded in any evidence or probative fact from which he could properly draw any such inference. And the finding further ignores that the Police Regulations do not apply to the Commissioner of Police (which the Chairman acknowledges **[para 11.301]** that Mr Picardo explained that "he well knew" without the Chairman making any finding rejecting this fact).

33.3 Third, as if to suggest that the non-application of the Police (Discipline) Regulations to the Commissioner was unknown to the Claimant at the relevant time, and thus make the Third Challenged Findings rationally possible, the Chairman says "even though ***now*** everyone ***including Mr Picardo*** agrees that the Regulations do not apply to the Commissioner…" (emphasis added) [**para 11.303**] (para 29.2 above). There was no evidence before the Inquiry that the Claimant did not know that, and the evidence that there was from him was that he did know, as recorded by the Chairman himself: "*Mr Picardo's explained that,* ***as he well***

***knew**, those regulations do not apply to the Commissioner of Police*..." [**para 11.301**] (para 31.1 above) (emphasis in bold added).

33.4 Fourth, having found (without evidence) that it is *"much more likely"* that the intended target was Mr McGrail (despite the Police Regulations not applying to him as COP), on that basis the Chairman finds that *"It shows that he firmly had Mr McGrail in his sights"*. This finding lacks logical integrity and is thus irrational. It is not logically possible to find something *"firmly"* on the back of something else which is only *"much more likely"*.

33.5 Fifth, whether the "target" was Mr McGrail or Mr Richardson is logically irrelevant. The Chairman's finding that Mr Picardo was thereby seeking the removal of either Mr McGrail or Mr Richardson ignores the fact that those Regulations gave no power to the Claimant (or to anyone one or to the Government or anyone else that he could direct) to do either thing. Under those Regulations, only the Assistant Commissioner of Police can formulate charges, which can then be heard only by either the RGP Disciplinary Board or the Commissioner of Police (at the accused's option, which he shall not have when dismissal may result). The message was therefore not legally or factually capable of being an attempt by the Claimant at removal of the investigator (Mr Richardson) or Mr McGrail (the Commissioner of Police "in overall control of the investigation") and it was thus not capable of being an interference by him in the Investigation by removing either of them. It is therefore irrational to base a finding that *the Claimant* was seeking or proposing to remove any police officer by citing the provisions of the Police Regulations.

33.6 Sixth, the removal of Mr McGrail (whose removal the Chairman – albeit wrongly – finds that the Claimant was proposing in this message) does not interfere with the investigation in the sense of protecting Mr Levy from it or otherwise. The RGP would simply continue the Investigation, under a new Commissioner of Police, as in fact the Chairman has found the RGP did **[paras 12.391 and 12.436]**, after Mr McGrail's retirement without interference from anyone. It is therefore irrational for the Chairman to conclude that this message was motivated by trying to protect Mr Levy from or to interfere with that investigation.

33.7 The Third Challenged Findings are also irrational for the reasons set out in paragraph 46 below, which are repeated here for this purpose.

34. **Ground 2 – Illegality.** For the reasons stated above, the findings interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Fourth Challenged Finding: Interference in the Investigation by requesting the Attorney General to consider taking over and discontinuing the warrant proceedings

Identification of the Fourth Challenged Finding

35. The Claimant challenges the following finding of the Chairman in the Report ("**the Fourth Challenged Finding**):

"*….but to my mind this is another grossly improper attempt by Mr Picardo to interfere in an active criminal investigation by the RGP, to protect his friend and mentor, James Levy*." **[para 11.357] and [para 0.121]**

Statement of Fact relating to the Fourth Challenged Finding

36. The Chairman noted and commented upon the evidence leading to the Fourth Challenged Finding as follows:

36.1 *"After midnight (now on 18 May), Mr Picardo came up with yet another idea [B1418]. At 00.36, he sent Mr Llamas an image [C6763], being a copy of section 59 of the Gibraltar Constitution, subsection (2) of which reads as follows:*
'(2) The Attorney-General shall have power in any case in which he considers it desirable to do so-…
(a) to institute and undertake criminal proceedings before any court of law…;
(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority …
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings …' " **[para 11. 352]**

36.2 "*Mr Llamas replied directly (at 00.37): '(2)(b)?' [B1418]. Obviously, he is seeking to identify the sub-section to which Mr Picardo is referring. A few minutes later (00.49), Mr Picardo replied: 'Exactly. In re a search warrant as a 'proceeding' [B1418]. To which (at 00.52), Mr Llamas replied 'We need to check what 'such' means in that context'* "**[para 11.353]**. "*There the exchange ended."* **[para 11.354]**

36.3 "*Mr Picardo accepted that one of the things he was doing was proposing to Mr Llamas that he exercise his constitutional power to take over and continue the search warrant proceedings against Mr Levy [T/16/297.21]. He then accepted that he was also suggesting Mr Llamas could 'potentially' discontinue the search warrant proceedings [T/16/298.15], although he subsequently clarified that he was alerting Mr Llamas to his power to potentially exercise it if he considered it appropriate [T/16/299.7]. He stated in evidence that he was referring to the search warrant proceedings, not the Operation Delhi investigation [T/16/298.6]*." **[para 11.355]**

36.4 *He suggested that there was nothing inappropriate about 'rais[ing] such issues' with the Attorney-General, or referring him to powers set out in the Constitution in 'the circumstances that appertained that day' and given his 'jurisdictional concern' [T/16/299.13]. It was in this*

context that he added that Mr Levy was not just his friend, but 'Gibraltar's biggest rainmaker' and 'one of the greatest sources of business for the finance centre' [T/16/300.23]. He maintains that by protecting Mr Levy, he was acting in the public interest to protect the wider economic interests of Gibraltar. He sometimes called this the 'jurisdictional' point [T/299.17]. **[para 11.356]**

36.5 "*In my judgement, here Mr Picardo, as Chief Minister, is canvassing the possibility that Mr Llamas should take over the process of the RGP executing the search warrant, under section 2(b) of the Constitution, and then discontinuing the 'proceeding' for the search warrant under 2(c), presumably by applying to the Magistrates' Court to withdraw the warrant. I am not called upon to determine whether section 59(2)(b) and (c) of the Constitution permits such a course in relation to a search warrant,* ***but to my mind this is another grossly improper attempt by Mr Picardo to interfere in an active criminal investigation by the RGP, to protect his friend and mentor, James Levy***." **[para 11.357]**

37. The Attorney General considered the Claimant's request and was not satisfied that it was open to him to do so, so that is where the matter rested.

Statement of Grounds relating to the Fourth Challenged Finding

38. The Fourth Challenged Finding is challenged on the grounds of irrationality (**Ground 1**) and illegality (**Ground 2**) and Natural Justice (**Ground 3).**

39. **Ground 1 – Irrationality.** The Fourth Challenged Finding lacks foundational logic and is irrational because:

39.1 First, asking the Attorney General to consider if it would be proper to have recourse to section 59 and accepting his view that it was not, is not and is not capable of being "*another grossly improper attempt by Mr Picardo to interfere in an active criminal investigation by the RGP*". The Chief Minister is perfectly entitled to ask the Attorney General to consider properly using his powers in support of a public interest of Gibraltar identified by the Chief Minister (or anybody else).

39.2 Second, to accept the outcome of that consideration is evidence of submission to proper process, not the contrary, as the Chairman appears to believe based only on his rejection (without proper evidential basis and irrationally) that Mr Picardo was not concerned with the public interest or that the public interest was not engaged.

39.3 Third, were the Claimant's request to the Attorney General to consider the use of section 59 to be inappropriate, it did not and could not constitute "interference" with the Investigation since, as the Chairman himself found, a court of law would have had to accede to any such request (and thus be satisfied that it was proper to do so) and/or would have been an entirely lawful, constitutional outcome. To discontinue a search warrant procedure following a

proper, lawful and judicial process cannot in any circumstances be an interference with the Investigation of which that warrant formed part. The finding that it did therefore lacks logic to the degree that it is unreasonable.

39.4 Fourth, the Chairman makes the Fourth Challenged Finding on the basis of his mischaracterisation and misstatement (in **[para 11.356]** that Mr Picardo had said in evidence that "*Mr Levy was not just his friend, but Gibraltar's biggest rainmaker*…." (thereby suggesting that he was seeking to protect both) and that "*he maintains that by protecting Mr Levy, he was acting in the public interest to protect the wider economic interests of Gibraltar*" i.e. the "jurisdictional argument" that the Chairman rejected. The Chairman relies for that premise on the Claimant's oral evidence at [T/16/299.17] but, far from sustaining the finding, that evidence demonstrates its incorrectness and error **[FP20/75]**. Mr Picardo did not say anything to the effect that he was protecting Mr Levy. Indeed, his evidence was to the contrary.[21]

39.5 The Fourth Challenged Finding is also irrational for the reasons set out in paragraph 46 below, which are repeated here for this purpose.

40. **Illegality and Natural Justice**

40.1 **Ground 2 – Illegality.** For the reasons stated above, the findings interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

40.2 **Ground 3 – Natural Justice.** For the reasons stated in para 39.4 above, the Fourth Challenged Finding was arrived at in breach of the Second Mahon Rule of Natural Justice.

Fifth Challenged Finding: Interference in the Investigation by 'unexplained' contacts with James Levy

Identification of the Fifth Challenged Finding

41. The Claimant challenges the following finding of the Chairman in the Report ("**the Fifth Challenged Finding**):

[21] "*I was acting in the interests of Gibraltar. I wasn't acting in the interests of a friend, I wasn't acting in my business interests, I was acting in the interests of Gibraltar every time. That's why I was expending quite so much time on these issues, because I believed genuinely that the interests of Gibraltar required me to act in that way.":* [T/16/301.12-20] **[FP20/76]**

"*In my judgement, henceforward, in his dealings with Mr Levy, 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*." **[para 11.151]**

Statement of Fact relating to the Fifth Challenged Finding

42. The Chairman drew the inference "*that very shortly – probably within hours – of the police leaving Hassans offices on 12 May, Mr Picardo must have learned or deduced that Mr Levy was suspected by the RGP of being involved in a conspiracy which was alleged to have caused serious failures to the NSCIS platform, which existed to protect the security of Gibraltar*." **[para 11.150]** ***"In my judgement, henceforward, in his dealings with Mr Levy, 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."*** **[para 11.151]** (The words in bold type and the challenged finding)

Statement of Grounds relating to the Fifth Challenged Finding

43. The Fifth Challenged Finding is unlawful on the grounds of irrationality (**Ground 1**) and Illegality (**Ground 2**).

44. **Ground 1 – Irrationality**. The Fifth Challenged Finding lacks foundational logic and is irrational because:

    44.1 The notion that contacts that are not otherwise improper, would, if unexplained, have the *appearance* of interference with the Investigation, and that any such unexplained contact is apt to be criticised, is manifestly incorrect. Contact either interferes in an investigation or it does not.

    44.2 The Chief Minister is not logically (or otherwise) required "*to proceed with extreme caution and circumspection*" simply because otherwise proper conduct might have "the appearance" of an interference with the police investigation.

    44.3 The Chairman's finding that the Chief Minister's contact with Mr Levy, if unexplained, would have at least the appearance of interference with the Investigation, lacks logical integrity, is an error of reasoning and arbitrary and is irrational and accordingly unlawful.

    44.4 The Fifth Challenged Finding is also irrational for the reasons set out in paragraph 46 below, which are repeated here for this purpose

45. **Ground 2 – Illegality.** For the reasons stated above, the Fifth Challenged Finding is fatally tainted by illegality because the finding:

45.1 is irrelevant to and thus outside the scope of the terms of reference and thus ultra vires the Chairman; and

45.2 interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

***ADDITIONAL GROUND OF IRRATIONALITY APPLICABLE TO ALL OF THE FIRST TO TWELFTH CHALLENGED FINDINGS*.**

46. The Chairman has found as a fact **[para 12.391]** and **[para 12.436]** that the Investigation continued after Mr McGrail's retirement without interference or attempted interference from anyone (including the Claimant). It is therefore without foundational logic and irrational for the Chairman to also conclude that whatever the Claimant did in relation to either the removal of Mr McGrail or the other acts of misconduct found by the Chairman in relation to the Investigation were motivated by trying to protect Mr Levy from that Investigation or from "*the likely consequences of the warrant being executed or his phones being interrogated*" **[para 11.85]** and therefore an interference in the Investigation:

46.1 It is irrational to conclude both (i) that Mr Picardo was seeking to protect Mr Levy and also (ii) that, having supposedly achieved his objective (when Mr McGrail retired on 9 June 2020), he took no steps after Mr McGrail's retirement to interfere or attempt to interfere in the Investigation to achieve the protection of Mr Levy from the Investigation or interrogation of his devices. The Chairman found as a fact that after Mr McGrail's retirement on 9 June 2020, the RGP made the decisions (i) whether to interrogate or not Mr Levy's devices and (ii) whether to proceed or not to charge Mr Levy entirely without interference or attempted interference from anybody (including Mr Picardo).

46.2 If Mr Picardo had no interest in interfering or attempting to interfere in the Investigation to protect Mr Levy from anything after 9 June, it is irrational to infer that he had and did so before 9 June. Mr Levy's supposed need for protection did not change on 9 June by reason of Mr McGrail's retirement or otherwise.

46.3 In fact, this finding of absence of further actions constituting interference or attempted interference by the Claimant after Mr McGrail's retirement also sustains the objective truth of the position of the Claimant, namely, that he had lost confidence in Mr McGrail because of his genuinely and honestly held belief (which the Chairman found to be a fact) that Mr McGrail

had lied to him, in his office, about the advice received from the DPP – and not out of any motivation to protect his 'friend and mentor James Levy'.

C. CHALLENGE TO FINDINGS RELATING TO OTHER IMPROPER CONDUCT IN RELATION TO OPERATION DELHI

47. The Challenged Findings other improper conduct relating to the Investigation are findings relating to:

47.1 Speaking to and meeting with Mr Levy, a suspect and Mr Baglietto, his lawyer about the suspected offence (paras 48 to 52 below) was grossly improper **(the Sixth Challenged Findings)**;

47.2 Improperly approving a proposal that the RGP had already approved (paras 53 to 56 below) **(the Seventh Challenged Findings)**;

47.3 Reassurances given to Mr Levy (paras 57 to 61 below) **(the Eighth Challenged Findings)**;

47.4 Advice given to Mr Levy's lawyer relating to recovery of devices (paras 62 to 66 below) **(the Ninth Challenged Finding)**;

47.5 Non-disclosure of the 17 May 2020 meeting between the Claimant, Mr Levy and Mr Baglietto at Claimant's home (paras 67 to 70 below) **(the Tenth Challenged Findings)**;

47.6 Determination to thwart the search warrant (paras 71 to 74 below) **(the Eleventh Challenged Finding)**,

each of which findings are dealt with separately below.

Sixth Challenged findings: Speaking to and meeting with a suspect and his lawyer about suspected offences

Identification of the Sixth Challenged Findings

48. The Claimant challenges the following finding of the Chairman in the Report ("**the Sixth Challenged Findings**):

48.1 "*I comment that, in my opinion, Mr Picardo, after he had received that confidential information, should not be speaking to the lawyer then representing Mr Levy in connection with that suspected offence.*". **[para 11.181]**

48.2 "*It is no excuse that all three were old friends, indeed it makes it rather worse, since that is a further reason why they should not have been discussing this matter at all. This was a grossly improper meeting, which should never have taken place*." **[para 11.323]** (This was with reference to the 17th May Meeting)

48.3 "*If Mr Picardo was aware of the boundaries, which I doubt, he had yet again chosen to break them*." **[para 11.324]**

48.4 "*I do not accept this explanation. Mr Levy was not, I think, 'reassured' because of exchanges he had with Mr Picardo about the Gibraltar Community Care Trust; as it seems to me, he was*

*reassured about what he had heard Mr Picardo say of his approach to Mr McGrail and to Operation Delhi. [**para 11.350**] "So, 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 that here again, Mr Picardo is here improperly attempting to protect his friend and mentor from the consequences of a warrant lawfully issued*." [**para 11.351**]

Statement of Fact relating to the Sixth Challenged Findings

49. The Chairman made related findings and comments as follows:

49.1 "*I comment that here we have Mr Picardo, as Chief Minister, meeting a person then suspected of serious crime, arising from the misuse of the NSCIS platform, intended to protect the security of Gibraltar, with the lawyer acting for him, at his own home, without any record or minute of the meeting. It is no excuse that all three were old friends, indeed it makes it rather worse, since that is a further reason why they should not have been discussing this matter at all. This was a grossly improper meeting, which should never have taken place*." **[para 11.323]**

49.2 "*Mr Baglietto was asked whether he thought there was anything improper in this meeting, he explained – and sought to excuse – his own conduct generally by saying, as others have done, that Mr Picardo would be 'aware of his boundaries' [T/9/182.10]. If Mr Picardo was aware of the boundaries, which I doubt, he had yet again chosen to break them*." **[para 11.324]**

Statements of Grounds relating to Sixth Challenged Findings

50. The Claimant challenges the Sixth Challenged Findings on the grounds of irrationality (**Ground 1**) and illegality (**Ground 2**).

51. **Ground 1 – Irrationality**. The Sixth Challenged Findings are irrational because:

51.1 No criterion is identified by reference to which the findings have been made. The findings are simply the opinion of the Chairman based on what he thinks is proper and not proper behaviour on the part of a Chief Minister. They are ungrounded in any established legal principle or legal provision or Parliamentary rule applicable to the Chief Minister and against which the Claimant's conduct has been or can be objectively assessed and judged. Accordingly, the findings are arbitrary.

51.2 These findings are especially unwarranted in the light of the Chairman's finding (as the Claimant had himself pointed out in his evidence) that "*The Chief Minister in Gibraltar has no legal standing in, still less statutory responsibility for, criminal investigations or prosecutions*" **[para 11.83].** The effects of this cuts both ways and there is therefore no logical or other rational reason for the findings the effect of which is to restrict the Claimant's freedom.

However much the Police, prosecution services and ministers may all be or represent emanations of the Crown (as is the judiciary), police investigations and criminal prosecution are not akin to "a team sport" in which all parts of the Crown are required to support the police or the prosecution. Indeed, the Rule of Law requires that different emanations of the Crown are and must act independent of each other and are therefore free to act, within the confines of the powers and duties of each of them – none of which the Claimant has exceeded in the actions giving rise to this finding.

51.3 The Sixth Challenged Findings are also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose.

52. **Ground 2 – Illegality.** These findings interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Seventh Challenged findings: findings that at the 17 May Meeting the Claimant had improperly approved the proposal of a written statement by Mr Levy to the RGP

Identification of the Seventh Challenged Findings

53. The Claimant challenges the following finding of the Chairman in the Report ("**the Seventh Challenged Findings**):

"Either during the meeting or immediately after he left the meeting at the Chief Minister's house on 17 May, at 14.51 [C3938], Mr Baglietto sent an email to Mr Llamas (copied to Mr McGrail) to the effect that following 'your confirmation that the Commissioner would be content with a written statement from Mr Levy … Mr Levy will give a written statement' and that, in the circumstances, he would not be attending for the interview under caution, which was scheduled for the following day." ***[para 11.330] I think the inevitable and irresistible conclusion is that this was the main topic discussed at the meeting with the Chief Minister only an hour or so beforehand." [para 11.331] "If this conclusion is right, as I find to be, it must follow that Mr Picardo had thereby given his approval to the proposal of a written statement (which as I set out above, was made, and agreed, at the meeting between the RGP and the Attorney General on 15 May). Of course, it was improper that he did so." [para 11.332] The very next day, Mr Picardo set in train the events which were to result in Mr McGrail's 'retirement'. [para 11.332]*** *(The words in bold type comprise the Seventh Challenged Findings)*

Statement of Grounds relating to the Seventh Challenged Findings

54. The Claimant challenges the Seventh Challenged Findings on the grounds of irrationality (**Ground 1**), breach of natural justice (**Ground 2**) and illegality (**Ground 3**).

55. **Ground 1 – Irrationality and Ground 2 – Natural Justice.** The Seventh Challenged Findings lack logical integrity and are arrived at without evidence or probative fact from which to infer them, and are therefore irrational and arrived at in breach of the principles of natural justice, because:

55.1 First, the Chairman's finding of impropriety on the Claimant's part is based on the *"inevitable and irresistible conclusion"* that because Lewis Baglietto issued an email after meeting with the CM *"this was the main topic discussed at the meeting with the Chief Minister only an hour or so beforehand"*. There is nothing forensically inevitable or irresistible about that conclusion simply from the chronology of events.

55.2 The Chairman says that if that conclusion is right (which the Chairman declares it to be) "*it must follow*" that the Claimant "*had thereby given his approval to the proposal of a written statement*" which had already been agreed to by the RGP and the AG on 15 May. There is no rational forensic basis for that apparently compulsory conclusion.

55.3 This finding therefore relies on multiple, overlaid, layers of supposition and arbitrary speculation –

(i) The Chairman finds (as to which see para 48.4 above and paras 57 - 61 below) that he does not accept the "explanation" that at this meeting Mr Levy was reassured about Community Care Limited. Instead, and unlawfully, he finds that "*it seems to me, he was reassured about what he had heard Mr Picardo say of his approach to Mr McGrail and to Operation Delhi"*. [**para 11.350**] (para 48.4 above);

(ii) Because he has found that, he then finds that it is the *"inevitable and irresistible conclusion"* from Mr Baglietto's later email that this was the main topic discussed at the meeting "*from which it must follow*" that the Claimant "*had thereby given his approval to the proposal of a written statement*".

55.4 Second, the Chairman declares it improper that the Claimant should purport to give his imprimatur (itself an assumption on his part) to a decision already taken by the RGP and others. This conclusion is itself unexplained, unfair and arbitrary. It is not explained why or how it is improper for the Chief Minister to express his agreement with something that the Chairman has found that the RGP had already freely agreed to do? This lacks logical integrity.

55.5 Third, the Chairman also then immediately notes (as if to suggest that it provides foundation to his inferences) that "*the very next day Mr Picardo set in train the events which were to result in Mr McGrail's retirement*" **[para 11.333]**. This is not correct, as found by the Chairman himself at **[para 12.60]** of the Report which states: "*It will be remembered that on 14/15 May, Mr Pyle and Mr Picardo had effectively concluded that they needed to approach the GPA to*

ask it to call for Mr McGrail's retirement". That was *before* the meeting at the Claimant's home on 17th May.

55.6 The Seventh Challenged Findings are also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose

56. **Ground 3 – Illegality.** The Seventh Challenged Findings interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Eighth Challenged findings: findings about the reassurance given by the Claimant to Mr Levy at the 17 May Meeting

Identification of the Eighth Challenged Findings

57. The Claimant challenges the following finding of the Chairman in the Report ("**the Eighth Challenged Findings**):

"*Mr Picardo sought to suggest that Mr Levy was reassured that his probity and standing in the community was intact; he said people continued to hold him in high regard, and it was not necessary for him to resign from the Charity [T/16/291.10].*" **[para 11.349]** *"I do not accept this explanation. Mr Levy was not, I think, 'reassured' because of exchanges he had with Mr Picardo about the Gibraltar Community Care Trust; as it seems to me, he was re-assured about what he had heard Mr Picardo say of his approach to Mr McGrail and to Operation Delhi*." **[para 11.350]**

Statement of Grounds relating to the Eighth Challenged Findings

58. The Claimant challenges the Eighth Challenged Findings on the grounds of irrationality (**Ground 1**), breach of natural justice (**Ground 2)** and illegality **(Ground 3**)

59. **Ground 1 – Irrationality.** The Eighth Challenged Findings lack logical integrity, are made without evidence and are arbitrary and are accordingly irrational because:

59.1 The Claimant did not give any "explanation". He gave direct evidence about what he had reassured Mr Levy about:

"Q: In what way did you reassure Mr Levy?
A: My view about his probity, his standing in the community, the fact that I insisted he should not resign as Chairman of Communicare Trust [sic] and that I believed that people continued to hold him in high regard despite the manner in which the RGP had pursued their investigation." [T/16/291.8-16] **[FP20/73]**

59.2 The finding that the Chairman does not accept that "explanation" is therefore effectively a finding that the Claimant, and Mr Levy (and possibly Mr Baglietto) – the attendees at the meeting and all of them Kings Counsel – lied on oath. But there is no fact in evidence as to what was said at that meeting to the contrary from which the Chairman would be entitled to infer the fact that *"he was re-assured about what he had heard Mr Picardo say of his approach to Mr McGrail and to Operation Delhi"*.

59.3 The Chairman appears to come to the above position based on the unlawful finding of "*inevitable and irresistible conclusion*" and the overlaid speculation upon speculation described above on which basis it so "*seems*" to him.

59.4 The Eighth Challenged Findings are also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose.

60. **Ground 2 – Natural Justice**. For the reasons stated above, the findings lack probative foundation and are therefore arrived at in breach of the Second Mahon Rule of Natural Justice.

61. **Ground 3 – Illegality**. For the reasons stated above, the Eighth Challenged Findings interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Ninth Challenged Finding: finding about suggestion made by the Claimant to Mr Baglietto in relation to recovery of Mr Levy's devices from the RGP under Section 76 of the Police Act

Identification of the Ninth Challenged Finding

62. The Claimant challenges the following finding of the Chairman in the Report ("**the Ninth Challenged Finding**):

"But here the Chief Minister of Gibraltar is suggesting to the lawyer of a man who was then suspected of serious crime, involving the security systems protecting Gibraltar, how he might retrieve his client's mobile from the police, so as to prevent the police from interrogating it, which they were very anxious to do. Again, one only needs to set out this proposition to demonstrate its gross impropriety. That the lawyer, and indeed the suspect, were Mr Picardo's great friends, merely makes the position worse." **[para 11.311] and [para 0.113]**

Statement of Facts relating to the Ninth Challenged Finding

63. The Chairman made the following findings in the Report leading to the Ninth Challenged Finding:

63.1 "*Later that evening, at 18.41 and 18.42, Mr Picardo messaged Mr Baglietto with another idea that had occurred to him. He wrote as follows:*

'Section 76 Police Act'; 'Power to make orders with respect to property in possession of Police. 76. Where any property has come into the possession of the Police in connection with any criminal charge or under any statutory provision or rule of law, 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, or, if the owner cannot be ascertained, make such order with respect to the property as the court may think fit.' [B1422] **[para 11.306]**

63.2 *"Plainly, Mr Picardo was suggesting that one possible way for Mr Baglietto to retrieve Mr Levy's devices from the RGP would be to apply to the Magistrates' Court under section 76 of the Police Act. Mr Picardo agreed this was 'very likely a proposal in respect of Mr Levy's phone' [T/16/260.8]."* **[para 11.307]**

63.3 *At 18.45, Mr Baglietto replied: 'Thanks, we are drafting letter. Let me think about this provision but we prefer not to have to go to court but for CPO to return due to clear unlawfulness' [B1422]. He made no other reply, but he said in evidence that he had 'no issue' if Mr Picardo wanted to send him this message [T/9/120.13].* **[para 11.308]**

63.4 *Indeed, the next day, he did write a letter to that effect [C3802], which I have addressed above. At 18.54, Mr Picardo replied: 'Yes. I understand.' [B1422]* ***[para 11.309]***

63.5 ***"****The Chief Minister has no official or statutory function in the investigation or prosecution of crime. Mr Picardo reminded the Inquiry that he is a qualified lawyer; he sought to justify his conduct by saying that the law is public and, he maintained, sharing it with another lawyer was not 'outside the bounds of that which one should be free to be able to do' [T/16/262.8]. He saw nothing wrong in giving the benefit of his advice to a lawyer, even though that lawyer was acting for his old friend and mentor. He did accept that there was a 'tension' between proposing an application to the Magistrates' Court against the police, and on the other hand needing to fit the bill of any such application as Minister of Finance, but he maintained that this tension had been brought about by the RGP's actions [T/16/261.25].* ***But here the Chief Minister of Gibraltar is suggesting to the lawyer of a man who was then suspected of serious crime, involving the security systems protecting Gibraltar, how he might retrieve his client's mobile from the police, so as to prevent the police from interrogating it, which they were very anxious to do. Again, one only needs to set out this proposition to demonstrate its gross impropriety. That the lawyer, and indeed the suspect, were Mr Picardo's great friends, merely makes the position worse.****"* **[para 11.310] and [para 0.113]**

Statement of Grounds relating to the Ninth Challenged Finding

64. The Claimant challenges the Ninth Challenged Finding on the grounds of irrationality (**Ground 1**) and Illegality (**Ground 2**).

65. **Ground 1 – Irrationality**. The Ninth Challenged Finding is made in error of reasoning and lacks logical integrity and is irrational for the following reasons:

65.1 The Chairman does not explain why or how suggesting to a person's lawyer how someone can exercise their legal right to lawfully (i.e., under a procedure provided for by statute, pursuant to an application to the Court) retrieve property seized by the police can possibly be improper, let alone a *"gross impropriety"*. Nor why the position may be different if the person making the suggestion is the Chief Minister nor why the position would be worse if the person lawfully seeking the return of his devices is the Chief Minister's friend. No criteria are identified for this decision which is arbitrary, wrong and unlawful.

65.2 It is not and cannot be improper, let alone a "gross impropriety" for the Chief Minister (or anyone else) to suggest to a suspect and his lawyer how the RGP – who are as independent of the Chief Minister as he is of them - can be made, lawfully and properly on the basis of statutory provisions, to give up devices by an Order of a Court after a full inter partes hearing, or be made liable for wrongly seizing the devices, or even what might be the personal consequences for police officers if they are found (by others, not by the Chief Minister) to have acted improperly. Any such outcome would necessarily be the decision of a court based on its view of Mr Levy's entitlement to return of his devices and could not in any sense be a gross impropriety for the Chief Minister to suggest.

65.3 The Ninth Challenged Finding is also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose.

66. **Ground 2 – Illegality.** For the reasons stated above, the Ninth Challenged Finding interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Tenth Challenged finding: Non-disclosure of the 17 May meeting ("the Tenth Challenged Finding")

Identification of the Tenth Challenged Finding

67. The Claimant challenges the following finding of the Chairman in the Report ("**the Tenth Challenged Finding**):

"*Mr Picardo did not disclose the fact of this meeting until very shortly before the Main Inquiry Hearing. He had not mentioned it in any of his earlier affidavits. 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*." **[para 11.314] and [para 0.116]**

"*I conclude that he deliberately did not disclose the fact of this meeting until his Third Affidavit (and even then did not directly reference or give evidence about the meeting in the body of that Affidavit), because he knew that others would find it to be deeply inappropriate."* **[para 11.316] and [para 0.116]**

Statement of Grounds relating to the Tenth Challenged Finding

68. The Claimant challenges the Tenth Challenged Finding on the grounds of irrationality (**ground 1**) and Illegality (**ground 2**).

69. The Tenth Challenged Finding is unsupported by evidence and contrary to it and therefore irrational for the following reasons:

69.1 First, the finding that the Claimant did not disclose the fact of this meeting until very shortly before the Main Inquiry Hearing is unsupported by evidence, contrary to it and factually incorrect. In fact, the meeting was disclosed by the Claimant himself in his Third Affidavit on 15 November 2023 and the Main Inquiry Hearing was on 8 April 2024.

69.2 Even if there were a material difference between disclosing a fact in the body of a witness statement or in an exhibit to it, that difference does not rationally sustain a finding that it was disclosed in an exhibit to "*deliberately*" not disclose the fact of the meeting. The inescapable contrary reality is that it was the Claimant himself who disclosed it.

69.3 The incontrovertible evidence (noted by the Chairman during the hearing) is that it was Mr Picardo himself who disclosed the fact that the meeting had taken place by revealing it in an exhibit to his Third Witness Statement. This led the Chairman to actually note orally at the hearing that, but for Mr Picardo's disclosure, the existence of the meeting would never have become known:

> ***"****Q. Are you familiar with the fact that that is an exhibit? And, indeed, were it not for the fact that you disclosed this witness statement, the existence of that meeting might not be known?*
> *A. Quite.*
> *THE CHAIRMAN: It certainly would not have been known because that is what revealed it."*
> [T/17/283.4.-12] **[FP21/72]**

Yet in the Report the Chairman finds that Mr Picardo "*deliberately did not disclose the fact of this meeting until his Third Affidavit (and even then did not directly reference or give evidence about the meeting in the body of that Affidavit), because he knew that others would find it to be deeply inappropriate*."

69.4 Second, supposed delay in disclosure "until his third affidavit" does not sustain a finding that he did not disclose "because he knew others would find it deeply inappropriate". If that had been his motivation, he would then logically not have disclosed it at all. The Claimant gained absolutely nothing in the context of the Inquiry by only "delaying" its disclosure to a date 4 months before the start of the Main Inquiry hearings.

69.5 Third this finding is also incompatible with the Chairman's findings (and criticism of the fact) that the Claimant felt free to meet and discuss with Mr Levy and Mr Baglietto (see for example only **[para 11.319]**). That is incompatible with his finding that he deliberately wanted to conceal this meeting "*because he knew that others would find it to be deeply inappropriate*". The two cannot sit together.

69.6 Fourth, the Chairman bases this inference-based finding of motive (for deliberately not disclosing because he thought that others would find it deeply inappropriate) on another inference-based finding for which there is no evidence either, namely, that the meeting was to discuss the Investigation **[para 11.320].**

69.7 The Tenth Challenged Finding is also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose.

70. **Ground 2 – Illegality.** For the reasons stated above, the Tenth Challenged Finding interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Eleventh Challenged finding: Determination to thwart the search warrant

Identification of the Eleventh Challenged Finding

71. The Claimant challenges the following finding of the Chairman in the Report ("**the Eleventh Challenged Finding**):

"I have no doubt that the real reason for Mr Picardo's loss of confidence was that Mr McGrail and the RGP had obtained a search warrant against his friend Mr Levy, which he was determined in one way or another to thwart." **[para 12.369**]

Statement of Grounds in relation to the Eleventh Challenged Finding

72. The Claimant challenges the Eleventh Challenged Finding on the grounds of irrationality (**ground 1**) and illegality (**ground 2**).

73. **Ground 1 – illegality**. The finding that Mr Picardo was "*determined in one way or another to thwart*" the search warrant against Mr Levy because Mr Levy was his friend is contrary to the available evidence and to other findings of the Chairman, and therefore irrational, for the following reasons:

73.1 First, the Chairman has found that in the 12 May 2020 Meeting Mr Picardo made no attempt to dissuade or prevent the RGP from proceeding with the execution of the search warrant against Mr Levy (para 19.11 above). There was no evidence before the Inquiry that Mr Picardo took any step to try to persuade Mr McGrail or the RGP not to execute the warrant or examine Mr Levy's devices. Indeed, the Chairman has found that there was no conspiracy to do so. The RGP executed the warrant (or not) entirely as they had planned and pleased and (ii) chose not to examine the phones even when they were free to do so.

73.2 Second, there is no evidence that Mr Picardo "*was determined in one way or another to thwart*" the search warrant against Mr Levy because he was his friend, or that he did so at all. Both before and after Mr McGrail's retirement the RGP were free to and did entirely as they pleased without any attempt by Mr Picardo to stop them doing so. The Chairman has so found as a fact.

73.3 Third, the Claimant made no attempt to "thwart the warrant" and the Chairman has in fact made no finding to the effect that he did. In fact, as the Chairman has found, the RGP did not in fact execute the search warrant because Mr Levy handed over his telephone voluntarily. There is no evidence, and the Chairman has made no finding that the Claimant took any action to prevent the RGP from examining Mr Levy's telephone which they had in their possession and could have examined at any time. Accordingly, there is no evidence whatsoever nor finding by the Chairman to the effect that the Claimant sought to prevent the execution of the warrant or the examination of the devices. Nor were the devices seized pursuant to the warrant. It is therefore arbitrary and irrational to find by way of comment that the Claimant was "*determined in one way or another to thwart*" the search warrant

73.4 Fourth, the finding that the Claimant was determined to thwart the search warrant *because Mr Levy was his friend* is challenged elsewhere in this claim on the basis that the Chairman's finding is unlawfully inferred from his unlawful rejection that the Claimant was motivated by concern for the public interest of Gibraltar (26.5 above).

73.5 The Eleventh Challenged Finding is also irrational for the reasons set out in paragraph 46 above, which are repeated here for this purpose.

74. **Ground 2 – Illegality.** For the reasons stated above, the Eleventh Challenged Finding interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

D. CHALLENGED FINDINGS RELATING TO THE MISLEADING OF AND CONCEALMENT FROM THE GIBRALTAR POLICE AUTHORITY

Twelfth Challenged findings: Deliberate concealment from and misleading of the GPA

Identification of the Twelfth Challenged Findings

75. The Claimant challenges the following finding of the Chairman in the Report ("**the Twelfth Challenged Findings**):

75.1 "*I consider this observation demonstrates that 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*." **[para 12.67]**

75.2 *"I do not accept this explanation for failing to spell out the 'event' to which he had referred. Mr Picardo had again glossed over what he contends was his main complaint against Mr McGrail and I find that he did so deliberately to conceal his real complaint from Dr Britto, and other members of the GPA, who would have made a much more searching enquiry had they been told the truth."* **[para 12.85]**

75.3 "*I turn to another serious criticism of Mr Picardo. Quite deliberately, as it seems to me, he told Dr Britto very little about his real complaint……. I do not accept his explanation for not spelling out his real grievance in the note; I am bound to conclude that he did not do so because he knew 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, to 36 North and this may have exposed his lack of independence. By suppressing the truth, he was in effect suggesting a falsehood; he was in the process seeking to mislead Dr Britto and the GPA as to the reasons for his loss of confidence in Mr McGrail*" **[para 12.104]**

75.4 "*In my view, by his cryptic reference to 'another event occurring last week', Mr Picardo quite deliberately and cynically did not spell out that his real grievance arose from the issue of the warrant against Mr Levy, including the alleged lie, and led 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. In this respect, I have no doubt that Mr Picardo deliberately underplayed his real grievance and thereby misled Dr Britto and the GPA."* **[para 12.138] and [para 0.135]**

75.5 "*….the reasons given by Mr Picardo were misleading*." **[para 12.237]**

75.6 "*I make the point 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*." **[para 12.156]**

75.7 "*….. I consider it to be remarkable and indeed sinister that the letter does not name Mr Levy or refer to the grant of the search warrant, the visit to Hassans, or to 'the lie' which Mr Picardo alleges that Mr McGrail told*." **[para 12.178] and [para 0.146]**

75.8 *"The inevitable and irresistible conclusion is Mr Picardo was using the processes of the GPA to bring about Mr McGrail's effective dismissal for reasons of his own, relating to the police investigation into Mr Levy, whilst managing the process so as to give the appearance that he was being asked to retire for other reasons, namely the Incident at Sea and the HMIC Report."* **[para 12.179] and [para 0.146]**

Statement of Facts relating to the Twelfth Challenged Findings

76. The Chairman made the following findings in connection with or leading to the Twelfth Challenged Findings

76.1 *"Mr Santos … asked Mr Picardo to explain why he did not refer to any specifics, he replied 'it's already a fairly lengthy message and, you know, typing these things with two thumbs takes some time, and there was a lot to talk about in that respect… I don't think I could have explained the loss of confidence I'd had in McGrail etc etc in a sentence as I have in respect of all the others' [T/16/310.4].* **[para 12.4]** *I find this explanation unconvincing. As I will show when considering other occasions when Mr Picardo referred to his complaints against Mr McGrail, he did not set his case concerning the search warrant in clear terms; all the references are terse and even cryptic"* **[para 12.5]**

76.2 *"It will be remembered that on 14/15 May, Mr Pyle and Mr Picardo had effectively concluded that they needed to approach the GPA to ask it to call for Mr McGrail's retirement (Pyle 1 para 13.3 [A240])".* [**para 12.60**]

76.3 *"At 18.47 on 17 May (which was a Sunday), Mr Pyle emailed Mr Picardo [C3953] setting out his 'thoughts' for their meeting with Dr Britto, which was to take place the following morning (Monday 18 May). Mr Pyle referred Mr Picardo to section 34 of the Police Act which 'allows for the GPA, after consultation with us, to call upon the Commissioner to retire'; he also pointed out that, as Governor, under section 13(1)(f) he had 'authority to call for the resignation of the Commissioner, where the Authority has failed to discharge its responsibility'. He said that, as he saw it, it was for the GPA to take the matter forward in the first instance, and that it was important that they 'follow the process to the letter', and suggested that they should 'therefore say to [Dr Britto] tomorrow that we have lost confidence in the Commissioner, set out why, and ask him to consider options as to the way forward'."* **[para 12.61]**

76.4 *"Very late that same night (17 May at 23.53 [C3953]), Mr Picardo emailed his reply setting out his concerns, adding in red his comments on Mr Pyle's original email……"* **[para 12.64]**

76.5 *"Mr Picardo went on to consider the procedures that the GPA should follow [C3955]. He advised that Mr Picardo and Mr Pyle 'should at this stage limit ourselves to setting out our concerns'. It would then be 'for the GPA to decide how to act and if they were – acting independently and in their own discretion and on proper advice – to decide that they want to engage the S. 34(1) power'; then they would have to consult both Mr Picardo and Mr Pyle and obtain the consent of one of them. He did add that 'we' – he meant Mr Picardo and Mr Pyle – 'would then also have the benefit of any representation that the Commissioner might have made'. He then referred to the powers that Mr Pyle would have 'if the GPA were not to discharge their functions properly (which I have no reason to doubt they will certainly see to*

do …)'. The emphasis here is mine, because although it is perfectly proper for Mr Picardo to set out his concerns to the GPA, and perhaps even to do so forcefully, ***I consider this observation demonstrates that 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***." **[para 12.67]** *(The emphasis is added by the Claimant to highlight the Twelfth Challenged Finding within this paragraph)*

76.6 *"Early the next morning (18 May at 08.40 [C3958]), Mr Pyle replied that he agreed 'fully' with Mr Picardo's email, including 'the importance of a joint approach', and his preliminary views on the five criteria 'and in particular on the issue of integrity'. They agreed that they should also seek Mr Llamas's advice on the issue."* [**para 12.68**]

76.7 *"The meeting between Mr Pyle, Mr Picardo and Dr Britto took place on the morning of 18 May at the Convent*." [**para 12.71**]. *"Shortly after the meeting, Mr Picardo exchanged emails with Dr Britto, in which he offered to prepare a note for him of the concerns which he (Mr Picardo) and Mr Pyle had expressed at the meeting. Dr Britto said that he wanted 'something to act as a summary' of what had happened; he added that he did not 'want to get this wrong' [B1435*].[**para 12.72**]

76.8 *"Mr Picardo produced the note two days later on 20 May 2020 [B1436]. The note, headed as an 'Informal Record of Meeting with HE the Governor and the Chief Minister, Monday 18th May 2020' [C3988], is several pages long. It is, in effect, an expanded version of the email which he had sent to Mr Pyle the night before, which he had used as an aide memoire in the meeting with Dr Britto [T/16/334.6; T/17/7.21]. Mr Pyle stated that Mr Picardo had cleared this note with him before sending it to Dr Britto (Pyle 1 para 14.5 [A241]), and he confirmed that it was an accurate record of the meeting [T/18/190.21]; although he later said that it did not reflect the full discussion [T/19/131.2, 132.20*]." **[para 12.73]**

76.9 *"I will summarise it. It stated that: 'The purpose of the meeting was to express grave concerns about certain aspects of policing in Gibraltar which had come to a head in the week before', being first the publication of the HMIC Report and, secondly, the publication of news of the filing of legal claims in Spain by the relatives of those killed and injured in the incident at sea. It then explained:*

'The GPA are therefore being invited by the Governor and the Chief Minister together to consider whether they believe that all OR any (note it is a disjunctive, not a conjunctive list) of the following 5 [criteria] have been impacted.' [C3989]" [**para 12.74**]

76.10 *"Then, after writing of his complaints arising from the Incident at Sea, he wrote this passage, which I shall quote in full (the underlining is my emphasis):*

'Mr Picardo also shared another event occurring last week which had left him also in a situation where the Commissioner had expressly misled him and which left him unable to believe the Commissioner." **[para 12.79]**

76.11 *"The note concluded:*

'It is now a matter for the GPA to decide how to act and to decide that they want to engage the S.34(1) power. If the GPA decide to go down this road the first step is to allow the Commissioner to make representations, if he wishes, under s34(2). It will of course be necessary for the GPA to consider any representation that the Commissioner might make.

Thereafter, if the GPA are of the view that the Commissioner should be invited to retire, then that is when they would need to consult BOTH of the Governor and Chief Minister and seek the agreement of ONE of them. The Governor and the Chief Minister would then also have the benefit of any representation that the Commissioner might have made under S.34(2) in expressing a final and firm view.' [C3992]" **[para 12.80]**

76.12 *"These extracts spell out the nature of the invitation, and if they had been taken at face value, would have given proper guidance to Dr Britto and to the GPA. On paper, Dr Britto recognised that he was being asked to make the decision independently. Thus, at paragraph 13 of his statement, (Britto 1 [A322]) Dr Britto said:*
'13. The interim Governor and the Chief Minister stated that it was a matter for the GPA, having been appraised of these concerns, whether in its discretion, it wanted to invoke the powers vested in it pursuant to Section 34 of the Police Act 2006.'" **[para 12.81]**

76.13 *"Unfortunately, Dr Britto did not take this at face value, as I will set out when I come to review his live evidence of what he understood and what happened."* [**para 12.82**]

76.14 *"I contrast the Chief Minister's wordy discourse on the 'Rule of Law' in this note with the terse and vague reference to 'another event occurring last week, which had left him also in a situation where the Commissioner had expressly misled him and which left him unable to believe the Commissioner' (the passage which I underlined above). It will be noted that he did not give any particulars whatsoever of that 'event' or the details of the way in which he had been 'misled'; he did not mention Mr Levy by name, he did not mention the search warrant; he did not mention Hassans or Operation Delhi; nor, of course, did he refer to his own financial interest in Hassans or to his close friendship with Mr Levy."* **[para 12.83]**

76.15 *"He explained that he did not set out the detail of Operation Delhi in the note as 'I was needing to prepare the note and get it out to Dr Britto as soon as possible. I think at one stage he was pressing me for it … I would have had to write a lot more…' [T/17/9.5]. Mr Santos suggested that he still managed to produce a five- page note; Mr Picardo and replied that it would have been even longer with more detail [T/17/10.3]. Mr Santos then asked whether he accepted that he included more specifics about the HMIC Report than the warrant; he replied 'the HMIC Report is a written document to which it is easy to cross refer. The other is something which I explain viva voce…' [T/17/12.5]."* **[para 12.84]**

76.16 ***"I do not accept this explanation for failing to spell out the 'event' referred. Mr Picardo had again glossed over what he contends was his main complaint against Mr McGrail and I find that he did so deliberately to conceal his real complaint from Dr Britto, and other members of the GPA, who would have made a much more searching enquiry had they been told the truth."*** **[para 12.85]**

76.17 *"I have no hesitation in accepting Dr Britto's live evidence about this meeting. By character and personality, he was unable to resist what he felt to be the pressure being put upon him. I have already observed that although Dr Britto had been told in the written note that the decision should be taken by the GPA, that is not how Dr Britto perceived the position. He understood that he was in effect being told what to do."* **[para 12.103]**

76.18 ***"I turn to another serious criticism of Mr Picardo. Quite deliberately, as it seems to me, he told Dr Britto very little about his real complaint.*** *According to Mr Picardo, the alleged lie told by Mr McGrail was the main reason for his loss of confidence in him, yet in his Informal*

Record he spent five pages detailing his other – subsidiary – complaints, whilst devoting only a few vague and unspecific lines to being 'misled'. ***I do not accept his explanation for not spelling out his real grievance in the note; I am bound to conclude that he did not do so because he knew 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, to 36 North and this may have exposed his lack of independence. By suppressing the truth, he was in effect suggesting a falsehood; he was in the process seeking to mislead Dr Britto and the GPA as to the reasons for his loss of confidence in Mr McGrail"*** **[para 12.104**]

76.19 ***"In my view, by his cryptic reference to 'another event occurring last week', Mr Picardo quite deliberately and cynically did not spell out that his real grievance arose from the issue of the warrant against Mr Levy, including the alleged lie, and led 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. In this respect, I have no doubt that Mr Picardo deliberately underplayed his real grievance and thereby misled Dr Britto and the GPA."*** **[para 12.138]**

76.20 *"It became very clear to me from Dr Britto's oral evidence to the Inquiry that having invited Mr McGrail to retire and to make representations in his defence, he hoped – and perhaps even expected – that Mr McGrail, perhaps having taken legal advice, would make representations which would then persuade the GPA that they had been wrong to ask for his retirement, with the result that Mr McGrail could remain in post and the crisis would be over. He only recognised, far too late, that by asking him to retire before hearing his representations, they had made a procedural blunder from which there was no return".***[para 12.144]**

76.21 *"As I have set out when I found the facts, the GPA were not given full particulars of the reasons by which either Mr Picardo or Mr Pyle claimed to have lost confidence in Mr McGrail; indeed,* ***the reasons given by Mr Picardo were misleading****."* **[para 12.237]**

76.22 *"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'."* **[para 12.182]**

76.23 ***"I make the point 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."*** **[para 12.156]**

76.24 *"In my judgement, if, as Mr Picardo maintains, the dominant reason for his loss of confidence was the issues arising from Operation Delhi, including the alleged lie,* ***I consider it to be remarkable and indeed sinister that the letter does not name Mr Levy or refer to the grant of the search warrant, the visit to Hassans, or to 'the lie' which Mr Picardo alleges that Mr McGrail told****. The letter was intended to set out, in detail, the reasons for asking the Commissioner of Police to retire, and yet it does not do so. In my opinion, an oblique and cryptic reference – or an 'allusion' as he claimed it to be – to the views of the Attorney-General is not sufficient to explain to Mr McGrail, or to anyone else reading, the real reason for his loss of confidence. When asked, Mr Picardo denied that he was being 'coy' about 12*

May in the letter [T/17/33.22]. But in my opinion, being 'coy' about the events of 12 May does not catch the significance of this omission." **[Para 12.178]**

76.25 *"Those acting for Mr McGrail argue that these absent reasons do not appear in the letter, which was largely drafted by Mr Picardo himself, because he knew that his intervention in respect of the warrant was improper and sought to exclude it from the written record (closing submissions, para 46.7). I accept this submission.* ***The inevitable and irresistible conclusion is that Mr Picardo was using the processes of the GPA to bring about Mr McGrail's effective dismissal for reasons of his own, relating to the police investigation into Mr Levy, whilst managing the process so as to give the appearance that he was being asked to retire for other reasons, namely the Incident at Sea and the HMIC Report."*** **[Para 12.179]**

77. The following evidence relevant to the Twelfth Challenged Findings was before the Inquiry:

77.1 Dr Britto's written evidence: "*The Interim Governor and the Chief Minister stated that it was a matter for the GPA, having been appraised of these concerns, whether in its discretion, it wanted to invoke the powers vested in it pursuant to Section 34 of the Police Act 2006*" [Britto 1 para 13]. **[FP4/A322]**

77.2 Dr Britto's written evidence: "*The Interim Governor and the Chief Minister pointed out that if the GPA were to consider inviting Mr McGrail to retire, the first step would be to allow Mr McGrail to make representations, if he wished to do so*". [Britto 1 para 15] **[FP4/A323]**

77.3 The Note of 18 May meeting **[FP6/C3997]**: "*It is now a matter for the GPA to decide how to act and to decide that they want to engage the S.34(1) power.....If the GPA decide to go down this road, the first step is to allow the Commissioner to make representations, if he wishes, under S.34(2)*."

77.4 The Note of 18 May meeting **[FP6/C3997]**: "*It will of course be necessary for the GPA to consider any representation the Commissioner might make*."

77.5 At the meeting on 22 May 2020 between Mr McGrail and Dr Britto (which Mr McGrail covertly recorded and of which a transcript was before the Inquiry in evidence):

(i) Dr Britto told Mr McGrail that the Governor and the Chief Minister "*realise that you may have explanations, so section 34 is where the Authority invites you to retire, right, but gives you time to make representations..."* [at 1:19 of Transcript] **[FP6/C4316]**

(ii) Mr McGrail asks Dr Britto whether he has an opportunity to express himself. Dr Britto responds: "*Yes, yes, absolutely...there is nothing in the Act to stop you from making representations to the Authority either in, I prefer that it is in writing and then in person but I would prefer it in writing. You can explain everything if you want*." [at 6:21] **[FP6/C4317]**

(iii) At 12:56: "*Honestly, anything that you have to say, tell everybody is going to be there, the Authority. You make the explanations on that, because then, once you make the representations we have to take a view*" **[FP6/C4319]**

(iv) At 17:22: "*this way is giving you more leeway because you can make representations to the Authority before a final view is taken*". **[FP6/C4321]**

(v) At 18:49: "*The important part is about the firm and final view, that has not erm, happened……..we are willing to listen to your representations and ……..We would consider them and we go the governor and the chief minister*". **[FP6/C4321]**

(vi) At 21:04: "*You can be perfectly open with the Authority*". **[FP6/C4322]**

(vii) At 24:36: (with reference to the HMIC Report) "*I will explain, if the Authority accepts the recommendations, and say look, there really isn't a need for him to go, because they triggered it, we still need to go to the chief minister and Governor, and say look we don't think that, or we do think or we don't think but then its up to them*". **[FP6/C4324]**

(viii) At 33:36 Mr McGrail asked: "*if I make my response to argue the case that I shouldn't accept the invitation, and convince the Authority, and then you share it with the Governor and the chief minister and then they are still of the view, would you ask them any explanations as to why?*" Dr Britto responded: "*We would*". **[FP6/C4326]**

(ix) At 33:48 Mr McGrail asked: "*If I argue my case That this should not be the case*"? Dr Britto responded: "*We would say, we don't see it as sufficient grounds*." **[FP6/C4326]**

(x) At 40:21: "*You can make representations and then I don't know what the outcome is going to be*". **[FP6/C4328]**

(xi) At **[FP6/C4328]** Dr Britto makes several references emphasising to Mr McGrail that he is able to make representations "*before a full and final view is taken*".

Statement of Grounds relating to the Twelfth Challenged Findings

78. The Claimant challenges the Twelfth Challenged Findings on the grounds of irrationality (**Ground 1**) breach of the rules of natural justice (**Ground 2**) and illegality (**Ground 3**).

GROUND 1 (Twelfth Challenged Findings) – Irrationality.

79. The Twelfth Challenged Findings are unsupported by any evidence, are contrary to the evidence and lack logical integrity and are therefore irrational for the following reasons.

Overview

80. The evidence before the Inquiry shows, contrary to the Twelfth Challenged Findings, that–

80.1 Dr Britto and the GPA knew and were fully alive to the facts that (i) Mr McGrail had to be given the opportunity to make representations and could provide explanations that would render an invitation to retire under section 34 inapplicable and (ii) that the GPA were free to make their own decision, and should do so and (iii) that the Governor and the Chief Minister understood and accepted that fact (see para 77 above).

80.2 Dr Britto and the GPA were aware of the direct link between the Claimant's loss of confidence in Mr McGrail and the RGP's Operation Dehi Investigation and the link to Hassans and Mr Levy and the Claimant's link to Mr Levy and Hassans (see paras 83.2 and 83.3 below).

80.3 Dr Britto and the GPA "*would not have made a much more searching enquiry had they been told the truth*". They knew, and even when they were told in great detail by Mr McGrail in his lawyers' letter dated 29 May 2020 to the GPA, the GPA consciously took the view that it made no difference to their decision, and that Dr Britto and the GPA were **not misled** into taking their decision by anything concealed from them by the Claimant (see paras 83.2 and 83.3 below).

As to "whilst ostensibly referring to the duty of the GPA to act independently, never doubted that they would not do as they were told to so -as indeed they did".

81. One of the Twelfth Challenged Findings is that "*I consider this observation demonstrates that 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*." **[para 12.67]** (para 75.1 above). In relation to this finding:

81.1 First, there is no evidence (and indeed no reasoned finding by the Chairman) that the Claimant (or the Governor) told Dr Britto or the GPA what to do or to do as they did. To the contrary, they told them to do what they did not do, i.e. give Mr McGrail the opportunity to make representations and then make their own decision about invoking their power under section 34 of the Police Act to call for him to retire.

81.2 Second, it is clear beyond any doubt from the evidence before the Inquiry (cited in paragraph 77 above) that Dr Britto (the Chairman of the GPA) and the GPA knew and were fully alive to the facts that (i) Mr McGrail had to be given the opportunity to make representations and could provide explanations that would render an invitation to retire under section 34 inapplicable and (ii) that the GPA were free to make their own decision, and should do so

and (iii) that the Governor and the Chief Minister understood and accepted that fact. They knew what they had to do and felt free to do it.

81.3 Although all the evidence cited in para 77 above is to that same effect, there is one finding by the Chairman that by itself makes the Thirteenth Challenged Findings completely untenable, contradictory and irrational, namely:

> "*It became very clear to me from Dr Britto's oral evidence to the Inquiry that having invited Mr McGrail to retire and to make representations in his defence, he hoped – and perhaps even expected – that Mr McGrail, perhaps having taken legal advice, would make representations which would then persuade the GPA that they had been wrong to ask for his retirement, with the result that Mr McGrail could remain in post and the crisis would be over. He only recognised, far too late, that by asking him to retire before hearing his representations, they had made a procedural blunder from which there was no return*". **[para 12.144]**

The Chairman cannot rationally have believed and concluded *both* this and that Mr Britto and the GPA felt compelled to "do as they were told" by the Claimant and the Governor. This finding is irreconcilable with the findings, to opposite effect that Dr Britto and the GPA did not take the Meeting Note's caution (that the GPA had to be given an opportunity to make representations before coming to their own decision) at "face value" **[para 12.81]** (para 76.12 above) and **[para 12.82]** (para 76.13 above), and was "unable to resist what he felt to be the pressure being put upon him" **[para 12.103]** (para 76.17 above).

81.4 Third, there is no proper basis for the Chairman to find (without any factual basis for doing so) that the Claimant meant the very opposite of what he and the Governor told the GPA in writing. Contrary to what the Chairman concludes, what the Claimant said is that he did ***not*** doubt that the GPA would (not would not) discharge their function properly.

81.5 Fourth, a conclusion reached in this manner is not capable of "demonstrating" – as the Chairman finds that the Claimant "*never doubted that they would not do as they were told to do - as indeed they did*". Nor, as a matter of logic does the fact that the GPA failed to follow the correct procedure "demonstrate" that the Claimant "never doubted" that that is what they would do. In any event, the evidence before the Inquiry clearly and repeatedly shows that Dr Britto and the GPA:

(i) were told by the Claimant and the Governor and understood that their duty was to consider the matter and come to their own decision; and

(ii) were aware that they should make their own decision and felt entirely able and willing to do so.

81.6 Fifth, as the Chairman himself found: "*Unfortunately, Dr Britto did not take this at face value, as I will set out when I come to review his live evidence of what he understood and what happened*" **[para 12.82]** (para 76.13 above). In fact, the evidence at para 77 above demonstrates that (contrary to the Chairman's finding) Dr Britto did indeed take the Meeting Note at face value. But, if Dr Britto "*did not take this at face value",* that is not the fault of the Claimant and does not provide a logical or rational basis for inferring against the Claimant that he knew that this would be so even as he was telling Dr Britto and the GPA the very contrary. This is most particularly so when considered with the fact that the Chairman also found that the Governor and the Claimant had indeed given Dr Britto and the GPA proper guidance as to how to proceed: "*These extracts spell out the nature of the invitation, and if they had been taken at face value, would have given proper guidance to Dr Britto and to the GPA*" [**para 12.81**] (see para 76.12 above)

81.7 Sixth, the content of the Meeting Note was shared with the rest of the members of the GPA present at the meeting and it cannot rationally be concluded, and the Chairman did not conclude, that all members of the GPA did not take the Meeting Note "at face value" or felt that they were being told what to do and being given no choice by the Governor and the Claimant. Still less could it rationally be thought that the Claimant knew (in advance) that all of them would not take the Meeting Note at face value.

81.8 Seventh, the Chairman found as a fact that "*Dr Britto conceded that whatever pressure he may have felt from Mr Picardo and Mr Pyle, he did not transmit this to the other board members when they came to make the decision*" **[para 12.118]**. Without evidence or other probative justification, and thus arbitrarily and irrationally, the Chairman dismissed this obvious impediment to the rationality of the Twelfth Challenged Finding by deciding that "*he did not attach much weight to this concession, since Dr Britto was still personally under pressure as he was leading, and directing, the discussion*." **[para 12.118]** The Chairman's failure to "attach much weight" to this concession was a serious error of reasoning and disregard for crucial evidence which led him to make the irrational finding that despite telling Dr Britto and the GPA that they had to act independently, the Claimant "*never doubted that they would not do as they were told to do – as indeed they did*". It completely undermined the finding as regards the other GPA members.

81.9 Ninth, the Chairman's serious error of reasoning is illustrated by the Minutes of the GPA meeting at which it made the decision **[para 12.115]**: "*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 the GPA so we could arrive at a firm and final decision and able to make recommendations to the Governor*."

81.10 Despite this finding being fundamentally and fatally flawed, it is key to the reasoning and rationale of the Chairman's other finding, very damaging to Mr Picardo's reputation, that he "deliberately misled" the GPA (as to which see para 82 below).

As to deliberate concealment and misleading

82. As to the finding of deliberate concealment and misleading:

82.1 First, the Claimant (and the Governor) had advised the GPA that they had to give Mr McGrail the opportunity to make representations. Had the GPA done so, Mr McGrail would then have said all the things that he said in the 29 May letter. The Claimant and the Governor were entitled to assume that the GPA would properly carry out its own statutory process, not least having been specifically reminded of it. There is no rational basis for concluding that the Governor and the Claimant could have known that the GPA would not do so.

82.2 This is borne out by the evidence in paragraph 77 above, and by evidence (as accepted by the Chairman) that "*Dr Britto accepted, in retrospect, that Mr McGrail should have been asked for representations before the GPA asked him to retire,* ***but stated when he gave him the letter and had the long conversation with him, he was convinced that he was in fact asking for representations before the GPA made any invitation to retire*** *[T/15/106.5]*." **[para 12.156].** This simply cannot be rationally reconciled with the Chairman's finding that the Claimant knew that Dr Britto and the GPA would not follow their own proper procedure to give Mr McGrail the opportunity to make representations. Even Dr Britto himself says that he thought that he was doing precisely that.

82.3 The Claimant cannot therefore rationally be thought to have had any expectation that the alleged and supposed "real reason" could be concealed from the GPA. It is fanciful to speculatively attribute to the Claimant an intention to conceal for ulterior purpose that which he knew would be immediately discovered.

82.4 It is in order to seek to overcome this otherwise insuperable obstacle to a *rational* finding to this effect that the Chairman was forced to make the finding (as to which see para 75.1 above) that the Claimant meant the very opposite of what he told Mr Britto and the GPA in the Meeting Note and, on that basis, knew or was confident that the GPA would not follow their own procedure which he himself had pointed out to them. This finding is without evidence, contrary to all the evidence (see para 77 above) and thus arbitrary.

82.5 Second, it is evident from the Chairman's finding at **[para 12.103]** (para 76.17 above) that he thought that Mr Britto "*understood that he was in effect being told what to do*" by both the

Claimant and the Governor. Even if (which the evidence cited in paragraph 77 above does not sustain) Mr Britto's weakness of character may have led *him* to perceive that he was "being told what he had to do", his perception does not alter the reality which is that the Claimant (and the Governor, who unlike the Claimant is not criticised in this respect) told him that he must give Mr McGrail the opportunity to make representations and then make their own decision and did NOT tell him anything to the contrary. They were entitled to assume that the GPA would properly discharge its statutory functions in accordance with its own procedures.

82.6 The Chairman's failure to criticise the Governor in this respect, while correct, demonstrates the irrationality of his criticism of the Claimant for the same thing (i.e., the same approach, in the same meeting in respect of the same person).

82.7 Third, the Governor telling Dr Britto that if the GPA did not act, he was minded to exercise his own powers under section 13(1)(f) is, firstly, not "pressuring" the GPA or "telling it what to do". The GPA remained entirely free to decline (as indeed Dr Britto had told Mr McGrail on 22 May that it would do, and all the evidence show they knew and felt free to do) and allow the Governor to do as he might decide. Secondly (and perhaps most importantly in this context), it is not attributable to the Claimant such as to provide justification for the "*deliberately*" concealed (or any) finding against him. Furthermore, if this was 'pressure' applied by anyone on the GPA (which is denied), it was pressure applied by the Governor, NOT the Claimant.

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

83. As to the finding that "*other members of the GPA… would have made a much more searching enquiry had they been told the truth"*–

83.1 First, the premise of the Chairman's "finding", namely that had the Claimant told Dr Britto of the Hassans/Mr Levy connection and/or the lie "*other members of the GPA, who would have made a much more searching enquiry had they been told the truth*" (and that this was Mr Picardo's reason for not doing so) simply ignores the evidence and is thus irrational.

83.2 The following evidence before the Inquiry shows that Dr Britto (and therefore the GPA) were indeed aware of the Hassans/Mr Levy connection and the fact that Mr Picardo believed that Mr McGrail had lied to him and therefore any failure by them to "*have made a much more searching enquiry"* is not the result of any failure to have *"been told the truth*" or to have it spelt out to them by the Claimant, as found by the Chairman without evidence and ignoring the evidence to the contrary:-

(i) The transcript of the covert recording of it shows that, in their meeting of 22 May 2020, Mr McGrail confirmed that he had ***previously*** (on 12th or 15th May, i.e. before the GPA's decision] briefed Dr Britto about the Op Delhi execution of warrant at Hassans: "*I've had the feedback from the chief minister arising from certain actions that we carried out, executive actions that we carried out on, which I think I briefed you on and that is the catalyst behind this all in my view*". (our underlining for emphasis) **[FP6/C4320]**

(ii) The same transcript of their meeting of 22 May 2020 shows that Dr Britto had been well aware of the link with Op Delhi, Mr Levy and Hassans:

"*this has all been triggered off from the impromptu meeting that I was called to in the chief ministers chamber with the AG. That is where it all stems from. There's no doubt at all, at all, at all that that is where this is stemming from. The fact that he has not been in agreement with the way we have been handling the case of the involving **Jaime Levy**. I was threatened there and then, and I was told that he was going to call up, in other words there was like, total interference with the operational running. That is against the law itself.*" (our underlining and bold font for emphasis) **[FP6/C4325]**

(iii) At 44:17: "*I do not deserve this. Simply because I have executed, well, we've executed a search warrant at the chambers of an individual who's suspected of that is the bottom line……. I'm telling you that is the bottom line*". To which Dr Britto replied: "*The Governor seemed to be in the know because, because at the meeting they were talking about the way that you handled, because, because they mentioned the AG had lost faith in you so, so, so they had that conversation. As they were not talking to me I didn't take note of what they said*." **[FP6/C4329]**

Whether Dr Britto "took note" or not is a matter for him. The point is that the Claimant plainly discussed the matter in Dr Britto's presence and thus revealed it and the link to him and thus the GPA. This renders unsustainable and irrational the finding that the Claimant sought or attempted to conceal it from Dr Britto and the GPA (a point that was not lost on Mr McGrail who answered "*Well, that is important. Well, you have told me now and I will make a note of that. Joey, that there's reference to operation Delhi which is the case I'm referring to.*") **[FP6/C4330]**

(iv) Furthermore, the direct link was made to the lie **[FP6/C4330]**:

***Mr McGrail**: "And please tell me; and if there's reference to that case in question I think it needs, because that is key, that is key"*
***Dr Britto**: "No no, what was mentioned is the way you handled case, that you had lied, you'd lied basically to the Chief Minister"*
…….
***Mr McGrail**: "I lied in what? In what? In the collision or in that particular case [?]"*
***Dr Britto**: "In everything, in everything"*.

In light of these exchanges and the obvious need to bear in mind their combined effect on the state of Dr Britto's knowledge, it is simply not possible to rationally conclude that Dr Britto was not aware – from Mr Picardo at the 18 May meeting – that the lie related to an investigation involving Mr Levy and Hassans (of which Dr Britto – in common with all of Gibraltar – well knew that Mr Picardo was a partner on sabbatical).

83.3 This conclusion is ratified and confirmed by Dr Britto's own evidence of what transpired between him and Mr McGrail at the meeting between them on the on 12th or 15th May:

(i) "*On 12th May 2020, Mr McGrail asked to see me. I agreed to his request and met him at his office at New Mole House Police Station on 15 May 2020. I did not take a note of the meeting but to the best of my recollection, Mr McGrail informed me of an investigation called "Operation Delhi". Mr McGrail said that Mr James Levy Q.C was a suspect in connection with this investigation and that he had Mr Levy's mobile phone in a safe. This was the first time I had heard of Operation Delhi or of Mr Levy's suspected involvement in it."* [Britto 1 para 10] **[FP4/A321].**

(ii) "*Mr McGrail further stated that the Chief Minister was not happy with him and that this had been expressed to Mr McGrail by the Chief Minister directly*" [Britto 1 para 10] **[FP4/A321]**

(iii) Mr McGrail had informed Dr Britto in some detail at their meeting on 12th or 15th May (Britto 1 para 10, 16-19 [A322 -A323], which he reported to the GPA Board including the reference to Mr Levy: *"To the best of my recollection, when informing the GPA of the meeting I had with Mr McGrail on the 15th May 2020…I did refer to Mr Levy QC by name"*. [Britto 1 para 19] **[FP4/A323]**

(iv) Furthermore, by the date of this meeting (12th or 15th May) Dr Britto was aware even that the company involved in the Op Delhi investigation was partly owned by Hassans: "Q. *Did he explain that the company involved was partly owned by Hassans*? A. *He must have when he mentioned Mr Levy, but to tell you the truth I didn't think twice about it*." [T/15/66.17-21] **[FP19/17]**

(v) Despite the extent of the evidence of Mr Britto's relevant knowledge acquired at his meeting on 12th or 15th May 2020 (see (i) and (a) - (d) above), the Chairman found that nothing "turns on this meeting, nor whether they also met on 12 May" [**para 11.259**] Ignoring this highly probative evidence led the Chairman toa manifest error of reasoning in making the irrational Thirteenth Challenged Findings.

(vi) In so far as concerns the lie, Dr Britto was asked in oral evidence-

(a) whether he linked McGrail's reference to the lie to the Op Delhi investigation i.e., the investigation that Mr McGrail was complaining about? He responded "*Possibly, yes*" [T/15/92.22-24] **[FP19/23]**. In the light of the above evidence, the word "possibly" is unjustified. Plainly he did.

(b) Whether he did "*not think it would have been useful to Mr McGrail to have a bit more detail as to the alleged misleading or lie that was such an important factor in the Chief Minister's loss of confidence*". He responded, "*I was convinced that Mr McGrail knew*" [T/15/124.11-16] **[FP19/31]**. (As indeed he did, because Mr Llamas had told Mr McGrail in their meeting on 13 May 2020.)

(c) Asked by CTI "*Do you accept now that you did refer to the lie but potentially you did not refer to the investigation itself?*", Dr Britto responded "*I must have. I really at that stage I couldn't remember, but yes, I possibly did*". [T/15/131.1-6] **[FP19/33]**. Once again, in the light of the above evidence, the word "possibly" is unjustified. Plainly he did.

(vii) On 18 May 2020 Dr Britto emailed Claire Pizzarello of Hassans to say "*it may be best if you do not participate – I need to explain*". That could only have been because Dr Britto was then already aware of the Hassans connection to the matter to be discussed. Dr Britto's oral evidence [T/15/86.21-87.8] **[FP19/22]** made it perfectly clear that he was aware of the Hassans connection (a conflict of interest for Claire Pizzarello as a partner of Hassans would not arise otherwise) and that the GPA would discuss the matter in that context:

> ***A. I know she didn't come to the meeting. Possibly because she was employed by Hassans and I didn't want her involved in a possible conflict***
> *Q. Does that mean that you considered that the matter involving Mr Levy would be an important part of the deliberations?*
> ***A. No, but it was certainly mentioned at the - I did mention - I can't remember if I mentioned him by name, I think I did, or simply said a senior partner at Hassans phone is - you know, he has got himself into trouble. I think I did mention him by name***

(viii) Dr Britto oral evidence [T/15/123.15-124.2] **[FP19/31]**:

> *Q. There is no explicit reference in the letter to Operation Delhi, to Mr Levy or to the criminal investigation at all, other than that bit that I have just read out to you. Given that the Chief Minister had mentioned that investigation and given that the informal note said that it was the main reason for his loss of confidence, why did this letter not refer to that explicitly?*
> ***A. I really can't answer that. I think it's to do with the fact that when I read this, this for me was a mention of that, or at least an allusion to that."***

(ix) Furthermore, it is inconceivable that by 21 May members of the GPA did not know that the RGP had obtained a search warrant against and seized the devices of Mr Levy at Hassans. It was the "talk of the town". Indeed, the Minute of the GPA's meeting at which it made the decision specifically refers to the Hassans/Op Delhi link: "*After the chair read out the file note and fully explained what had been discussed, including the fact that the Commissioner had claimed at a previous meeting, that 'they' were trying to interfere in an investigation in which, allegedly, a senior partner in a law firm was, allegedly, involved*."

[para 12.115] By the 21 May 2020 the whole of Gibraltar knew that the RGP had "executed" a search warrant on Hassans/Mr Levy.

(x) Dr Britto's oral evidence in answer to questions on behalf of the Govt Parties [T/15/152.23-153.13] **[FP19/38]**:

> *Q. If you would confirm that you have done this already, I will not ask you any more questions. Is it your evidence now - I do not mean "now" in the critical sense of the word - is it your evidence that you probably did mention Delhi, or rather that the Delhi/Chief Minister's reasons/lie was mentioned at the 18 May meeting, and that you transmitted that to the board at the emergency meeting?*
> ***A. There's a probability that I did. I can't recall, but I certainly mentioned to the board, "Look, Mr McGrail is going to say", because I did mention that he'd called me to his office, before I told them, to explain all about the Chief Minister being upset with him, and all that.***

(xi) It is therefore clear from the above evidence that Dr Britto and the GPA were aware of the Hassans/Mr Levy connection, and that it made no difference to them. In Dr Britto's own words (see para 83.5 below) "*nobody in the GPA said, "No, no, we shouldn't.*" [T/15/126.7] **[FP19/32]**

83.4 Second, it is clear from the above evidence that Dr Britto knew about the lie. If Dr Britto failed to inform the other GPA members about the lie, the consequences of that cannot be attributed (still less as "deliberate" concealment) to the Claimant. It would be absurd to attribute to the Claimant (on the basis of no evidence whatsoever) that he knew that Dr Britto would not mention the issue of a lie to the other GPA members. But, in fact, Dr Britto's oral evidence (which the Chairman found he had no hesitation in accepting) was that he "**probably did tell the GPA about the "Delhi/Chief Minister's reasons/lie**" (see para 83.3 (x) above).

83.5 Third, contrary to the premise of the Chairman's criticism of the Claimant, the other members of the GPA did not make (and therefore would not have made) *"more searching enquiry had they been told the truth":* The evidence is clear: they were told and they did not. Dr Britto oral evidence (referring to Mr McGrail's lawyer's letter dated 29 May 2020 providing every detail of his allegation against the Claimant, including the alleged lie and its abuse by him), [T/15/125.25-126.8] **[FP19/32]**:

> *Q. And having received that letter were you still of the view that Mr McGrail should be invited to retire?*
> ***A. Put it this way, I paid a lot of attention to Mr Gomez's letter. I read it many times and passed it over to Mr Neish for his views. And I think that what happened afterwards is nobody in the GPA said, "No, no, we shouldn't."***

83.6 Fourth**,** the GPA Minute had made clear that the GPA made its decision principally because of deaths at sea incident, not the Op Delhi/lie issue (hence the GPA's lack of concern about those matters even after the 29 May letter spelling it all out in detail): "*The GPA felt that the maritime incident seemed to be far more serious in its repercussions, overall, than we had previously been alive to and felt that this was the major factor in our decision"*. [**para 12.115**].

83.7 Fifth, even after receipt of the 29 May 2020 letter, the GPA members expressed no interest in and sought no information, explanation or clarification of the "lie", the link to Hassans or the fact it had not been directly alluded to in the letter of 22 May 2020. The Chairman himself noted this fact **[at para 12.136]**: "*With hindsight, I comment that it is remarkable – and regrettable – that no one at the meeting of the GPA asked for any further particulars of any of these matters"*. The consequences of that failure to inquire further by the GPA, even when Mr McGrail's Counsel had spelt out his views about the issues relating to Hassans explicitly, cannot be visited upon the Claimant as the Chairman has irrationally purported to find.

83.8 ***That is the point*** and not any "deliberate concealment" by the Claimant. The GPA members knew and it made no difference to them. Even after 29 May 2020 letter from Charles Gomez & Co (Mr McGrail's solicitors), it made no difference to them (see Dr Britto's evidence in para 83.5 above). This is the reality, and it cannot rationally be both this and "*other members of the GPA, who would have made a much more searching enquiry had they been told*". In himself noting this, the Chairman contradicts his own finding, upon which he bases the "concealment and misleading" findings against the Claimant, that if they had been told details of the 'lie' they would have asked more searching questions. They did not. The contradiction is self-evident.

83.9 Sixth, for these reasons, the Chairman's finding **[para 12.138]** and **[para 0.135]** (see para 75.4 above) that "*by his cryptic reference to 'another event occurring last week', Mr Picardo quite deliberately and cynically did not spell out that his real grievance arose from the issue of the warrant against Mr Levy, including the alleged lie, **and led** 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*". *In this respect, I have no doubt that Mr Picardo deliberately underplayed his real grievance and thereby misled Dr Britto and the GPA"* (emphasis added), lacks foundational logic and is contrary to the evidence. It is self-evident that the GPA were not "led" (and therefore mislead) to any such focus.

83.10 Despite these fatal flaws in the finding that the other members of the GPA "would have made a much more searching enquiry had they been told the truth" it is the very foundation of the finding that the Claimant misled the GPA and "caused them to focus on the Incident at Sea".

As to the letter being "sinister" and The Claimant manipulating the GPA process

84. In relation to the findings that *if, as Mr Picardo maintains, the dominant reason for his loss of confidence was the issues arising from Operation Delhi, including the alleged lie, I consider it be remarkable and indeed sinister that the letter does not name Mr Levy; it does not refer to the grant of the search warrant, or to the visit to Hassans to execute the same or to 'the lie' which Mr Picardo alleges that Mr McGrail told."* **[para 12.178]** and that ***"****The inevitable and irresistible conclusion is Mr Picardo was using the processes of the GPA to bring about Mr McGrail's effective dismissal for reasons of his own, relating to the police investigation into Mr Levy, whilst managing the process so as to give the appearance that he was being asked to retire for other reasons, namely the Incident at Sea and the HMIC Report****."* **[para 12.179]:**

84.1 First, the Chairman's finding that the Claimant "genuinely believed" that Mr McGrail had lied to him and had done so intentionally **[para 11.113] and [para 11.131]** was sufficient cause for the Claimant to lose confidence in Mr McGrail. Accordingly, there is no rational basis for the Chairman to also attribute to the Claimant by inference, or for the Claimant to have or need, any concealed other (supposedly) "real" grievance, nor the desire to conceal this good grievance and reason for seeking Mr McGrail's removal.

84.2 Second, nor can there be anything "sinister" in the fact that the letter does not mention Mr Levy. The Clamant had discussed the Hassans/Mr Levy connection and the fact that he had been lied to, in Dr Britto's presence at the 18 May meeting. Indeed, Mr McGrail had informed Dr Britto of this just three days before, on 15 May. Mr Britto knew about it. There was no concealment.

84.3 The Claimant fully expected the GPA to give McGrail the opportunity to make representations as the Claimant and the Governor and they had told him he must do. Indeed, the Chairman has found that that is precisely what Dr Britto thought he was doing in the letter of 22 May, and that is precisely what he explained to Mr McGrail at their 22 May meeting. In these circumstances, it is not rational to attribute to the Claimant any intention to deceive or mislead the GPA through a concealment that (i) the evidence shows never occurred and (ii) he fully expected Mr McGrail to make representations about – which is exactly what transpired.

84.4 Third, the question of the precise degree (or absence) of ***detail about*** the lie is a red herring. If

Dr Britto and the GPA had been interested in the ***details about*** a lie (as opposed to the ***fact of*** a lie) they had every opportunity to ask and did not do so. The only rational conclusion is that the detail made no difference to them and not that they were deliberately deceived by the Claimant.

84.5 There is therefore nothing either "inevitable" or "irresistible" about this conclusion which is contrary to all the evidence and logic and therefore irrational.

85. **Ground 2 – Natural Justice**. For the reasons stated above, the Twelfth Challenged Findings lack foundation in probative evidence and are therefore arrived at in breach of the First Mahon Rule of Natural Justice and ignores the probative evidence to the contrary effect and is thus arrived at in breach of the Second Mahon Rule of Natural Justice (as to which see para 13.2 above).

86. **Ground 3 – Illegality.** The Twelfth Challenged Finding interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

E. FINDINGS RELATING TO SEQUENCE OF EVENTS LEADING TO MR MCGRAIL'S RETIREMENT

87. The Challenged Findings relating to sequence of events leading to Mr McGrail's retirement are findings relating to:

87.1 The manner in which the S. 34 Police Act complaint was raised by the Claimant (paras 88 to 93 below) **(the Thirteenth Challenged Findings)**.

87.2 The reasons why Mr McGrail retired (paras 94 to 97 below) **(the Fourteenth Challenged Findings)**,

each of which findings are dealt with separately below.

<u>Thirteenth Challenged finding: Findings in relation to the manner in which the S. 34 Police Act complaint was raised</u>

Identification of the Thirteenth Challenged Finding

88. The Claimant challenges the following finding of the Chairman in the Report ("the Thirteenth Challenged Finding"):

"*In my opinion, the process by which Mr Picardo and Mr Pyle raised their complaints against Mr McGrail was unfair because they provided no proper particulars of what was alleged against him*

and such particulars, as he was eventually given by the GPA, omitted entirely Mr Picardo's real grievance." **[para 12.183] and [para 0.147]**

Statement of Facts relating to the Thirteenth Challenged finding

89. Section 34 of the Police Act provides:

"34.(1) The Authority acting after consultation with the Governor and the Chief Minister and with the agreement of either of them, may call upon the Commissioner to retire, in the interests of efficiency, effectiveness, probity, integrity, or independence of policing in Gibraltar.
(2) Before seeking the approval of the Governor and the Chief Minister under subsection (1), the Authority shall give the Commissioner an opportunity to make representations and shall consider any representations that he makes.
(3) Where the Commissioner is called upon to retire under subsection (1), he shall retire on such date as the Authority may specify or on such earlier date as may be agreed upon between him and the Authority."

90. The facts set out in paragraphs 76 and 77 above are repeated in this context.

Statement of Grounds relating to the Thirteenth Challenged Finding

91. The Claimant challenges the Thirteenth Challenged Finding on the grounds of irrationality (**Ground 1**) and illegality (**Ground 2**).

92. **Ground 1 – Irrationality**. This finding is arrived at in error of reasoning, lacks logical integrity, visits manifest unfairness on the Claimant and is therefore irrational because:

92.1 It distorts and mischaracterises the Claimant's role and responsibilities in relation to the section 34 process:

(i) The Claimant's role was (as the Chairman rightly recognises) as 'complainant'. The finding therefore ignores the obvious legal fact that the section 34 process is a GPA process. The Claimant therefore had no obligation (at least at that stage) to give Mr McGrail "proper particulars of what was alleged against him". Nor was the Claimant's failure to do so *the cause* of any injustice visited upon Mr McGrail.

(ii) It was, factually and legally, for the GPA to assess the adequacy of the Claimant's and Governor's joint complaint, the extent of the information provided in support of it and to request further particulars (or to reject it) as it may have considered appropriate. The Claimant made it clear to the GPA that it was its function to do so. Indeed, Dr Britto himself acknowledged as much to Mr McGrail at their meeting on 22 May, which Mr

McGrail covertly recorded, when, among other relevant things, he told Mr McGrail that if after considering his representations and explanations they did not think that the Chief Minister's and Governor's reasons for sufficient to call for his retirement they would not do so and tell them as much.

(iii) As the Chairman himself has found: it "*is for the GPA independently to consider whether they accept the grounds on which the Chief Minister and the Governor claim to have lost confidence in the Commissioner, and they should only require his retirement if those grounds are clearly set out and withstand robust examination, indeed scrutiny, and can be properly brought within the provisions of the criteria set out in section 34*"." **[para 12.215(c)]**

(iv) Had the GPA followed its own procedure (including inviting Mr McGrail to make representations as it was reminded it should do before inviting him to retire), Mr McGrail, or his lawyers on his behalf, would have been able to say all the things that he said in Gomez and Co's letter dated 29 May 2020, and anything else that he may have wished or been advised to say (including as to the failure to provide proper reasons). The fact that they did not, is not the fault of the complainant and he cannot lawfully be made responsible for the consequences. It is to seek to overcome this obvious obstacle to a rational finding imposing blame for that on the Claimant that the Chairman makes the equally irrational finding that despite telling him the contrary, the Claimant, whilst ostensibly telling the GPA to act independently, "never doubted that they would not do as they were told to do" (see the Thirteenth Challenged Finding above).

(v) As stated, 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 in which Mr McGrail could/would have challenged and tested those reasons as he did in the 29 May letter.

92.2 It is clear beyond peradventure from the evidence that such procedural injustice as has been visited on Mr McGrail has been inflicted on him by the GPA. To lay the responsibility on the Claimant by reason of his alleged (found by the Chairman to be a fact) failure to properly particularise the detail of the lie that was his reason for losing confidence (when, in any event, it was the Governor's reasons that most concerned the GPA and whose power to require him to resign Mr McGrail feared to the point of "jumping before he was pushed", which only the Governor could do), is to distort both the process and the causative realities of Mr McGrail's retirement.

92.3 Accordingly, this finding is wrong, lacking in foundation in fact or logic, visits manifest unfairness on the Claimant and is thus irrational. It is also unlawful on the ground of illegality as it is based on a fundamental error of law.

93. **Ground 2 – Illegality.** The Fifteenth Challenged Finding is fatally tainted by illegality because:

93.1 It is arrived at by an error of law, namely, the role and responsibility of the Claimant as complainant under Section 34 of the Police Act.

93.2 It interferes with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

Fourteenth Challenged Finding: Findings relating to the reasons why Mr McGrail retired

Identification of the Fourteenth Challenged Finding

94. The Claimant challenges the following finding of the Chairman in the Report ("the Fourteenth Challenged Finding"):

> *"Although he knew that Mr Pyle and Mr Picardo claimed to have lost confidence in him, and he realised that his position had therefore become untenable, he retired only because he felt he was being unfairly and unlawfully compelled to do so. This was because neither they nor the GPA had followed the proper procedures, and because Mr Picardo had not explained the real reason for his loss of confidence, which was the application by the RGP for the search warrant against Mr Levy and the 'lie' which Mr McGrail was alleged to have told to Mr Picardo and Mr Llamas at the meeting of 12 May."* **[para 12.389a.] and [0.165a.]**

Statement of Grounds relating to the Fourteenth Challenged Findings

95. The Fourteenth Challenged Findings are unlawful on the grounds of irrationality (Ground 1) and illegality (Ground 2).

96. **Ground 1**: **irrationality**:

96.1 The findings that Mr McGrail felt compelled to retire because the Claimant had not "*followed the proper procedures*" and because "*Mr Picardo had not explained the real reason for his loss of confidence, which was the application by the RGP for the search warrant against Mr Levy and the 'lie' which Mr McGrail was alleged to have told to Mr Picardo and Mr Llamas at the meeting of 12 May"* are contrary to the evidence before the Inquiry, lack logical integrity and are inconsistent with and contradictory with itself and other findings of the Chairman in the Report, and are therefore irrational because:

(i) The Chairman found that Mr McGrail "*retired **only** because he was being unfairly and unlawfully compelled to do so*". Only the Governor could compel him (under section 13 of the Police Act). Only the Governor had the power to compel or "push" Mr McGrail. The Claimant had no such power (as Mr McGrail well knew) and he therefore did not "jump" (retire) for fear of what the Claimant could do.

(ii) The evidence (including Mr McGrail's own evidence and the evidence of his own WhatsApp messages with Mr Ullger) clearly shows (and the Chairman found) that Mr McGrail retired because he feared that the ***Governor*** was about to exercise his power under section 13 of the Police Act to call upon him publicly to resign (i.e. sack him) hand he feared the humiliation and pension consequences of that so (in the words of the Chairman) "*he jumped before he was pushed*".

(iii) The Chairman found this very fact:

"'*It follows from what I have said in the last section ('Unfair treatment by the GPA and by the Interim Governor') that the way in which Mr Pyle was about to use his powers under section 13(1)(f) was unfair. In the circumstances, I think that Mr McGrail was acting reasonably to pre-empt this unfairness by retiring*." **[para 12.385]**

(iv) Furthermore, the Chairman found that the Claimant had not pressurised the Governor to consider exercising his power under section 13:

"*I accept that Mr Pyle's decision to consider exercising his power under section13 of the Police Act was entirely his own. There is no evidence that he was put under any pressure by anyone else and in particular by Mr Picardo (Pyle 1 paragraph 26.1 [A257]) (para 12.228). But, having said that, the initiation of the process had been encouraged by Mr Picardo, who had his own agenda, as I have explained*." **[para 12.229]**

(v) Furthermore still, none of this was lost on the GPA itself which in the Minutes of its emergency 21 May meeting, acknowledged that after considering any representations by Mr McGrail it would be able to make representations to *the Governor* and felt that "this recourse was better and 'gentler' than the Governor potentially activating Section 13 which allows him to seek his resignation." [**para 12.115**]

(vi) Nor was any of this lost on Mr McGrail himself, who in oral evidence said explicitly:

"I want to underscore that I didn't choose to retire; I was forced to retire. I was muscled out. The only two options were I followed the instructions of the GPA or I get sacked by Mr Pyle and that was a very difficult situation to deal with.' [T/23/85.12]." [**para 12.343**]

(vii) It is therefore irrational for the Chairman to attribute Mr McGrail's feeling that he was being "compelled" to retire to any failure on the Claimant's part to "*follow the proper procedures*" or the Claimant's failure to explain to the GPA "*the real reason for his loss of*

confidence, which was the application by the RGP for the search warrant against Mr Levy and the 'lie' which Mr McGrail was alleged to have told to Mr Picardo and Mr Llamas at the meeting of 12 May".

97. **Ground 2: Illegality.** The Sixteenth Challenged Findings are fatally tainted by illegality because:

97.1 By virtue of the reasons stated in paragraph 96 above the findings are irrelevant to the Inquiry's terms of reference and are thus ultra vires the Chairman and illegal, for the following reasons:

(i) While it is not in issue that the Claimant wanted Mr McGrail's removal as Commissioner of Police, whatever may have been the Claimant's motives or reasons for his loss of confidence in Mr McGrail did not cause Mr McGrail to feel compelled to retire.

(ii) The Claimant's motives and whether they were sufficiently articulated or particularised or not and his possible motives for not better particularising to the GPA were, in any event, irrelevant to Mr McGrail's decision to apply for early retirement.

(iii) Accordingly, the Report's focus and "conclusions" relating to the Claimant's supposed concealment of his supposed "real reasons", is in any event irrelevant to the reasons for his retirement. They therefore represent gratuitous criticism of the Claimant out with the Chairman's terms of reference and are therefore ultra vires.

97.2 They interfere with the Claimant's right to respect for his reputation contrary to Section 7 of the Constitution and Article 8 of the ECHR and the common law.

F. REMEDIES

98. The Claimant seeks a declaration that the Challenged Findings have been unlawfully arrived at and are legally invalid and such further or other relief as the court may think fair and just, including an order that they be set aside or quashed.

Sir Peter Caruana KCMG KC

Christopher Allan

Philip Dumas

4th February 2026