

UFFIĊĊJU TA' L-AVUKAT ĠENERALI
IL-PALAZZ
IL-BELT
MALTA



OFFICE OF THE ATTORNEY GENERAL
THE PALACE
VALLETTA
MALTA

TELEPHONE: 21225401
21235315
21238189
FAX: 21240738

Our Ref: AG 1456/18

Your Ref: TRM/SKK/003303-1-5/7732

Mr. Tony Murphy
Bhatt Murphy
Solicitors
10 Tyssen Street
London E8 2FE
United Kingdom

5 October 2018

Dear Mr Murphy,

As you know from my letter of 31 August 2018, the Maltese High Commissioner in London passed on your letter to him dated 8 August 2018 and the subsequent document, a Legal Opinion written by you and two London barristers dated 9 August 2018. Thank you for the letter and the Opinion.

You are aware of the current and ongoing functions and steps of the Malta Police and the Magistrate leading the enquiry. As I put it in my letter of 31 August 2018 *"the Magistrate leading the enquiry into the murder of Ms Caruana Galizia has unfettered discretion and freedom"* and *"he, and the Malta Police, are free to go wherever the evidence takes them"*. I added: *"The investigation itself is one of the most resource intensive investigations in the history of Maltese law enforcement"*; *"Significant resources are still being utilised in this case from both the Malta Police and the Maltese Security Services"*; and *"the Maltese authorities are working closely with international law enforcement bodies"*.

You are also aware of the right of effective judicial protection before the Courts. As I put it in my letter of 31 August 2018: *"Our judiciary is independent and impartial"*. The Opinion refers to the *"human rights challenge within the Maltese courts ... brought in December 2017"* by the family, in which proceedings I was a Respondent. Those proceedings led to a judgment of the Malta Civil Court First Hall (Hon Judge Silvio Meli) which ruled that there was an existing violation of

the domestically applicable legal standards of Article 2 and Article 6, to the extent of the involvement in the investigation of Deputy Commissioner Valletta who immediately after that judgment withdrew from involvement in the investigation. A judgment delivered by the Constitutional Court on the 5 October has confirmed the finding with regard to Article 2 but reversed the judgment of the first Court with regard to Article 6.

The request in your letter of 8 August 2018 is for a “public inquiry” into the “crucial question” whether the assassination “could have been prevented”, to establish “the truth of the full circumstances surrounding the loss of Ms Caruana Galizia’s life” and for “identifying any measures necessary for the protection of other investigative journalists and anti-corruption campaigners in Malta”. You rely on “the State’s duty to protect Ms Caruana Galizia’s right to life”, distinct from any “individual criminal culpability”. You say the “failure to investigate such a central issue is a clear breach of ... Malta’s obligation to the family under Article 2”.

There are some questions which arise from the position which you are taking on behalf of the family. I consider that it is appropriate that I should raise these questions with you, before I reach any conclusion on any aspect of what you have requested the Government to do. I want to give you this opportunity to respond to these questions, if you wish to do so. I would like to be clear as to what you say about them. To assist you, I will give you some explanation as to their relevance.

Sequential and Parallel Actions

The first questions that arise relate to the appropriate sequence of actions and decisions, in the context of a possible public inquiry. This topic (including in relation to the application of human rights standards), is addressed in the English textbook *Beer on Public Inquiries* at pp.89-99, which cites as the leading case the judgment of the English Divisional Court in *R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin). An example of when questions as to sequencing arise is where an English inquest is adjourned when, and because, a related criminal investigation or prosecution is underway. I was not able to find a recognition of this topic, or the principles which inform it, in the letter or any discussion of it in the Opinion.

Beer says: “In general terms, it is normally appropriate for any technical, professional, internal disciplinary, other internal or criminal investigation to take place before an inquiry. This is because, first, the outcome of that investigation can assist in determining whether a public inquiry is needed and, if so, what its focus and parameters should be. Secondly, information gathered in the course of such an investigation or proceedings can be used to assist in informing any subsequent inquiry.”

The *Mousa* case addressed the issue as to whether questions as to the need for an inquiry, and the precise scope of the issues that any such inquiry could cover,

could lawfully be left for a decision at a later date. In that case, they could be. Points made by the Court included the following:

- The ECHR does not require everything to be done at once. Reasonable phasing is allowed and there can be a number of good reasons for deferring any decision whether to take the additional step of establishing a public inquiry. On the other hand, a powerful factor against deferral would be if delay were liable to jeopardise the effectiveness of investigation, as where delay might in practice frustrate an inquiry.
- It is relevant that work directed at fulfilling the main purpose of an ECHR-compliant investigation - namely the identification and punishment of wrongdoers - is already in hand. A good reason for deferral can be that the core fact-finding exercise is already under way, and is liable to impact on the issues for potential investigation, because allegations relevant to the investigation may be found to lack credibility or substance; some wider issues may themselves be investigated in practice; the number and formulation of issues for investigation may be substantially affected by the process already in hand.
- Another good reason for deferral is where, even if a public inquiry were established now, there is relatively little that it could achieve pending the resolution of investigations and any ensuing prosecutions, given the issues and the overlap. It is relevant to ask whether there would be any risk of prejudice to criminal investigations and proceedings if an active public inquiry ran in parallel with them. It is relevant to ask whether witnesses implicated in allegations would be unlikely to give evidence to a public inquiry unless they were first given immunity from prosecution and disciplinary action, which in practice would need to await charging decisions.
- Overall, it is relevant to ask whether there are real advantages and relatively little prejudice in waiting to see whether a public inquiry is needed at all in relation to wider issues and, if so, precisely what issues it should cover. Cost and proportionality are relevant considerations when deciding whether a decision on a public inquiry can be deferred.

I consider it appropriate to bring this topic to your attention and give you an opportunity to address it, if you wish to do so. What is your position on this topic and the considerations relevant to it?

Species of State Responsibility and Ongoing Investigation

As I have recognised, your letter of request dated 8 August 2018 refers to the question of whether there has been a failure of the State's duty to protect Ms Caruana Galizia's right to life through a failure to prevent her death. The Opinion describes this as "*whether Malta complied with its protective obligation to her, ie. (a) whether Malta knew, or ought to have known, of a real and immediate risk to her life; (b) the adequacy of any steps taken by Malta to guard against that risk ...*" (§1.7(ii)). It speaks of "*the critical question of whether the Maltese authorities complied with their protective obligation ... ie. could Ms Caruana Galizia's death have been prevented?*" (§4.16). It invokes the "*operational obligation to protect Ms Caruana Galizia*" (Opinion §4.5).

I would like to know your and the family's position, and give you this opportunity to respond, on what is and is not being said about potential state responsibility and how it links to ongoing investigation. I would like to understand whether you are saying there is a clear, crystallised and distinct issue of state responsibility, involving an agent or agents of the state, separate, distinct and insulated from any issue which could arise - or person who could be investigated or interviewed - within the proper scope of the investigation of the police and Magistrate.

For your part, is it your and the family's position that:

- The question as to a possible failure by state authorities to protect against a real and immediate risk, of which those state authorities knew or ought to have known, is the only question which could arise in relation to those state authorities in this matter?
- No question relating to the conduct of those authorities could be the subject of, or a person within those authorities be a relevant witness for, investigation by the police or under the supervision of the Magistrate?

It will help you if I give some further context. Neither the letter nor the Opinion seems to be specific about which person or persons, agency or agencies, are said to have breached the Article 2 duty of protection; nor do they say that such person or persons, agency or agencies, could not be the subject of or a relevant witness for investigation by the police and Magistrate. The Opinion speaks of the "*Application of the Investigative Duty in this case*" in language which was not limited to failure of protection, but includes "*that state authorities 'may bear responsibility for the death', or that they 'are, or may be, in some way implicated'*" which "*may result from a failure to prevent a death at the hands of a third party and/or direct involvement*" (Opinion §4.5). When that language was previously used, in the Urgent Advice written by the same London barristers dated 8 December 2017

(§3.6), it was linked not only to a possible failure of a duty to protect but also to a *"concern on the part of the family that agents of the State may have had direct involvement in her assassination"*. Moreover, the family's position in written submissions to the Court was that the Article 2 investigative duty is *"more onerous"* because *"it cannot be excluded that the murder was ordered by agents of the State"* (§17). I am aware that the press (Times of Malta) have recently reported you as saying *"the crucial question" concerns "investigating whether [Ms Caruana Gazilia's] death could have been avoided and if there was any state complicity in her assassination"; and "whether the state was responsible for the loss of Ms Caruana Gazilia's life either by failing to protect her from others or as a result of state collusion, which could not be ruled out"*. I have been unable to find reference to involvement, complicity or collusion in the letter or Opinion. I am conscious that there may have been a change of position.

The following questions arise:

- Is it your and the family's position that the police and Magistrate investigation may need to investigate issues of state responsibility, including issues of what was known to agencies of the state and what actions were and were not taken by them?
- Are you and the family advocating a public inquiry into whether state authorities failed to protect against a known risk to life, in parallel with a criminal investigation which may include whether one or more of those same authorities were implicated in some other way?

There is a further question to raise with you under this heading:

- Is it your and the family's position that even a question of an Article 2 failure to protect could in the present case itself be a matter for criminal investigation?

By way of context for that further question, I have seen that the discussion in the Opinion of the 'wider investigation' into the question of failure of protection culminates in conclusions (§5.2) regarding public inquiry under the Inquiries Act, but also criminal investigation. It can, in principle, be the case that an Article 2 failure to protect could be a matter for criminal investigation: an example is *Kemaloglu v Turkey* (2015) 61 EHRR 36. So, it would be helpful for me to know clearly what you and the family are saying about whether that could be the case in the present case.

Preserving evidence

The Opinion says that a *"wider investigation must now be instituted by Malta, as a matter of urgency, by way of enhanced public inquiry"* because *"time is being lost at a*

period which should be critical to the evidence gathering process” (§4.21). In terms of evidence envisaged for gathering, the Opinion describes “evidence on ... wider issues” identifying “whether the police or other Maltese authorities knew or should have known of a risk to [Ms Caruana Galizia’s] life prior to her assassination; whether that risk was real and immediate; any steps taken to attempt to avert that risk, and the adequacy or appropriateness of those steps ...; and whether there were any additional steps which could and should have been taken to protect [her] right to life” (§4.20).

I was unable to find in the letter or the Opinion a clear and crystallised description of the evidence for whose preservation the present time is critical. I would like to understand the position which you and the family take about the preservation of evidence, the investigation which was and still is being supervised by the Magistrate, its Article 2 compatibility, and effective judicial protection for the family.

By way of context, in the Urgent Advice dated 8 December 2017 London Counsel there described “an additional issue” regarding “securing evidence” (§1.6), stating that “Article 2 requires that reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances” and “We are concerned that the current investigation is failing to comply with this requirement...” The Advice said (§3.24): “there is a real question whether the current investigation is capable of meeting this evidence-gathering requirement, and that time is being lost at a period which should be critical to the investigation”. When the human rights challenge was pursued, the family acknowledged in their written submissions (§28) that the investigation includes collecting evidence and the Inquiring Magistrate has powers under Article 554 of the Criminal Code, including “seizure of documents ... so that the truth is uncovered”. The respondents to those proceedings recorded that “the investigation, collection and preservation of evidence is being done under the supervision of the Inquiring Magistrate”. The family’s challenge was designed, as they said in their written submissions to the Court (§44) to “assure an investigation which satisfies all the requirements of Article 2”.

More recently, in the Introductory memorandum by the Rapporteur to the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly (7 August 2018), on the question of “whether the authorities could have had prior knowledge of the plot” and “questions as to what the Maltese police and security services might have known prior to the murder”, the Rapporteur’s stated concern is about “records of surveillance” having not yet been “provided to the investigating magistrate” (§20).

- Is it not your position and the family’s position that this “real question” of urgent evidence-gathering is one to be raised with those conducting the investigation and whose current investigation is said to be incapable of meeting it?

- If there were an urgent Article 2 duty to preserve perishable evidence, why would and could this not have been raised when legal proceedings were launched invoking Article 2 as they were on 22 November 2017?
- Is it your and the family's position that the setting up of an immediate public inquiry would be appropriate, necessary and proportionate, solely for the purpose of securing certain evidence, even if no other progress can appropriately be made? Are you able to point to any authority or example where this course has been considered necessary for compliance with Article 2?

I look forward to receiving your response to these topics and any further submissions or information which you and the family wish to make on any aspect of what you have put forward, but I shall refrain from reaching any position on these and any other aspect raised by you , until you have had that opportunity.

Yours faithfully,



Peter Grech

Attorney General