

**PUBLIC INQUIRY INTO
THE ASSASSINATION OF DAPHNE CARUANA GALIZIA**

THIRD OPINION

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1. INTRODUCTION

- 1.1 Daphne Caruana Galizia, the renowned Maltese journalist, was assassinated in a car bomb attack on 16th October 2017.
- 1.2 On 9th August 2018 Ms Caruana Galizia's family called on the Prime Minister of Malta to establish a Public Inquiry into whether her assassination could have been avoided. This formal request was supported by our legal Opinions dated 8th December 2017 ('First Opinion') and 9th August 2018 ('Second Opinion'), both of which were published by the family in the interests of transparency.
- 1.3 The family asked that a Public Inquiry be established without further delay, given the time that has already elapsed and the urgent need to preserve evidence of any state complicity or neglect surrounding the assassination. It was made clear to the Maltese authorities that, in the event that the Prime Minister refuses to institute a Public Inquiry, which is compliant with the European Convention on Human Rights ('ECHR'), the family will have no option but to commence legal proceedings in Malta, and ultimately if necessary in the European Court of Human Rights in Strasbourg.
- 1.4 The background to Ms Caruana Galizia's assassination is set out in our earlier Opinions and is well known.
- 1.5 By letter dated 5th October 2018 the Attorney General of Malta, Mr Peter Grech responded to our Second Opinion dated 9th August 2018. The Attorney General's letter posed a number of direct questions and inferentially raised others, which are considered in Part 3 of this Opinion.
- 1.6 It is important to note in this regard that Article 2 of the ECHR includes the expectation that the state concerned will act of its own motion, and not leave compliance to the initiative of the next-of-kin, either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (*Al-Skeini and Others v UK* (2011) 53 EHRR 18, [165]). Accordingly, it is for the Maltese authorities rather than the bereaved family to ensure Malta's compliance with Article 2.

- 1.7 It is a matter of grave concern that to date Malta has failed to comply with Article 2 in relation to its investigation into Ms Caruana Galizia's assassination, requiring the family to initiate legal proceedings against the Attorney General in order to ensure compliance. Those proceedings culminated in a judgment by the Maltese Constitutional Court on 5th October 2018 concluding that the active involvement of Deputy Commissioner Silvio Valletta in the investigation into Ms Caruana Galizia's death amounted to a violation of Article 2.
- 1.8 A grieving family should not be expected to engage in litigation in order to ensure the state's compliance with Article 2, or to respond to questions from an Attorney General as to the nature of that duty in circumstances where the urgent need for a public inquiry is obvious. Notwithstanding, the family has instructed us to provide our Opinion on the questions raised by the Attorney General in a final attempt to avoid further litigation.
- 1.9 In summary, it is our Opinion that Malta is acting unlawfully in not instituting a Public Inquiry into the circumstances of Ms Caruana Galizia's assassination. If it persists in this illegality, we advise that court proceedings are issued in Malta to compel the Prime Minister's compliance with Article 2 ECHR and if necessary thereafter in the European Court of Human Rights ('ECtHR') in Strasbourg.

2. UPDATE ON RECENT DEVELOPMENTS

- 2.1 Before turning to the questions posed by the Attorney General, we summarise briefly below the key developments since the family's call for a Public Inquiry in August 2018.
- 2.2 On 5th October 2018 the Constitutional Court in Malta found that the investigation into Ms Caruana Galizia's assassination breached Article 2 ECHR due to the involvement of a senior police officer who had been a subject of her journalistic investigation. On that same day, the Attorney General of Malta said that he is giving active consideration to establishing a public inquiry into the assassination.

- 2.3 On 8th October 2018, the Council of Europe’s Committee on Legal Affairs and Human Rights held a hearing entitled *‘Daphne Caruana Galizia’s assassination and the rule of law, in Malta and beyond: ensuring that the whole truth emerges’* in Strasbourg, at which Tony Murphy of Bhatt Murphy and Jonathan Price of Doughty Street chambers addressed the relevant issues related to Articles 2 and 10 ECHR raised by Ms Caruana Galizia’s assassination.¹ The Committee will have its next hearing on the case in January 2019.
- 2.4 Following the hearing, the Committee requested the opinion of the European Commission for Democracy through Law (‘Venice Commission’) on Malta’s constitutional arrangements on the separation of powers and the independence of the judiciary and law enforcement bodies. The role of the Venice Commission is to provide legal advice to its member states to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. The Venice Commission travelled to Malta on 5th November 2018 and is expected to publish its opinion in December 2018.
- 2.5 In October, a delegation of international press freedom organisations, including Reporters Without Borders (‘RSF’), PEN International, the European Federation of Journalists, Committee to Protect Journalists (‘CPJ’), European Centre for Press and Media Freedom (‘ECPMF’) and the International Press Institute (‘IPI’), conducted a mission to Malta. On 17th October 2018 the delegation released their preliminary findings, raising their concern with the apparent lack of progress in the investigation and its chilling effect on public interest investigative reporting. Their recommendations included that Malta:
- 2.5.1 Ensure a full and comprehensive investigation into the murder of Ms Caruana Galizia; and
 - 2.5.2 Establish without delay a Public Inquiry, including into whether Ms Caruana Galizia’s assassination could have been prevented and to learn lessons for the future; with comprehensive and transparent

¹ Available at <https://vodmanager.coe.int/coe/webcast/coe/2018-10-08-2/en>.

terms of reference; meaningful involvement of the family, protection of sources and public hearings.

2.6 In November 2018, contradictory information began to circulate regarding whether the ‘masterminds’ behind Ms Caruana Galizia’s assassination have been identified. On Sunday 18th November 2018 the Times of Malta reported that “*more than two masterminds*” have been identified as commissioning the assassination, with the information referring to “*Malta’s top investigators.*”² The Maltese Home Affairs Minister, Michael Farrugia, reportedly gave comments to similar effect to the Italian media (Rai 3) stating that investigators are closing in on the suspected masterminds.³ However, Reuters’ journalist Stephen Grey contested the story, stating that he was informed “*by an authoritative source*” that it was not true that the police had identified those who commissioned the journalist’s assassination.⁴ The Ministry of Home Affairs also appeared to distance itself from the reported comments of Minister Farrugia, by stating that he had said in a telephone interview that arrests would be made, only after there is concrete evidence.

2.7 There are four concerns regarding these developments in November. First, the family were not informed of any breakthrough or developments in the investigation; learning only of these claims via media reports of the Minister’s comments and those of the unnamed “*top investigators*”. Second, if the investigation has made progress in this respect it is obviously concerning that such a development would be leaked to the media. Third, if the Minister is privy to sensitive information concerning the investigation this raises concerns given that there may be matters to be investigated concerning members of the same cabinet. Fourth, understandable questions have been raised regarding the timing

² See Caroline Muscat, ‘Reporters Without Borders renews call for public inquiry after investigation leak,’ *The Shift*, 19th November 2018, available at <https://theshiftnews.com/2018/11/19/reporters-without-borders-renews-call-for-public-inquiry-after-investigation-leak/>.

³ ‘Home Affairs Minister confirms police closing in on more Caruana Galizia suspects,’ *Times of Malta*, available (in updated form) at <https://www.timesofmalta.com/articles/view/20181119/local/home-affairs-minister-confirms-police-close-to-more-arrests-in-caruana.694674>.

⁴ See Muscat, above fn 2.

of “*sudden news that the ‘police were close to cracking the case’*” being made public.⁵

3. QUESTIONS RAISED BY THE ATTORNEY GENERAL

3.1 The questions raised by the Attorney General in his letter of 5th October 2018 are fourfold:

- (i) What is the nature of the duty imposed by Article 2 of the ECHR to investigate the wider circumstances of Ms Caruana Galizia’s assassination beyond seeking to establish criminal culpability?
- (ii) When should a Public Inquiry be established?
- (iii) What are the potential breaches of the Article 2 duty to be investigated by the Public Inquiry?
- (iv) What is the relationship between the need for a Public Inquiry and the need to preserve evidence via the criminal investigation?

Question (i): What is the nature of the Article 2 duty to investigate the wider circumstances of this assassination, beyond seeking to establish direct criminal culpability?

3.2 The Attorney General asserts that “*the identification and punishment of wrongdoers*” is “*the main purpose of an ECHR-complaint investigation*” (page 3). While it is agreed that a central purpose of an Article 2 compliant investigation is the identification and punishment of wrongdoers, it is clear from the case law of the European Court of Human Rights (“ECtHR”) that there are wider purposes to such an investigation, outside the context of establishing criminal liability. Thus, for example, in *Öneriyildiz v Turkey* (2005) 41 EHRR 20 , [94], reference is made to the importance of establishing systemic regulatory failures “*ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system*” and of “*identifying the State officials or authorities involved in whatever capacity in the chain of events*

⁵ Ibid.

in issue". This approach is echoed in for example *Trubnikov v Russia* [2005] ECHR 462, [88] and *Sergey Shevchenko v Ukraine* (2007) 45 EHRR 27, [65].

- 3.3 The ECtHR has in other contexts emphasised that the true circumstances of contentious deaths cases are often confined within the knowledge of State officials and authorities, and so "*the bringing of appropriate domestic proceedings such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial*": *Makaratzis v Greece* (2005) 41 EHRR 49, [73]. This reflects the critical connection between the need for an effective official investigation and the possible range of domestic proceedings, including criminal, disciplinary proceedings or civil proceedings.
- 3.4 It is beyond doubt that the substantive obligations under Article 2 extend far beyond the criminal sphere. States are obliged to establish systems of laws, precautions, procedures and means of enforcement, which will to the greatest extent practicable, protect life. Thus, for example, in *Kemaloğlu v. Turkey* (2015) 61 EHRR 36, the ECtHR found there to be a breach of Article 2 arising from the Turkish authority's failure to inform the municipality's shuttle service about the early closure of a school due to a blizzard. The applicants' seven-year-old son froze to death whilst trying to walk home, on a day when school classes ended early due to the weather and the shuttle did not arrive at that time; the ECtHR held that the authorities had failed to take measures which might have avoided the risk to the child's life.
- 3.5 The broad approach to the substantive obligations under Article 2 is key to the correct interpretation of the investigative, procedural obligation. The investigative obligation has been recognised as arising from the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "*secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention,*" in contexts where there is an arguable breach of the substantive obligations. An essential purpose of an Article 2 investigation is to "*secure the effective implementation of the domestic laws which protect the right to life*", plus in those cases involving State agents or

bodies, “to ensure their accountability for deaths occurring under their responsibility”: see, amongst many authorities, *Jordan v. United Kingdom* (2001) 37 EHRR 52, [105]. It would be intellectually incoherent for the substantive Article 2 obligation to be cast widely, incorporating broad questions outside the specific context of criminal liability, but to cast the investigative obligation narrowly.

- 3.6 It was explained in detail in our previous Opinions as to why there was an arguable breach of Malta’s substantive, protective obligation to Daphne Caruana Galizia. The Attorney General’s letter does not address that issue. A central question remains to be answered by the Public Inquiry: whether the Maltese authorities knew or ought to have known of, or indeed posed, a real and immediate risk to Daphne Caruana Galizia’s life. An Article 2 compliant investigation is required to explore that question. It is clearly important not to prejudge the answer, which requires a full, fearless and independent investigation. This is precisely why an Article 2 compliant Public Inquiry into whether Ms Caruana Galizia’s life could have been saved is so urgently required.

Question (ii): When should a Public Inquiry be established?

- 3.7 Deferral of the initiation of a Public Inquiry is liable to jeopardise and frustrate the Inquiry, as crucial evidence concerning the wider circumstances of Ms Caruana Galizia’s assassination may be lost as a result of the delay. By way of example, the terms of the Inquiry will need to include a consideration of any state neglect or complicity in the assassination. A consideration of that issue will in turn require the preservation by the Chair of all official documentation relating to state authorities’ interaction with Ms Caruana Galizia and with any third parties who may have posed a risk to her life. It is essential to engender public confidence in this process that this preservation begins without further delay, including in order to quell suspicion that political interference may jeopardise the chain of evidence. These concerns are compounded by the recent developments with Minister Ferrugia, referred to above in Part 2 of this Advice.
- 3.8 In referring to the applicable legal processes in England and Wales, the Attorney-General’s letter omits to recognise that in this jurisdiction, where inquest and

criminal proceedings run in parallel in relation to a death engaging Article 2, the inquest proceedings will first be opened so that a Senior Coroner can establish terms of reference for his/her Article 2 inquiry and take steps to ensure that all relevant evidence is preserved. In a death concerning potential state complicity or neglect, that evidence is gathered by organisations entirely independent of those potentially implicated.⁶ Importantly, the scope of that evidential search also extends well beyond criminal culpability, in order to consider not only what happened, but *could it have been prevented* – a central purpose for any Article 2 inquiry. In *Öneryildiz v Turkey* (2004) 41 EHRR 325 it was held that, where lives had been lost “*in circumstances potentially engaging the responsibility of the State*”, the procedural aspect of Article 2 entailed a further duty on the State “*to ensure ... an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented*” (at [91]).⁷ As recognised by the UK’s House of Lords in *R(Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653, [31], in the leading opinion of the late Lord Bingham, the purpose of an Article 2 inquiry is:

“...to ensure so far as possible that the full facts are brought to life, that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”⁸

⁶ Independent Office for Police Conduct or Prison and Probation Ombudsman.

⁷ In that case, the Turkish State allegedly tolerated and, for political reasons, encouraged slum settlements close to a large uncontrolled rubbish tip, without informing residents of dangers the tip posed; and the tip exploded, killing 39 residents. At [93], the ECtHR made clear that the principles developed in its lethal force jurisprudence applied to such situations, stating that, “*the applicable principles are rather to be found in those the Court has already had occasion to develop in relation notably to the use of lethal force, principles which lend themselves to application in other categories of cases.*”

⁸ Similar phrasing is found in many other cases, including in a range of situations in which the State has a positive substantive obligation to take steps to safeguard life. Such situations exist, as explained in our previous Opinions, not only where the right to life is inherently at risk but also where the State is on notice of a specific threat or threats to someone’s life against which protective steps could be taken: see e.g. *Osman v UK* (1998) 29 EHRR 245; *Öneryildiz v Turkey* (2004) 41 EHRR 325; *R (Smith) v Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1, particularly at [210].

3.9 These are precisely the reasons why it is so important to establish a Public Inquiry without further delay into Ms Caruana Galizia's assassination, bearing in mind that the only investigation currently under way in Malta is criminal in nature. Malta's legal system does not provide for inquest proceedings and it has no independent organisations outside of the criminal context with responsibility for investigating any state complicity or neglect in a death engaging Article 2. As raised in our previous Opinions, the Magistrate's investigation can only lead to a criminal prosecution conducted by the police. This means that the police are ultimately investigating themselves and that no one in Malta is investigating a central question necessary for Article 2 compliance: could Ms Caruana Galizia's assassination have been prevented and what lessons should be learned from the loss of her life. It is concerning that the Attorney General's correspondence fails to engage in any way with such an important issue.

3.10 The ECtHR has regularly cited the importance of maintaining public confidence in the rule of law in its Article 2 jurisprudence; for example, in *Al-Skeini and Others v the United Kingdom* (2011) 53 EHRR 18, it was stated that: "*maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts*" is an important aspect of Article 2 compliance, at [167]. A further delay in initiating an Article 2 compliant Public Inquiry into whether Ms Caruana Galizia's life could have been saved can only further undermine public confidence in Malta's commitment to complying with Article 2 by uncovering the full truth regarding her brutal assassination.

3.11 This is not least against a background where the Constitutional Court has now found that, the involvement of Deputy Commissioner Valletta in the police investigation breached the objective test of independence and impartiality required by Article 2. There is an obvious risk that this breach may affect the Magisterial inquiry, including as that the Magistrate is reliant on the police to conduct any prosecution arising from his investigation. Given Malta relies on the Magisterial investigation to discharge its Article 2 duty, it is concerning that the Attorney General's correspondence fails to engage in any way with this important issue.

3.12 These concerns are particularly acute given that this Inquiry concerns an assassination of an investigative journalist. Strasbourg has repeatedly emphasised the importance of the role of journalists in society. In cases concerning the murders of investigative journalists, the ECtHR has highlighted the importance of investigating the wider context, including, but not limited to, identifying the intellectual authors of the killing.⁹ In the recent ECtHR decision concerning the murder of the Russian journalist Anna Politkovskaya (*Mazepa and Others v Russia*, App No 15086/07 (17th July 2018) (unreported)), the Court stated at [73] and [75] that:

“in cases where the victim of a killing is a journalist, it is of utmost importance to check a possible connection of the crime to the journalist’s professional activity. In this connection, the Court would also refer to Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors, in which the Committee of Ministers recommended in paragraph 19 that the conclusions of an investigation must be based on a thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate... [T]he Court takes the view that the investigation into a contract killing cannot be considered adequate to the extent of discharging the obligation of means implicit in the procedural limb of Article 2 in the absence of genuine and serious investigative efforts taken with the view to identifying the intellectual author of the crime, that is, the person or people who commissioned the assassination. The domestic authorities’ scrutiny in the case concerning a contract killing must aim to go beyond identification of a hitman and it is incumbent on the Court to satisfy itself that the investigation in the present case has addressed this important point.”

⁹ See further Sejal Parmar, Chapter 2, ‘The International Human Rights Protection of Journalists’ in Onur Andreotii et al. 2015. *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe) (pp.53-60).

- 3.13 Moreover, in *Kılıç v Turkey* (2001) 33 EHRR 58, [82] the ECtHR observed that the investigation “*did not include any inquiries as to the possible targeting of Kemal Kılıç due to his job as an Özgür Gündem journalist*” and that there was “*no indication that any steps have been taken to investigate any collusion by security forces in the incident*”. In *Gongadze v Ukraine* (2006) 43 EHRR 44, [179] the ECtHR remarked that “*the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than with discovering the truth about the circumstances of the disappearance and death of the applicant's husband*”.
- 3.14 The stark fact that not a single politician or government official has been interviewed regarding Ms Caruana Galizia’s assassination over a year later by either the police or the Magistrate underlines the urgent need for the initiation of a Public Inquiry so that its Chair can ensure that any and all relevant evidence regarding any state complicity or neglect is preserved.
- 3.15 The sequencing of the different phases of a Public Inquiry is a matter for its Chair. It would be unlawful for Malta to seek to block or exert improper influence over this decision, given a central purpose of the Inquiry is to examine any complicity or neglect by Maltese authorities in Ms Caruana Galizia’s assassination. The sinister nature of the criminality behind Ms Caruana Galizia’s assassination and the need for answers to burning questions that go beyond matters of criminal culpability, cry out for the immediate initiation of a Public Inquiry before further evidence and public confidence is lost. The appropriate course is for the Public Inquiry to be initiated without further delay and for the Chair to then decide upon the next steps. As recognised in our Second Opinion,¹⁰ where necessary it is possible for the hearing stage of the Public Inquiry to be phased so as not to coincide with any criminal trial; however, it would be unlawful for the Public Inquiry to await the criminal proceedings including because:
- a. The purpose of the Public Inquiry into Ms Caruana Galizia’s assassination is distinct from the purpose of the criminal proceedings;

¹⁰ Page 30, paragraph 4.38(v).

- b. The evidence that needs to be gathered and preserved for the purpose of the Public Inquiry will therefore be distinct in part from the evidence necessary for the criminal proceedings; and
- c. The urgent establishment of a Public Inquiry is necessary to ensure evidence is preserved and public confidence regained.

Question (iii): What are the potential breaches of the Article 2 duty to be investigated by the Public Inquiry?

3.16 It appears clear that a central issue for inclusion in the Inquiry's Terms of Reference will be whether the Maltese authorities complied with their protective obligation to Ms Caruana Galizia under Article 2, i.e. (i) whether Malta knew or ought to have known of, or itself posed, a real and immediate risk to her life; and (ii) whether the Maltese authorities failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

3.17 It is likely that the Inquiry will consider systemic issues regarding the identification, assessment and resolution of risks posed to Ms Caruana Galizia's life, as distinct from issues of criminal culpability. It is anticipated that some witnesses may overlap between the Public Inquiry and any criminal trial; however, this can easily be addressed by the Chair when deciding how best to sequence the various phases of the Inquiry.

3.18 Matters of any state complicity were addressed in our Second Opinion at paragraph 4.5 and should be included in the Inquiry's Terms of Reference. It is clearly important not to prejudge this issue prior to the investigation by the Public Inquiry.

Question (iv): What is the relationship between the need for a Public Inquiry and the need to preserve evidence via the criminal investigation?

3.19 This matter has been addressed above. In short:

- a. The recent judgment of the Constitutional Court underlines the importance of a Public Inquiry being allowed to preserve evidence

relevant to its Terms of Reference, free of police or other state interference. The police or other state agencies must not be allowed to investigate themselves;

- b. The purpose and Terms of Reference of the Public Inquiry will be distinct from and wider than any criminal trial;
- c. Any degree of overlapping evidence can easily be managed by the Chair of the Public Inquiry after its initiation. This is a matter for an independent Chair to manage, not the very State which falls to be investigated for its potential failures. It would be unlawful for Malta to prevent the Chair from undertaking his/her vital role by seeking to block or throw into the long grass the initiation of a Public Inquiry, on the purported basis that they are protecting the integrity of any criminal proceedings. The Chair can ensure that no prejudice is caused by the Public Inquiry to any parallel criminal proceedings.

4. CONCLUSION

- 4.1 In the event that Malta does not agree to institute a Public Inquiry without delay, we advise that proceedings should be issued in Malta in order to compel the Prime Minister's compliance with Article 2 and if necessary thereafter in the ECtHR.

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