

THE ASSASSINATION OF DAPHNE CARUANA GALIZIA

BRIEFING NOTE

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1. INTRODUCTION & SUMMARY

1.1 Ten days before her assassination, journalist Daphne Caruana Galizia wrote a hard-hitting blog about troubled Maltese banks and actions of the Maltese government, entitled, *“Sometimes, you find the back-up you need a little late.”*¹ The blog related to a ‘breaking news’ piece she had authored in November 2016, which had resulted in aggressive responses and claims she was the purveyor of fake news; however, eleven months later, in October 2017, she found material supporting her journalistic hunch. She had been right all along. She wrote:

“In journalism, as in many areas in life, you sometimes find the back-up you need a little too late.”

1.2 Ten days later, Daphne Caruana Galizia was dead, assassinated in a car bomb just metres away from her family home. Today marks the third anniversary of that brutal and horrific act.

1.3 The truth of the words Ms Caruana Galizia wrote in October 2017 has become increasingly apparent to her family in the three years since her death. Over that time, many of their initial concerns – that the assassination was linked to Ms Caruana Galizia’s investigative journalism; potential involvement at the highest levels in Malta; the ineffectiveness of the initial murder investigation – have, gradually, crystallised into credible concerns, with a clear evidential basis. Indeed, a number of the family’s concerns have already proven to be well-founded and entirely accurate. They too have been finding the back-up they need too late.

1.4 In this short Briefing Note we address the central importance of protecting, reaffirming and enhancing the independence from Government of the ongoing public inquiry into Ms Caruana Galizia’s assassination. We have in our previous public Advices made clear the steps Malta must take in order to comply with its obligations under Articles 2 and 10 of the European Convention on Human Rights (“ECHR”). The public inquiry and the criminal proceedings are both essential elements in ensuring ECHR compliance. We urge the Government to respect the importance of these proceedings, and, to refrain from interfering with the work of either process. The Board of Inquiry must have the time it

¹ Daphne Caruana Galizia, ‘Sometimes you find the back-up you need a little too late,’ Running Commentary, 6th October 2017, available at <https://daphnecaruanagalizia.com/2017/10/sometimes-find-back-need-little-late/>.

needs to comply with its Terms of Reference, free of political interference, and be adequately resourced to fully, fairly and fearlessly investigate the wider circumstances of Ms Caruana Galizia's assassination. Clearly, the ongoing criminal proceedings must also be free from political interference in order to ensure that justice is done.

1.5 In addition to protecting the integrity of these processes, we echo the call by the Council of Europe's rapporteur, Pieter Omtzigt, for Malta's newly appointed Attorney General, Victoria Buttigieg, to end impunity for high level corruption in Malta. We share his concerns that the present situation in respect of corruption in Malta "*remains deeply unsatisfactory.*"

1.6 These central concerns are developed in more detail below.

2. PUBLIC INQUIRY: THE CURRENT POSITION

2.1 The Public Inquiry opened on Friday 6th December 2019, and the Board of Inquiry has since heard evidence from a wide range of witnesses. The Terms of Reference make clear that the Board is tasked with considering both the question of whether there was any State involvement or complicity in the assassination, in addition to the question of preventability, i.e. whether State officials could or should have done more to protect Ms Caruana Galizia and prevent her murder.

2.2 As Matthew Caruana Galizia made clear when giving evidence on the opening day, his statement was inevitably based only on what was known to him at that stage, that is, prior to the Board seeking any disclosure from State bodies, any investigators being appointed, or any investigative work having been undertaken. The statements made to the Board by members of the family during December 2019 all carry this important caveat, given they were statements made before the family had sight of any disclosure or heard from any State witnesses. A family cannot know what they do not know.

2.3 Since that time the Board has made progress despite constraints arising from the Covid-19 pandemic since March 2020; however, there is more to do, including the Board obtaining documentary disclosure from State bodies pursuant to the Inquiries Act and its Terms of Reference, so that all relevant documentary evidence is collated, analysed and disclosed to the family. This will enable the family to prepare questions and submissions, including on any further disclosure or witnesses to be called or re-called, from an informed position. This process will in turn inform the preparation by the Board of a

report of its findings in due course. It will also be open to the Board to produce more than one report, for example a preliminary Report making any recommendations it considers appropriate, followed by a supplementary Report reviewing the implementation of those recommendations. All of these matters are for the Board to determine. It is the master of its own procedure and process.

- 2.4 In September 2020 there was a remarkable intrusion upon by the Board's operation by the Government, when Prime Minister Robert Abela sought to inform the Board that he was granting a "one-time" deadline extension to its operation until 15th December 2020.² This would guillotine the Board's work on the basis of an ultra-vires deadline sought to be imposed by one of the central subjects of the Inquiry's investigation. The deadline bore no relation to the Board's workload or needs; nor to the requirements of an ECHR-compliant investigation. The family objected to this trespass upon the Board's independence, as the time needed by the Board must of course be decided by the Board, not by the Government under investigation by the Board.

3. ENSURING THE BOARD OF INQUIRY CAN PROCEED WITHOUT POLITICAL INTERFERENCE

- 3.1 In our opinion, the Government must not be allowed to guillotine the Inquiry's work, or pressure it in any way – expressly or impliedly. Moreover, the Government must ensure that the Board is adequately resourced to carry out its investigative role; including by the Government providing full disclosure of all relevant information in its possession concerning the assassination to the Board.
- 3.2 This is required of the Government by the jurisprudence of the European Court of Human Rights ("ECtHR") regarding Article 2 investigations. In a series of cases, many of which concerned deaths in Northern Ireland in which there was a suspicion of State failings or involvement in paramilitary murders, the ECtHR established a number of minimum requirements for an investigation to be Article 2 compliant.³ Of most relevance to the Board's task, and the Government's intervention in September 2020, are the following four elements: (i) the inquiry must be independent; (ii) it must be effective; (iii) it must involve a sufficient element of public scrutiny; and (iv) the next of kin must be involved

² See further <https://newsbook.com.mt/en/watch-zammit-lewis-defends-abelas-one-time-extension-to-daphne-inquiry/> and <https://timesofmalta.com/articles/view/caruana-galizia-inquiry-turned-into-a-political-exercise-glenn.818722>.

³ See, in particular, *Jordan v. UK* (2001) 37 EHRR 52, [105]-[109] and *Edwards v. UK* (2002) 35 EHRR 19, [69]-[73].

to the extent necessary to safeguard their legitimate interests. These four elements are addressed in turn below.

- 3.3 First, independence is enshrined in the terms of reference and the composition of the Board. 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, [167] 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.
- 3.4 In December 2019, as the Board began its important work, three United Nations experts issued a joint call for the then Prime Minister, Joseph Muscat, to, “*remove himself from any role related to the conduct of the public inquiry,*” stating, “*the public inquiry and any other investigation or prosecution must be allowed to proceed without being tainted by suspicion or conflict of interest.*”⁴ They also stated that: “*independence means that anyone potentially implicated in the murder of Daphne Caruana Galizia, even if indirectly or by omission, must be fully removed from the public inquiry, including its overall conduct and the chain of decision-making, while impartiality entails a duty to follow the facts and ensure that the investigations are untainted by outside considerations.*”
- 3.5 It is regrettable that, ten months later, Joseph Muscat’s successor as Prime Minister did not take heed of these words by attempting to guillotine the Board’s work.
- 3.6 It is vital that the conduct of the Inquiry is free from any interference from the office of the Prime Minister. The Government should make it clear that it accepts this basic principle. Only the Board can determine when its task has been fulfilled, and it must do so unencumbered by pressure from the Government. This would also be in keeping with the UN experts’ request that, given the nature of the crisis, “*it is of crucial importance*” that there is transparency regarding the preservation of the independence and integrity of the Public Inquiry process.
- 3.7 Second, to ensure efficacy of the Public Inquiry it is imperative that the Government takes immediate steps to preserve and gather all potentially relevant evidence, and provide it to the Board. The Board has not to date used its coercive powers to obtain this

⁴ Statement of three UN Special Rapporteurs, 3rd December 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25381&LangID=E>.

evidence, but it can now do so unless the Government agrees it will be provided. This has long been a concern of the family's; for example, at the outset of the Inquiry the family was extremely concerned at the suggestion that records concerning Mr Theuma's alleged public employment may have been destroyed or may no longer exist. Given the alleged involvement of high-ranking officials in the circumstances surrounding the assassination, securing evidence is critical and time-sensitive. Steps must be taken now given the ongoing absence of pro-active full disclosure by State bodies to the Inquiry.

- 3.8 In investigations concerning the murders of investigative journalists, the ECtHR has repeatedly highlighted the importance of investigating the wider context, including, but not limited to, identifying the intellectual authors of the killing.⁵ For example, in *Mazepa and Others v. Russia* (application no. 15086/07, judgment of 17th July 2018), a case concerning the investigation into the 2006 murder of journalist Anna Politkovskaya, the ECtHR found that, whilst the authorities had found and convicted a group of men who had directly carried out the contract killing of her, they had failed to take adequate investigatory steps to find the person or persons who had commissioned the murder. The authorities had followed one theory about the instigator of the crime, but they had not explored other possibilities, including those suggested by the applicants (Ms Politkovskaya's mother, sister and children). They had alleged the involvement of agents from Russia's FSB domestic secret service or of the administration of the Chechen Republic, but the State had failed to abide by its obligations under the Convention to carry out an effective investigation in this regard. The ECtHR emphasised 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...”

⁵ 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).

- 3.9 The ECtHR has made similar findings in cases where the question under consideration mirrored the Terms of Reference for this Inquiry. For example, in *Kılıç v Turkey* (2000) 33 EHRR 58 the ECtHR held that the State did not do all that could be reasonably expected of it to minimise the risk to the life of the applicant’s brother, an investigative journalist, criticising the authorities’ failure to investigate, consider and plan operational measures to protect against “*the possible targeting of Kemal Kılıç due to his job as an Özgür Gündem journalist.*”
- 3.10 Whilst the ECtHR authorities indicate that the precise form of investigation which is required to achieve the purposes of Article 2 may vary depending on the circumstances, they are clear that the authorities must act of their own motion once the matter has come to their attention, and they cannot leave it 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: see, for example, *Al-Skeini and Others v. the United Kingdom*, [165]. Accordingly, the State apparatus has the ultimate responsibility to identify, preserve and share all relevant documentation without delay. In the absence of pro-active disclosure by the Government and police, the Board can take steps to obtain that evidence given a central purpose of this Inquiry is to reveal any hidden state failings or complicity, which might lie within the exclusive knowledge of the State authorities.
- 3.11 Third, the need for public scrutiny is central to this inquiry. Given that the assassination of Ms Caruana Galizia is not just a matter of intense public interest within Malta but around the world, and given the continuing constraints arising from the Covid-19 pandemic, the family asks the Government to provide adequate resources to the Board to enable it to consider measures to ensure that the conduct of its remaining stages maximises accessibility to, and scrutiny of, its processes. For example, public inquiries in other jurisdictions have established a website on which the inquiry’s protocols and transcripts of the live evidence received can be accessed.⁶ At a minimum, publication of notice of the Board’s sitting days and the upcoming witness list well in advance would assist greatly. At present, family members are collating such information when available and disseminating it, rather than it being readily available, in good time, through official channels.
- 3.12 Fourth, in relation to the involvement of the family the ECtHR has consistently emphasised the importance of investigations involving the family to the extent necessary

⁶ See, for example, www.graingerinquiry.org.uk.

to safeguard their legitimate interests. This is also reflected in the Inquiry's Terms of Reference and conduct to date. Key to the family's participation are the tasks of suggesting lines of inquiry and putting questions to witnesses, both of which the family has been doing to date, but without the benefit of advance documentary disclosure. They require disclosure and time for it to be analysed in order to formulate questions and submissions from an informed position.

- 3.13 The importance of advance disclosure to bereaved families has been highlighted in a number of the Strasbourg authorities. For example, the ECtHR in the case of *McKerr v. UK* (2002) 34 EHRR 20 held that the *"inability of the applicant's family to have access to witness statements before the appearance of the witness must also be regarded as having placed them at a disadvantage in terms of preparation and ability to participate in questioning."* In that case, the ECtHR also emphasised the striking contrast with the State authorities, who had *"full access to relevant documents."*
- 3.14 In the context of this Inquiry, many of the key witnesses are State officials or politicians, including the former Prime Minister and his chief of staff, who will have access to information or briefings unknown to the family. The Inquiry is intended to redress that imbalance, by ensuring that the family have a meaningful opportunity to participate from an equally informed position. It is imperative that the Government does not obstruct this process; in particular, the Government must provide adequate disclosure and refrain from any guillotines.
- 3.15 The family of Daphne Caruana Galizia has long said that the State authorities have nothing to fear but the truth. The central purpose of this Public Inquiry is to uncover that truth, and this important task has been entrusted to the Board. The Government's role is to provide comprehensive documentary disclosure and to support, rather than seek to stymie, the work of the Board. On this third anniversary of Daphne's death, we must ensure that the truth is served.

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