

**IN THE MATTER OF:
THE ASSASSINATION OF DAPHNE CARUANA GALIZIA**

**URGENT ADVICE
CONCERNING THE INVESTIGATIVE OBLIGATION UNDER
ARTICLE 2 ECHR**

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1. INTRODUCTION

- 1.1 This urgent Advice is provided to Paul, Andrew and Matthew Caruana Galizia, sons of Daphne Caruana Galizia, the investigative journalist, writer and anti-corruption activist. She was murdered on 16th October 2017, in a brutal assassination; she was killed by a car bomb close to her home in Bidnija, Malta. Ms Caruana Galizia is also survived by the boys' father and her husband, Mr Peter Caruana Galizia, and by her parents and three sisters.
- 1.2 We have been asked to advise the bereaved family at this stage on an urgent question concerning the investigation into Ms Caruna Galizia's murder, namely whether it is compliant with the procedural requirements of Article 2 of the European Convention on Human Rights ("ECHR") to conduct an effective investigation into her death, often referred to as "the investigative duty". For the reasons summarised in this Advice, we are of the firm view that Malta is in flagrant violation of the Article 2 investigative duty and thus in breach of its obligations under the ECHR.
- 1.3 We note that our concerns are echoed by a delegation of Members of the European Parliament ("MEPs") who travelled to Malta on a fact-finding mission last week. The MEPs have indicated that they arrived "*seriously concerned*" about the rule of law on the island, and they have left "*even more worried*" about deep rooted, systemic failures in the legal and investigative mechanisms. MEPs from the delegation have referred to an apparent reluctance to investigate and prosecute major cases which has created a "*perception of impunity*"; and an impression of "*incompetence*" on the part of the police.¹ The MEPs' findings are extremely disturbing.
- 1.4 We emphasise at the outset that this Advice is focused upon immediate, pressing issues concerning the investigative duty only. From the information available at this stage it appears highly likely to us that the Maltese authorities have also violated other human rights of Ms Caruana Galizia and the bereaved family, under Articles 2, 3, 8, 10 and/ or 13 ECHR (and indeed under other international human rights treaties and domestic law); we will advise on those matters further in due course, if so instructed, but this urgent Advice does not address these matters.

¹ Jon Henley, 'MEPs looking into death of journalist 'disturbed' by trip to Malta,' *Guardian*, 2nd December 2017, available at <https://www.theguardian.com/world/2017/dec/02/daphne-caruana-galizia-malta-death-of-journalist-meps>.

1.5 As regards the investigative duty, there are two immediate issues of grave concern to us, each of which is in clear and serious breach of the Article 2 investigative duty. We address these two issues below in more detail, but in outline they are as follows:

- (i) Independence: in order to be Article 2 compliant, the investigation must be independent and impartial, and conducted by individuals other than, and separate to, those who are or may be the subject of the investigation. The involvement in the investigation of Deputy Commissioner Silvio Valletta is in clear breach of this requirement, given that he and his wife were frequently the subject of stories on Ms Caruana Galizia's blog and she had conducted substantial investigative journalism into alleged corruption in their areas of responsibility, and given that the investigation must consider whether appropriate steps were taken to protect Ms Caruana Galizia by the Deputy Commissioner and others. It is surprising and regrettable that he has refused to recuse himself and that the family has been forced to issue proceedings in the Maltese courts in order to remove him from the investigation, causing further distress and delay. Our view is that the Deputy Commissioner should immediately recuse himself or be removed from the investigation to avoid any further prejudice to it;
- (ii) Involvement of the next of kin: a further requirement of Article 2 is that the investigation involve the next of kin to the extent necessary to safeguard their legitimate interests. However, the family in this case have been learning of key developments in the investigation in grossly inappropriate ways, without any advance notice, including via twitter accounts of politicians and from newspaper headlines. They have repeatedly raised concerns about this, both in private correspondence and publicly, but have yet to receive a meaningful response. There must be an immediate and clear apology and commitment to radically alter how the police interact with, involve and update the family;

1.6 There is an additional issue which we note at this stage, also: securing evidence. Article 2 requires that reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances. The circumstances to be examined here are broader than simply the forensic detail of the car bomb itself. We are concerned that the current investigation is failing to comply with this requirement. We address this matter briefly at this stage, but we consider it imperative that further work is undertaken as a matter of urgency regarding the need for an independent, impartial investigation which will enable evidence-gathering to take place without any further delay.

2. BRIEF OUTLINE OF THE FACTUAL BACKGROUND

- 2.1 In this section we provide a brief summary of key background facts. We do not set out an exhaustive history.

Malta

- 2.2 Malta is a constitutional parliamentary republic with a single house of representatives normally made up of 65 members who are elected every five years. The President – whose role as head of state is ceremonial – is appointed for a five-year term by a majority decision taken by members of parliament. The President in turn appoints the Prime Minister from the party which commands a parliamentary majority.
- 2.3 Malta’s population is around 430,000. The Maltese economy has grown strongly since Malta’s accession to the EU in 2004, in particular in the financial services and gaming industries.
- 2.4 Malta’s legal system is ‘mixed’: a hybrid of civil (continental) and common (British) law and legal practice. For example the investigatory and prosecutorial aspects of criminal proceedings are conducted by a supervising magistrate as is common in civil law countries, whilst trials may be before juries as in common law jurisdictions.
- 2.5 According to the US State Department’s website, criminal trials in Malta, “*typically last five to seven years and are characterised by lengthy and sometimes unpredictable delays between hearings.*”²

Daphne Caruana Galizia’s Work

- 2.6 Ms Caruana Galizia was a journalist and prolific blogger who focussed particularly upon financial and political corruption in Malta. Obituaries and profiles have described her variously as “*the leading light of Maltese journalism*” (Joseph Borg in the *Guardian*³), “*Malta’s most prominent investigative reporter*” (Harrison Smith in the *Washington Post*⁴) and “*a one-woman Wikileaks, crusading against untransparency and corruption*

² <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Malta.html>.

³ <https://www.theguardian.com/media/2017/nov/21/daphne-caruana-galizia-obituary>.

⁴ https://www.washingtonpost.com/local/obituaries/daphne-caruana-galizia-journalist-who-assailed-the-powerful-dies-in-car-bombing/2017/10/17/c247e4d4-b345-11e7-a908-a3470754bbb9_story.html?utm_term=.081dba70ead6.

in Malta, an island nation famous for both” (Denise Nestor in Politico). She had recently been selected by Politico as one of the 28 people most likely to influence the world in 2017.

- 2.7 The President of the European Parliament, President Tajani, made a statement following her death, in the presence of her family. He described her as,

“.... A courageous woman and a fine journalist. She epitomised everything that is good about that profession: she sought out the truth, the facts, and refused to let anyone stand in her way. She was not afraid to do whatever was needed to fulfil her duty. In thirty years as a journalist, she never lost heart. She continued to shine light on darkness, to speak the truth, answering only to her readers, the only people to whom she felt accountable. Drawing on that inner strength, she published more than 20,000 articles denouncing abuses of power, corruption and the failings of governments.”⁵

- 2.8 Her blog, *Running Commentary*, was hugely influential, sometimes attracting 400,000 readers a day, more than the combined circulation of the country’s newspapers, and bearing in mind that Malta’s population is only around 430,000. The topics she covered included nepotism in government and between government and business, money laundering, links between Malta’s growing gambling industry and organised crime, the corrupt sale of Maltese passports, and criminal links between Malta and the government of Azerbaijan.
- 2.9 There were clear threats to her physical safety, linked to her journalism. We understand that she was first attacked in 1995, when her front door was set alight using petrol, and shortly after that the family dog was killed and its corpse left outside her home, with a slit throat. These attacks came shortly after she had written a hard-hitting editorial for the *Sunday Times of Malta* (the largest newspaper in Malta) calling for the commander of Malta’s armed forces to resign because his children had been linked to drug trafficking. The family temporarily moved away from Bidnija and the boys were out of school for a period. Another serious attack took place in 2006, shortly after she published an article concerning neo-Nazi groups in Malta; stacks of tyres containing bottles of petrol were set alight behind the house, and multiple murder was averted only because one of her sons was coming home late and spotted the blaze. She repeatedly received death threats and threats of violence, over a sustained period.

⁵ Statement of 24th October 2017, <http://www.europarl.europa.eu/the-president/en/newsroom/statement-by-president-tajani-in-plenary-in-the-presence-of-the-family-of-daphne-caruana-galizia>.

- 2.10 In the year prior to her death, these threats and retaliatory attacks escalated. During that year, Ms Caruana Galizia had made a number of revelations about senior Maltese politicians, and was a perpetual thorn in the side of the Maltese political establishment. She broke the story in 2016 about secret Panamanian companies which top government politicians had set up days after getting into power, and she later reported that a third secret company in Panama belonged to the wife of the Prime Minister. In 2017 she was undertaking substantial investigative and reporting work on a range of issues, including Pilatus Bank and Henley and Partners, and their links to government and each other, and also on allegations of money laundering and tax evasion against the leader of the Nationalist Party, Adrian Delia.
- 2.11 Perhaps unsurprisingly given the subjects of Ms Caruana Galizia's investigations and reporting, and the effectiveness of her work, she made many powerful enemies and there were multiple attempts to silence or muzzle her. This included threats and violent attacks. It also included legal attempts to shut down her reporting. She was often involved in legal battles with those she reported on, and had been prosecuted several times on charges of criminal libel. She had received a large volume of complaints from defamation lawyers, including London-based solicitors acting for the private company at the centre of her investigation into corruption in the sale of Maltese passports. We understand that there were 41 pending defamation suits at the time of her death.

Daphne Caruana Galizia's Death

- 2.12 Ms Caruana Galizia was murdered on 16th October 2017. She was the victim of a car bomb near her home in Bidnija. She was aged 53.
- 2.13 Since Ms Caruana Galizia's death her husband Peter has remained in Malta but her three sons after taking independent advice have chosen not to return there permanently for fear that their safety may not be guaranteed.

Contact between the Family and the Police Since Her Death

- 2.14 The contact between the police and the family has been very limited. The police have no liaison officers and no formal procedures or protocols for dealing with families of victims. Only the following meetings have taken place between the police and the family:
- 2.14.1 On the day of the Ms Caruana Galizia's death (16th October 2017) Kurt Zahra, an investigating officer and Keith Arnaud, Head of Homicide came to the family home to ask questions.

2.14.2 On 2nd November 2017 Matthew and Andrew had a meeting with Inspector Nicholas Vella to complain about leaks from the investigation to the press. There had been numerous reports in the press as to the progress (or lack of progress) in the investigation, and as to potential leads. For example a suspicious car had been seen near the scene, and the police were also said to be following an Italy/ Libya diesel smuggling racket in connection with the murder. Neither of those things had been made public by the police, nor had the family been informed of them. The only way they could have come into the public domain was by an unlawful leak from within the investigation.

2.14.3 On the morning of 6th December 2017 Peter met with Police Inspector Zahra, who gave some forensic details about the bomb and how it was detonated.

2.15 There was one invitation to a further meeting: one full month after a request was sent for information on police protection, requesting that details be provided to the family, the Office of the Commissioner of Police invited Peter to a meeting in person. This meeting was declined for reasons set out in an email to the Police Department. The proposed meeting however did not concern the murder investigation but only matters related to police protection.

2.16 The three sons and their father have made concerted efforts to correspond with the Maltese police. Those efforts include the following communications⁶:

2.16.1 On 31st October 2017 Peter wrote to Inspector Nicholas Vella expressing on his own behalf and that of his three sons and Andrew's wife Lucie, and Ms Caruana Galizia's sister Corinne Vella, their concerns as to their security. The letter sought assurance that they would all receive appropriate police protection, and asked for certain information, including the police's threat assessment and details of what protection was in place. Despite the urgency and gravity of the issues raised, no response to this letter has been received in the five weeks since it was sent.

2.16.2 On 15th November 2017 Matthew emailed Inspector Vella on his and his family's behalf noting the lack of any response to the 31st October letter, despite the

⁶ The family had wished to keep these communications private, but in light of the approach adopted by the authorities and the continuing failure to reply to their private correspondence, the family have asked that they be included in this Advice.

intervening meeting, and seeking to be provided with the names and contact details of the officers handling the investigation and those responsible for providing protection to the family. No response to this email has been received.

- 2.16.3 On 16th November 2017 Matthew again emailed Inspector Vella, reiterating the family's wish for a response to their letter of 31 October, but most pressingly complaining about a further leak from the investigation to the press, this time leading to a story that the police had "drawn a blank" in relation to the suspicious vehicle near the scene. Matthew repeated the family's request, first made at the 2 November meeting, that the source of these leaks be investigated so as to ensure the integrity of the investigation. He concluded as follows:

"Aside from our concern that the investigation is being sabotaged by the Malta Police Force itself, we as a family would appreciate the courtesy of being kept informed about our wife and mother's investigation directly from the investigative team rather than leaked reports to the certain sections of the Maltese media."

Again, no response to this email has been received.

- 2.16.4 On 21st November 2017 Matthew wrote by email to Inspector Vella seeking to file a criminal complaint against Mr Neville Gafa, an employee of the government. On the day before the assassination Mr Gafa or someone known to him had posted on Facebook photographs, taken surreptitiously the same day, of Daphne and Peter Caruana Galizia sitting together. The accompanying text apparently stated that whoever took the photographs had been following the couple around the area of Floriana. Matthew provided a further photograph to Inspector Vella on 22nd November 2017. No response to these communications has been received.

- 2.16.5 Matthew was forced to write another email on 23rd November 2017 when a further article giving details about the direction of the investigation was published. The family again reiterated its request to be kept informed of the progress of the investigation directly rather than via leaks to the press, and noted that:

"It has been five weeks since the assassination. In this time, we, the family of the victim, have not received a single formal communication from the Police Force on any aspects of the investigation as well as on any measures envisaged for the protection of surviving family members."

Again, no response to this email has been received.

- 2.16.6 The complaint made by Matthew on 21st November by email to Inspector Vella about the harassing conduct of Neville Gafa was followed up by Peter in a formal letter on 27th November 2017 to the Commissioner of Police. Peter reminded the Commissioner that Mr Gafa had himself been under investigation for the illegal selling of medical visas and forged documents to Libyan citizens, and that the only reason he was not charged was lack of police resources. Peter drew to the Commissioner's attention the likely links between Gafa and organised crime, and the certain links between organised crime and his wife's murder. Peter reminded the Commissioner of his duty under the Police Act to, "*respond immediately to any request for the protection and intervention of the law*". We are not aware of any response having been provided to this letter, or of any action taken by the police in response to it.
- 2.16.7 Also on 27th November 2017, Peter wrote to Michael Farrugia, Minister of Home Affairs and National Security. This letter was prompted by comments Mr Farrugia had made in Parliament about the progress of the investigation. He had said that he had been informed that the magistrate had access to "*certain personal items which belonged to Daphne Caruana Galizia*". This was information that was neither in the public domain, nor had been given to the family. The first the family heard of it was through this statement made in Parliament. Peter pointed out to Mr Farrugia that his statement revealed to the perpetrators potentially crucial information about the progress of the investigation. In this letter Peter reminded Mr Farrugia of his own obligations and responsibilities as a public official, and that under Clause 6 of the Second Schedule pursuant to Article 24 of the Police Act (Cap 164 Laws of Malta) members of the Police Force who divulge information which they have obtained by virtue of the functions of their office will be guilty of committing an ethical breach. Peter justifiably pointed out that notwithstanding the statement made in Parliament, and the police's propensity to leak information, no letter he and the family had written seeking information from the police had so far been answered.
- 2.16.8 Whilst no written responses to the family's communications had been received, the Police Commissioner did telephone Peter on 6th November after receipt of the letter dated 31st October to ask whether he knew there was static police protection outside his home. The call did not address the detailed concerns expressed in the letter and the Police Commissioner did not suggest how the concerns would be followed up.

After a reminder was sent on 27th November, and a month after the initial letter was sent, the Police Department on 29th November suggested a meeting with the Police Commissioner, although the family made clear their wish to have at least some basic responses in writing before any future meeting.

2.16.9 What occurred next is a matter of very serious concern. Mr Farrugia responded to the letter written to him by Peter on 27th November by publishing the letter on the government's website, sending it to all news outlets, and making a public statement in which he claimed that the information he had divulged in Parliament about the investigation had already been in the public domain. The press statement accompanying the publication of the family's letter was tweeted by Mr Farrugia and retweeted by the Prime Minister.

2.16.10 Peter wrote to Mr Farrugia on 1st December to complain about this conduct. He pointed out that the specific information about the investigation had not already been in the public domain, and in any event any information that was in the public domain should not have been, and was there only due to unlawful police leaks. The letter makes a number of points, including in relation to Article 2 of the ECHR. It is pointed out to Mr Farrugia that the state has a duty to ensure that it is a credible deterrent to crime. It is also pointed out that the publication by Mr Farrugia of the family's correspondence was inappropriate and irregular:

"Our letter was sent to you privately, from the widower and children of an assassination victim to their country's minister responsible for the police and ultimately the assassination investigation. We remind you that we are the widower and children of a person assassinated on your watch ... and not our adversary, political or otherwise."

Concerns Raised by the Family Concerning Capability, Competence and Independence

2.17 The family has repeatedly raised concerns regarding the capability, competence and independence of the investigation, including in the correspondence above.

2.18 We are informed that the magistrate on duty on the day of Ms Caruana Galizia's murder was someone who had herself brought criminal defamation proceedings against Ms Caruana Galizia. That magistrate nevertheless proceeded to undertake the vital initial stages of the investigation without considering recusing herself. Within three or four hours of learning of this, the family had filed an application seeking to have this magistrate replaced. It took a further 14 hours for that application to be considered and

eventually the magistrate did recuse herself. Meanwhile however vital decisions had been taken at this crucial stage of the investigation by someone with a clear and demonstrated animosity against Ms Caruana Galizia.

2.19 On 22nd November 2017 the family issued proceedings in the First Hall of the Civil Court against the Commissioner and Deputy Commissioner of Police. The complaint is that Deputy Commissioner Silvio Valletta, who was taking a lead role in the investigation into Ms Caruana Galizia's death, and the Deputy Commissioner's wife Justyne Caruana, were frequently the subject of stories on Ms Caruana Galizia's blog. In particular, Ms Caruana Galizia had investigated Malta's Financial Intelligence Analysis Unit, on the board of which the Deputy Commissioner is a member. Ms Caruana Galizia had aimed pointed criticism at the Deputy Commissioner and his wife, who formed part of a government party to corruption disclosed in the Panama Papers. The complaint cites Article 2 ECHR, and sets out that in order to safeguard the right to life an investigation must be effective and impartial. We understand that the first hearing in this claim is to take place on 12th December 2017.

2.20 On 24th October 2017 a debate took place in the European Parliament concerning the protection of journalists and the defence of media freedom in Malta, and in particular about Ms Caruana Galizia's work, her death and the adequacy of (a) investigations in Malta into the allegations she had made of corruption and other illegal activity, and (b) the investigation into her death.⁷ During the debate many MEPs were highly critical of Malta. For example, European People's Party MEP Esteban Gonzalez Pons said, "*she died with 42 cases against her and without access to her bank account. They began killing her already before they finished her off. We failed Daphne. Europe failed her,*" and Green MEP Sven Giegold argued that it was clear why the murderers had chosen to place a bomb under Ms Caruana Galizia's car rather than under that of the Police Commissioner or Attorney General, and he called for an international investigator to examine money laundering and corruption claims concerning Malta.⁸ Many MEPs queried how the Prime Minister, the government and the police could investigate themselves, given the likely links between her death and her investigative journalism work which involved allegations of corruption at the heart of the Maltese government, judicial system and on the part of Maltese police officers.

⁷ Available at <http://audiovisual.europarl.europa.eu/malta-press-freedom>.

⁸ See further <https://www.timesofmalta.com/articles/view/20171024/local/meps-debate-fallout-from-daphne-caruana-galizias-murder.661274>.

- 2.21 A number of weeks later, on 14th November 2017, in plenary session the European Parliament considered the rule of law in Malta and passed a highly critical resolution regarding this.⁹
- 2.22 Last week, a delegation of MEPs travelled to Malta on a fact-finding mission. As we indicated at the outset of this Advice, the MEPs indicated that, although they were seriously concerned prior to their arrival, at the conclusion of their visit their concerns had deepened substantially. The delegation was critical of the lack of any meaningful investigation into the allegations Ms Caruana Galizia had made concerning corruption and money laundering, describing there as being a “perception of impunity”. One MEP was reported as having said that publicly available information and even reports by the anti-money laundering agency FIAU had failed to trigger investigations, “*protecting high government officials and financial institutions*”.¹⁰ He indicated that he was particularly concerned about Malta’s police and Attorney General, as both had demonstrated “*a high degree of unwillingness to investigate and a failure to prosecute corruption and money-laundering*”, and senior police officials left him with an impression of “*incompetence*”. Another MEP said it was “*extremely disturbing*” that officials refused to answer basic questions, and one failed to even show up to a meeting. The delegation also expressed concern over the constitutional arrangements whereby the Prime Minister has the right to appoint key officials, thus weakening the independence of the judicial system and reducing financial supervision and oversight.
- 2.23 It is understood that the delegation is liaising with the European Commission in relation to a formal audit of the rule of law in Malta.

Events this Week

- 2.24 On Monday 4th December 2017 it was announced that ten people had been arrested in connection with Ms Caruana Galizia’s death. On Wednesday 6th December it was announced that three of those people have been charged with murder, conspiracy, forming part of a criminal gang, using explosives to kill, being in possession of explosives, and “*relapsing*”¹¹ (this followed their arraignment before a magistrate on 5th December). It is understood that they have pleaded not guilty to all charges and been

⁹ Available at <http://audiovisual.europarl.europa.eu/malta-press-freedom>.

¹⁰ <https://www.theguardian.com/world/2017/dec/02/daphne-caruana-galizia-malta-death-of-journalist-meps>.

¹¹ See for example: <http://www.independent.com.mt/articles/2017-12-05/local-news/Three-to-be-arraigned-so-far-over-murder-of-Daphne-Caruana-Galizia-6736182304>.

remanded in custody. Those three men are Vince Muscat, 55, Alfred Degiorgio, 52, and George Degiorgio, 54. The remaining seven arrestees have been released on bail.

- 2.25 We note from news reports¹² that Mr Farrugia has refused to give details as to the arrests, citing criminal legal threats from the family.
- 2.26 The three men charged appear from media reports to have long criminal records and to be what some would call career criminals, with reports linking them to “the HSBC heist of 2010”, the robbery of a Group 4 security van in 2001, possession of unlicensed weapons, possession of cocaine, armed robbery, and other crimes.
- 2.27 As with other developments in the case, the announcements about the arrests and charges have been made without any significant information first being given to the family. The family learned the details of the events of this week from Twitter and news headlines, alongside the rest of the public.¹³
- 2.28 On 4th December the family issued a statement expressing serious concern regarding the manner in which the arrests that day had been communicated to them, and stated that this, “indicates serious institutional deficiencies which are cause for general public concern.” They stated:

“The information about the arrests was communicated by the Prime Minister, and not by the Malta Police, who appear to prioritise informing the Prime Minister of developments to the exclusion of the surviving members of the assassination victim’s family. In addition, the Prime Minister appears to view the investigation into Daphne Caruana Galizia’s assassination as a marketing exercise for his government and not as a contract killing, which has left surviving family members wondering what happened and how justice can truly be served.

The family heard about today’s arrests at the same time as media reported on the Prime Minister’s press conference this morning. This means that the Malta Police informed the Prime Minister of the arrests but did not inform Daphne Caruana Galizia’s family about a critical development in the investigation. It also means that the media learned of the arrests before the family did. The Prime Minister said that the family “has faith” in the inquiring magistrate, on whom he counts to keep family members informed. The family remind the Prime Minister that it is not the

¹² See for example: <http://www.independent.com.mt/articles/2017-12-04/local-news/Legal-threats-stop-minister-from-giving-details-on-arrests-linked-with-Daphne-s-murder-6736182239>.

¹³ It should be noted that for the first time this week, at least some effort appears to have been made to contact the family prior to a public announcement in relation to the investigation being made, in that Peter was informed by text message on the morning of the 4th December 2017 that “a number of arrests” had been made, without further details. However, within minutes of that scant message, the much fuller announcement was being made by the Prime Minister at a press conference, and details of the arrests were being carried in the national media and online generally.

magistrate's role to act as a liaison officer for the Police Force, over which he has no oversight. The Police are running a separate investigation to the magisterial inquiry and have a separate duty to keep family members informed.

A further two arrests were made this morning and the family only heard of them because the Prime Minister Tweeted about them. Again, the Prime Minister was informed before the family was informed, and the Prime Minister's prioritising the media over the assassination victim's family indicates that his public image is his primary concern. It is beneath the dignity of public office that critical information about an assassination investigation by the police should be released by the Prime Minister, rather than by the police, and on social media, rather than in a formal setting.

The Prime Minister misled the press this morning with regard to who signed the arrest warrants and failed to resist making a partisan reference even in a moment of such profound tension for the country and for Daphne Caruana Galizia's family. The Prime Minister said that the arrest warrants were signed by the inquiring magistrate. Arrest warrants are routinely signed by the duty magistrate. The inquiring magistrate, Anthony Vella, is not the duty magistrate today.¹⁴

Daphne Caruana Galizia's family could have been informed of today's arrests by a family liaison officer of the Malta Police force -- if one had been appointed. It is what might be expected in any homicide case, particularly one which is high profile and which has wide-reaching implications. The family had already written to the Police Commissioner about the lack of formal communication and about the constant stream of leaks which prejudice the integrity of the investigation. The Police Commissioner has not responded in writing to any of the family's letters to him.

Within an hour of the arrests, the mugshots, names, and addresses of seven of the suspects were leaked by the Malta Police. If police officers who have access to the case files are leaking this information so wantonly, it is important to ask whether they are not also leaking information to other suspects, some of whom could be in or close to government.

The family is concerned that a number of people who could be implicated continue to receive political cover for crimes they are widely reported to have committed. None of the developments in the investigation or its handling by the Malta Police have served to reassure the family that real justice is within reach. The blurring of boundaries with the executive – and this in a case which has political implications – is disturbing. When the handling of an investigation is not sound, it is difficult to have faith in its outcome.

Daphne Caruana Galizia's family will continue to fight for an independent and impartial investigation that is theirs by right and will fight to hold to account any institutions or officials who fail to uphold their duties, prejudicing the investigation either by incompetence or misfeasance."

¹⁴

It has subsequently come to the family's attention that the arrest warrants, which were thought to have been signed on the day of arrest, were in this case in fact signed earlier, possibly on Saturday 2nd December. This only highlights how the family has been slow to receive relevant information about the investigation, and the consequences of that in circumstances where information is so routinely being put into the public domain that has not first been shared with the family.

3. ARTICLE 2, ECHR

The Article 2 Duties

- 3.1 Article 2 of the ECHR, which safeguards the right to life, “*ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted... Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe*”: *Makaratzis v. Greece* (2005) 41 EHRR 49, [56] (Grand Chamber). The European Court of Human Rights (“ECtHR”) has repeatedly made clear that, as the object and purpose of the Convention is “*as an instrument for the protection of individual human beings, [this] also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective*”: *Makaratzis*, above, [56], citing *McCann v. UK* 1996) 21 EHRR 97, [146]-[147].
- 3.2 The first sentence of Article 2(1) provides that, “*everyone’s right to life shall be protected by law.*” The ECtHR has repeatedly held that this sentence, “*enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction*” (see, e.g., *Kemaloğlu v. Turkey* (2015) 61 EHRR 36, [32]; *LCB v. UK* (1999) 27 EHRR 212, [36]).
- 3.3 Article 2 imposes both substantive and procedural obligations upon States. In brief outline, these various obligations are:
- 3.3.1 The substantive obligations:
- (i) A negative obligation, requiring States not to take life unless “*absolutely necessary*”;
 - (ii) A general positive obligation to, “*establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life*”: *Öneryildiz v. Turkey*, (2005) 41 EHRR 20, [89]; *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, [30]; *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, at [2]; *Mitchell and another v. Glasgow City Council* [2009] 1 AC 874, per Lord Rodger at [66], 902A-B; *R (AP) v. HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), [50]-[52]; *Smith v. Ministry of Defence* [2013] UKSC 41 at [68], 121F. This includes a general obligation to put in place appropriate systems for the protection of life, including matters such as employing competent staff, for example.

This is often referred to as the “systems duty”. The ECtHR has made clear that the systems duty must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake; and, where the obligation applies, the authorities are required to assess all the potential risks inherent in the relevant activity, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risks: *Öneryildiz*, above, [71]; *Kolyadneko v. Russia*, above, [158], [166];

- (iii) A positive obligation, often described as the “operational obligation,” to take preventative measures to protect an identified individual whose life is at risk where the authorities know, or ought to know, of the existence of a real and immediate risk to the individual’s life. Where the operational obligation arises, the authorities must take such steps within the scope of their powers which, judged reasonably, might be expected to avoid the risk to life: *Osman v. UK* (2000) 29 EHRR 245, [116]; *Rabone v. Pennine Care NHS Trust* [2012] 2 AC 72 [15] –[18], [21]-[25]; *Sarjantson v. Chief Constable of Humberside* [2013] EWCA Civ 1252, [18]-[22], [26]-[29], [31]. The broad nature of this positive obligation has been confirmed by the Grand Chamber of the ECtHR: see e.g. *Öneryildiz v. Turkey* (2005) 41 EHRR 20.

3.3.2 The procedural obligation or investigative duty: an obligation to conduct an effective investigation into possible violations of the substantive obligations under Article 2.

- 3.4 The investigative duty clearly applies where there has been an arguable breach of the substantive duties under Article 2: *Edwards v UK* (2002) 35 EHRR 487; *McCann*; *R (Middleton) v. HM Coroner for West Somerset* [2004] 2 AC 182.
- 3.5 The threshold for considering whether there has been an “arguable” breach of the substantive obligations of Article 2 is a low one. There have been a number of cases in the ECtHR on this point, but it is put most clearly in a domestic UK case, *R (AP) v. HM Coroner for the County of Worcestershire* (2011) Med LR 397, [2011] EWHC 1453 (Admin), [60]: “arguable” is anything more than “fanciful,” Hickinbottom J held. This reflects the language in the leading cases of *Hurst* and *Middleton*, in which it was made clear that the investigative obligation is triggered “where the state may bear

responsibility for the death,” or “agents of the state are, or may be, in some way implicated” (see Hurst at [28]; Middleton at [2] and [3]).

Application of the Investigative Duty in this Case

- 3.6 It is plain that the investigative duty applies in this case.¹⁵ It is beyond doubt that there has been an arguable breach of the operational obligation to protect Ms Caruana Galizia, and also an arguable breach of the systems duty. There is also an understandable concern on the part of the family that agents of the State may have had direct involvement in her assassination. It is clear that State authorities, “*may bear responsibility for the death,*” or that they “*are, or may be, in some way implicated,*” adopting the language of the leading cases of *Hurst* and *Middleton*. Importantly, in respect of the operational and systems duties, there is a question concerning the adequacy of the steps taken by Maltese police in relation to Ms Caruana Galizia herself, and the policies and practices of the Maltese police. Each of these aspects must be investigated in an Article 2 compliant manner.

Purposes of an Article 2 Investigation

- 3.7 An investigation which discharges the procedural obligation has a number of purposes, including:
- 3.7.1 To expose and bring to public notice culpable and discreditable conduct, ensuring the accountability and punishment of those at fault (*Jordan v. UK* (2001) 37 EHRR 52, [105]; *Edwards v. UK* (2002) 35 EHRR 19, [69], [71]; *Öneryildiz v. Turkey* (2005) 41 EHRR 20, [91];
 - 3.7.2 To secure the effective implementation of the domestic laws which protect the right to life (*Jordan v. UK*, [105]);
 - 3.7.3 Investigate all the facts surrounding the death thoroughly, impartially and carefully (*R (Sacker) v. West Yorkshire Coroner* [2004] 1 WLR 796, [11]);
 - 3.7.4 Rectify dangerous practices and procedures, correct mistakes and learn lessons, ensuring that those who have lost a relative may at least have the satisfaction of knowing that lessons learned from her death may save the lives of others (*R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, [31]);

¹⁵ For the purposes of the present urgent Advice we do not go into further detail regarding each of the substantive obligations; it is plain that the arguability threshold is passed.

- 3.7.5 Allay rumour or suspicions as to how the death occurred (*Jordan v. UK*, [128], [144]).

Necessary Elements of an Article 2 Investigation

- 3.8 In a series of cases, many of which concerned deaths in Northern Ireland in which there was a suspicion of State involvement in, or a State failure to prevent, paramilitary murders, the ECtHR has established that there are a number of minimum requirements which must be satisfied in order for an investigation to pass Article 2 muster. See, in particular, *Jordan v. UK* (2001) 37 EHRR 52, [105]-[109] and *Edwards v. UK* (2002) 35 EHRR 19, [69]-[73].
- 3.9 The essential, bare minimum ingredients of relevance here are that the authorities must act of their own motion in initiating the investigation; the investigation must be independent; it must examine the circumstances surrounding the death; it must be capable of identifying and punishing those responsible; reasonable steps must be taken to secure evidence; it must be prompt; the investigation must involve a sufficient element of public scrutiny; and the next of kin must be involved to the extent necessary to safeguard their legitimate interests.
- 3.10 We have serious concerns regarding each of these requirements, but there are three particularly urgent matters arising which we address in this Advice, concerning independence, securing evidence and family involvement. We are happy to advise further on additional issues if the family wish us to do so.
- 3.11 Independence: The persons responsible for and carrying out the investigation must be independent from those implicated in the events being investigated. This means not only a lack of hierarchical or institutional connection but also practical independence: see, amongst many authorities, *Jordan v. UK*, [106].
- 3.12 In many Council of Europe member States, suspicious or violent deaths which have occurred in circumstances where there is a suspicion of potential police involvement or a failure to act appropriately by the police (e.g. domestic violence cases in which the police are alleged to have taken insufficient steps to respond to the risk posed by the perpetrator) are investigated by an independent, external body, such as the UK's

Independent Police Complaints Commission.¹⁶ However, there is no such body in Malta. In this case, this has resulted in the Maltese police investigating themselves.

- 3.13 There has been some external involvement in the investigation by the FBI, Europol and the National Investigations Bureau of Finland, but we are instructed that this has involved technical support only rather than any oversight or strategic role in the investigation, or any directive power whatsoever. The investigation has been conducted by the police.
- 3.14 Of particularly grave concern is the continued involvement in the investigation of Deputy Commissioner Silvio Valletta. Our firm view is that this is in clear breach of Article 2's guarantees. He and his wife were frequently the subject of stories on Ms Caruana Galizia's blog and she had reported on alleged corruption and serious conflicts of interest on their parts. The investigation into her death must consider whether appropriate steps were taken to protect Ms Caruana Galizia by the Deputy Commissioner and others, and consider whether there was any police collusion in her death, or police negligence regarding assessing, managing and responding to the risk to her life.
- 3.15 It is surprising and regrettable that the Deputy Commissioner has refused to recuse himself and that the family has been forced to issue proceedings in the Maltese courts in order to remove him from the investigation, causing further distress and delay. A hearing is due to take place on 12th December. It is clear that his continued involvement is a flagrant violation of Article 2. He should step aside or be removed immediately. It is hoped that this will take place prior to the hearing on the 12th December, to avoid the need for the family to have to argue this point through the courts when they wish to have no further delays to the investigation of the brutal killing of their mother, wife and daughter.
- 3.16 Although the upcoming hearing on the 12th December concerns the Deputy Commissioner issue, we are conscious that the family have many other concerns regarding the independence and efficacy of the police investigation, and it will be necessary to explore these further. We note that there is a particular concern regarding the role of the Prime Minister, with him adopting a lead and spokesperson style role on the investigation into the assassination of his most relentless and effective critic, who had been investigating him, his government, and several of his associates for possible corruption and other criminal activity. The family is concerned that this, at the very least, gives a perception of bias, and it causes them serious concern that anyone with

¹⁶ From January 2018, this will be known as the Independent Office for Police Conduct.

sufficiently close ties to the Prime Minister will be shielded from the investigation, despite the family considering that a number of potential suspects fall within that group.

- 3.17 The *Times of Malta* echoed the family's concern in a recent editorial, on 7th December, criticising the Prime Minister for addressing a press conference on the police investigation as not only was this, "*a very wrong message to send... The police are not at his command*"; but also due to the possibility of involvement in Ms Caruana Galizia's death by individuals connected to him. The editorial stated:

*"There is also another problem. Ms Caruana Galizia was a harsh critic of many, not least the Labour Party he leads. It is unclear whether the accused acted on their own initiative or were commissioned to carry out the murder. The investigations are not over and Dr Muscat should keep his distance because they may point to his government or party. Instead, he took centre stage."*¹⁷

- 3.18 Involvement of the next of kin: a further requirement of Article 2 is that the investigation involve the next of kin to the extent necessary to safeguard their legitimate interests. There are a number of elements to this duty, but of most relevance for present purposes is the question of disclosure. The ECtHR has made clear that the extent of disclosure made to the family is relevant to the question of whether there has been adequate involvement (see *Jordan v. UK*, [134]). The courts in England and Wales, in interpreting Article 2, have held that the family must be given reasonable access to all relevant evidence in advance: *R (D) v. Secretary of State for the Home Department* [2006] EWCA Civ 143, [46]; and *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 632, [37], [46].

- 3.19 There is a similar obligation arising under Article 8 ECHR. The ECtHR has recognised a right to informational self-determination in certain circumstances, including a positive obligation on the State to inform an individual in respect of material relating to private or family life, where access is sought and its provision might allay the individual's ongoing fears and/ or enable them to seek effective redress. In determining whether or not such a positive obligation in fact exists, in circumstances where Article 8 is applicable, the Court has had regard to the fair balance to be struck between the general interest of the community and the competing interests of the individual(s) concerned. The Northern Irish courts have referred to this obligation in relation to information

¹⁷ <https://www.timesofmalta.com/mobile/articles/view/20171207/editorial/Daphne-murder-opportunity-lost.665064>.

sought from the State by a family member in respect of the controversial death of a loved one, in *MacMahon's Application* [2012] NIQB 93.¹⁸ Treacy J stated at [23]:

“The right to respect for physical and psychological integrity is included in Article 8. In the case of victims, in my judgment, this requires the state to desist from conduct which would, as here, significantly exacerbate the applicant’s understandable feelings of distress and anguish. In my view this is incompatible with the positive obligation inherent in an effective respect for private and family life and accordingly I find that Article 8 has been breached.”

3.20 In this case, the bereaved family has been learning of key developments in the investigation in grossly inappropriate ways, without any advance notice, including via twitter accounts of politicians and from newspaper headlines. They have repeatedly raised concerns about this, both in private correspondence and publicly, but have yet to receive any substantive response.

3.21 We consider this to be a further violation of the Article 2 investigative obligation, and also a violation of the Article 8 rights of the bereaved family members who are finding this so distressing. Their grief, distress and anguish is being compounded and exacerbated by the manner in which they are learning of developments in the case. There must be an immediate and clear apology and a commitment to radically alter how the police interact with, involve and update the family.

3.22 Securing evidence: Article 2 requires that reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances, and this includes a requirement to act with sufficient speed to avoid perishable evidence being lost: *Jordan v. UK*, [107]; *Edwards v. UK*, [71]; *Kakoulli v. Turkey* (2007) 45 EHRR 12, [123]; *Ramsahai v. Netherlands* (2008) 46 EHRR 43, [321]. The expectation on the authorities is a high one; even a relatively short delay in evidence collection, or difficulties in doing so caused by ongoing civil war and regular terrorist attacks, have been held not to alter the requirement to take reasonable steps: *Yasa v. Turkey* (1999) 28 EHRR 408, [104]; *Al-Skeini v. UK* (2011) 53 EHRR 18, [173]. 71. The inquiry and investigation must be adequate to ensure that the quality of evidence is not undermined: *Jordan v. UK*, [107]; *Ramsahai v. Netherlands*, [330].

3.23 In the context of suspected police collusion, it has been held that officers conferring can breach the procedural obligation: *Ramsahai*, [321], [330] (and see also the UK case of *R*

¹⁸ We are grateful to our Doughty Street Chambers colleague Fiona Murphy for bringing this authority to our attention.

(Saunders) v. Independent Police Complaints Commission [2009] 1 All ER 379, [38]-[40], where appropriate steps were not taken to prevent officers conferring following a death, even where they did not in fact confer).

- 3.24 We are extremely concerned by the information provided to us by the family, and by the criticisms made of the Maltese system by the delegation of MEPs. It is clear that there is a real question arising regarding 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. A truly independent, impartial investigation, which involves compliance with Article 2's evidence-gathering requirements, is essential. It does not appear that the current investigation is capable of meeting these requirements.

4. CONCLUSION

- 4.1 For the above reasons, we consider there to be a number of clear violations of the Article 2 investigative duty, of the most serious kind. Malta is in breach of its obligations to the bereaved family under the ECHR. Swift action must be taken by the authorities in Malta, namely to: (a) immediately remove the Deputy Commissioner from his role; and (b) apologise to the family for the failure to appropriately update and involve them in the investigation, and alter the way in which information is provided to them to comply with Article 2's requirements.
- 4.2 There is also a broader issue arising, which is outside the scope of this urgent Advice: whether the Maltese police are capable of conducting an Article 2 compliant investigation in this case, and whether external, impartial investigators are required. On the basis of the information we have seen, we consider this to be an essential requirement, and an extremely urgent one. We are happy to advise further as to how this can and should be achieved.

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8th December 2017