IN THE SHEKU BAYOH INQUIRY

APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG WALKER; and (3) Ms. NICOLE SHORT (together, "the Applicants") re the Hearing Fixed for 12 and 13 June 2025

Introduction and motion

1. At the outset, the Applicants all wish to stress that they have the greatest respect for the Chair, whose integrity they do not seek to impugn. They have no doubt that the matters discussed herein were the result of a well-intentioned desire to assist the family of Mr Bayoh in navigating the Inquiry.

2. However, for the reasons discussed below, all three have regrettably lost confidence in the Chair. They are concerned that they can no longer be seen to be receiving a fair hearing, and that apparent bias has now arisen.

3. Accordingly, and with regret, they invite the Chair to recuse himself from further involvement in the Inquiry. They require to make the same application regarding one of the assessors, Mr Bhatt.

The law on apparent bias as referable to public inquiries

4. It is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein: *Errington v Minister of Health* [1935] 1 KB 239; *Kanda v Malaya* [1962] AC 322; *Hibernian Property Company Limited v Secretary of State for the Environment* [1974] 27 P & CR 197; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105; *Furmston v Secretary of State for the Environment* [1982] JPL 49; *Bradford v McLeod* 1986 SLT 244; *Simmons v Secretary of State for the Environment* [1985] JPL 253; *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205; *Doherty v McGlennan* 1997 SLT 444; *Georgiou v Enfield London Borough Council* [2004] LGR 497; *The Queen on the Application of Tait v Secretary of State for Communities and Local Government* [2012] EWHC 643 (Admin).

5. The rigour of this principle is well illustrated by the case of *Doherty, cit.sup*. There, in summary criminal proceedings, after convicting the accused but before sentence and whilst an appeal was possible, the Sheriff invited the complainer to his chambers for a private meeting. In finding apparent bias made out, LJC Ross said:

> "As was stressed in the case of *Bradford v McLeod*, it is essential that judges should be very careful not to do anything which may give rise to [a suspicion of lack of impartiality] and although justice may well have been done in this case, we are persuaded that a reasonable bystander might well form the suspicion that the sheriff was not being impartial in acting as he did. The sheriff admittedly had convicted the complainer by the time he had this meeting with the witness, but for all the sheriff knew the complainer might have appealed against conviction in which event the sheriff would have had to prepare a stated case. ***It is stated in the statement of facts that the issue of credibility and reliability of witnesses was a crucial one in this case and if that is so, then in a stated case the sheriff would have had to express a view upon the credibility of, among other witnesses, the complainer who was the individual with whom he had this private meeting***."

6. What has been happening here goes far beyond that which gave rise to a reasonable suspicion in *Doherty*.

7. The basic position is summarised as follows in *Kanda v. Government of Malaya*, *cit.sup*:

> "The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness."

8. This principle is equally applicable to the Chair of a public inquiry, and to his assessors. The test of apparent bias has been applied in several cases involving

public inquiries: see e.g. the cases cited above of *Errington*; *Hibernian Property Company Limited*; *Furmston;* and *British Muslims Association.*

9. The Chair is subject to a statutory requirement to act with fairness (2005 Act, s.17(3)), and to the common law requirements of natural justice (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry* 2025 S.L.T. 205). This is underlined by the provisions of s.9 of the 2005 Act:

> "**s.9 Impartiality**…
>
> (4) A member of the inquiry panel must not, during the course of the inquiry, undertake any activity that could reasonably be regarded as affecting his suitability to serve as such."

10. It is clear that "Parliament is taken to have known what the law was prior to the enactment": *Lachaux v Independent Print Ltd* [2020] AC 612 at [13]. Accordingly, by expressly imposing the requirements of impartiality (s.9) and fairness (s.17) as laid down in *Kanda,* Parliament may be taken as having decided to impose the same requirements of natural justice on the Chair.

11. Once apparent bias is demonstrated, recusal is mandatory. It matters not that the decision-maker protests that he is not in fact biased or that he will obtemper his duties to act fairly and impartially: *Kanda, cit.sup*. As was confirmed in *Millar v Dickson* 2002 SC (P.C) 30 at [65]:

> "The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice... ***It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial.*** The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. ***If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is***

that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand."

The grounds for recusal here

12. The following events are now apparent. They are presented in chronological order, under explanation that many have only recently become known (as a result of disclosure by the Inquiry in advance of the hearing fixed for June 2025)[1].

November 2021

13. Before the oral hearings commenced, a meeting was arranged between the family of Mr Bayoh and the Chair. In advance thereof, (a) the family was invited to set the agenda, and (b) the family asked for sight of the s.21 notices which had at that point been served by the Inquiry[2].

14. This is instantly problematic. Private meetings should not occur at all, other than (perhaps) for the very limited purpose of introducing Core Participants to the Chair and providing reassurance as to the procedure that will be followed. *A fortiori,* a meeting whose agenda is set by one of the Core Participants and not by others (the content of that meeting not being disclosed until disclosure was forced by the concerns raised by the Applicants) is not one indicative of fairness or impartiality.

15. Moreover, the provision to the family of the s.21 notices does not involve treating the Core Participants equally. Other Core Participants had asked for sight of the s.21 notices. That request was, for a long time, refused. It was not known until now that the refusal applied only to the other Core Participants, and that the s.21 notices had been shared with the family. There is no good reason why those notices should

[1] Procedural Hearing Bundle, referred to hereafter as "PH Bundle"
[2] PH Bundle, p.11

have been shared with the family and yet denied to others. From the very outset, accordingly, the family was treated differently from other participants.

16. The meeting then seems to have taken place on Thursday 2 November 2021. No minutes were taken, and it is not clear precisely who was at the meeting: but it plainly involved the Chair, the family, and the family's legal representatives.

17. At the meeting, the family were invited by the Chair to "tell me something of the journey that you've had from 3 May 2015"[3]. That "journey" is something that would require to be explored in evidence before the Inquiry, and indeed has been so explored with some (but not all) of the family members who attended the meeting. There is no basis upon which such matters could, consistently with the requirements of fairness, be the subject of private discussion with the Chair, in the absence of other Core Participants.

18. Also at the meeting, the family were asked for their thoughts on the question of race[4]. From the very outset, the question of race has been something that the Chair has stressed is core to this Inquiry, and permeates every aspect thereof. There is no basis upon which that could, consistently with the requirements of fairness, be the subject of private discussion with the Chair, in the absence of other Core Participants.

19. The Chair followed up that meeting with letters to the family, which were not shared with other Participants and have only recently come to light. In one, to Mr and Mrs Johnson[5], the Chair referred to the meeting of 2 November 2021, and recorded the fact that at that meeting the family had discussed "the subsequent actions of the police and those investigating your brother's death". This can only relate to events at the police station after the arrest, and the involvement of PIRC, all of which involve contested matters of fact which will require to be decided as part of the Inquiry. Moreover, in that letter the Chair did not merely record that he

[3] PH Bundle, p.14
[4] PH Bundle, p.24
[5] PH Bundle, p.30

had listened to the family in this respect: he indicated that he felt "humbled and honoured that you shared the story of your loss and the frustration you feel at the subsequent actions of the police and those investigating your brother's death". That does not display a dispassionate or objective view regarding whatever was said (that being unclear in the absence of any minutes) in this regard. The Chair also went on to explain that he "heard your concerns about race". He thereby confirmed that this core aspect of the Inquiry was the subject of private discussion and representation, contrary to all requirements of fairness and impartiality. It cannot be maintained that none of this matters when evidence has been given on oath, or that the Chair would put such matters to one side and focus only on that evidence: one of the key participants at this meeting (and indeed in the others) was Ade Johnson, and Mr Johnson has not been asked to give evidence to the Inquiry (other than *via* the medium of these private meetings).

April 2022

20. Shortly before the evidential hearings began, a further meeting was arranged, attended by members of Mr Bayoh's family, Counsel to the Inquiry, and the Chair. A minute of that meeting was taken, and has been produced. At that meeting, the Chair is recorded[6] as having said that, at the previous meeting in November 2021, each family member had given a "powerful account of the way in which you were treated on 3 May 2015". Accordingly, it would indeed appear that at the unminuted meeting the previous November, not only was there discussion of factual matters that would be core to the Inquiry (vouchsafed by the fact that the Chair goes on to say that he wants them to give evidence about that in due course), but moreover that the Chair had found what the family had said to him "powerful". Given the fact that such meetings should not be happening at all, the fact that at the second such meeting the Chair described the representations he had heard at the first in such a manner is acutely disconcerting.

[6] PH Bundle, p.42

21. The Chair went on[7] to discuss the video that was to be shown on the first day of the Inquiry (discussed further below), indicating that this would "be a very strong start to the hearings".

May 2022

22. In opening the Inquiry, in comments which have been repeated on multiple occasions and publicly, the Chair stated that the family of Mr Bayoh would be at the heart of the Inquiry. He has said no such thing of any other Core Participant, despite the fact that some of them have clearly suffered as a result of the events of 3 May 2015. In particular, former PC Nicole Short (another Core Participant) was, on any view of the facts, assaulted by Mr Bayoh on 3 May 2015, and as a result was medically retired from service with Police Scotland. She is uncontestably entirely innocent of wrongdoing, and no one involved in the Inquiry has ever suggested otherwise. At no point has the Chair suggested that she might be "at the heart of the inquiry". She is entitled to ask why that is so.

23. The first day of the Inquiry then commenced with the showing of a professionally shot video, depicting the life of Mr Bayoh and involving drone footage over his home village in Sierra Leone. This was arranged, and paid for, by the Inquiry.

24. It is accepted that such a presentation is not unheard of in public inquiries. This has been done, for example, in the COVID inquiries. However, in other instances where it has taken place, the subject of such a "pen portrait" was incontestably the innocent victim. In the present case, as must have been apparent, there is an acute dispute as to who was the wrongdoer: Mr Bayoh, or the officers who arrested him. Arranging and paying for a video tribute to the life of one Core Participant when it was known that other Core Participants did not accept the description of Mr Bayoh as the "victim" is again problematic – all the more so when the Chair had indicated in advance (privately) that this would "be a very strong start to the hearings".

[7] PH Bundle, p.43

25. The second day of the inquiry heard the evidence of Zahid Saeed, who had become involved in a fight with Mr Bayoh shortly before his arrest. Mr Saeed was uncooperative. Rather than compelling that individual to obey his oath, the Chair adjourned the inquiry, and has since decided that the inquiry should proceed without his being recalled. This is in stark contradistinction to witnesses from Police Scotland and Crown Office, who have been subjected to robust questioning.

November 2022.

26. On 21 November 2022, a further meeting took place, involving the family of Mr Bayoh (but no other Core Participant), Counsel to the Inquiry, the Chair, and both assessors. At that meeting, there was plainly discussion of evidential matters. In particular, Ade Johnson is noted[8] as having said that "what happened on 3 May 2015 should never have happened", and linked the arrest of Mr Bayoh to the "colour of [his] skin". As already noted, such meetings should not happen at all. *A fortiori,* they should not involve discussion of matters of substance.

27. At the same meeting, Mr Bhatt is noted as having said to the family that he was sad to hear what the family had to say, and that we (namely, the Inquiry) "don't have the magic wand to change the world but what we can is try to help achieve what you want". That assertion appears to have gone uncontradicted by anyone else at the meeting. That statement is redolent of partiality and unfairness. No other Core Participant has been told that the Inquiry will "try to help achieve what you want".

28. Immediately after that, the Chair is noted as having said something. In the original disclosure of the PH Bundle, this was completely redacted. Following protestation of that redaction, there has been a further incomplete disclosure, so that it is now known that the Chair said (presumably prompted by Mr Bhatt's comment that the Inquiry will "try to help achieve what you want"), "Is there anything we can do [REDACTED]"). This is again concerning. It is entirely unclear why the question

[8] PH Bundle, p.44

that the Chair posed of the family ("Is there anything we can do…") should be left opaque in this manner. What was the Chair asking the family in this regard?

29. The meeting then went on to discuss the evidence that had, by then, already been heard by the Inquiry. Ade Johnson is noted[9] as having commended the way in which evidence was taken from the arresting officers, and as going on to assert that this evidence contradicted the statements of those officers (and was thus false), with a discussion then taking place of the consequences of giving false evidence. That is again entirely inappropriate. One party should not be allowed private access to a decision maker in order to discuss evidence that had been given or to provide commentary thereon.

30. In a similar vein, the Chair then is noted[10] as having invited the family to discuss matters arising from the *post mortem* report. That involved a further discussion of evidential matters, and resulted in Ade Johnson criticising the medical report obtained regarding Nicole Short. The family solicitor, Mr Anwar, is then noted[11] as having been critical of the way in which the *post mortem* was carried out. These are again matters of contention before the Inquiry, and should not have been the subject of private discussion or representations.

31. The discussion then turned to further aspects of the evidence already heard. In particular, Kadi Johnson is noted[12] as having stressed to the Chair that the family "are the victims", and criticising the approach of the Inquiry regarding Mr Saeed (who she considered had been treated "a bit firm") when contrasted with that applied to PC Paton (another Core Participant), who had been "given such privilege". At that point, Senior Counsel to the Inquiry is noted[13] as having intervened to say that she had pushed Mr Saeed and "encouraged him to help" Mr Bayoh. Again, there was no intervention by anyone else present. It is not clear why

[9] PH Bundle, p.45
[10] Ibid.
[11] PH Bundle, p.46
[12] PH Bundle, p.47
[13] ibid

the Inquiry should be trying to "help" Mr Bayoh, as opposed to getting to the truth. This is again not consistent with requirements of fairness and impartiality.

32. Ade Johnson is then noted[14] as having, again without contradiction, made further criticism of PC Paton (plainly implying racism on his part), and made suggestions as to how the questioning of counsel might proceed thereafter. Why the family was allowed to tell counsel how to question witnesses is entirely unclear. It is, however, clear that the suggestion ("give more examples – worked with or come into contact [with members of the BAME community] – white/black and comparison in approaches") was thereafter taken up and adopted by Counsel to the Inquiry: several witnesses have been questioned in such a manner.

January 2024

33. On 18 January 2024, a further meeting took place, involving the family, their legal representatives, Counsel to the Inquiry, and the Chair. By then, some family members had given evidence. At that meeting, the Chair is noted[15] as having said to Kadi Johnson that he was "profoundly affected" by her evidence. That is suggestive of pre-determination. Had it been said publicly (in the course of the Inquiry hearings) it would have been the subject of challenge. As it was said privately, no challenge was possible.

34. Kadi Johnson is then noted[16] as having made further representations as to how the family had been treated, and having commended the Inquiry as to how matters had been handled to that point. No other Core Participant has been invited to discuss evidential matters privately, or to offer their views as to how the Inquiry has been handled.

35. Ade Johnson is then noted[17] as having said that witnesses to the events of 3 May 2015 were lying. What happened on 3 May 2015 is plainly central to the Inquiry.

[14] ibid
[15] PH Bundle, p.57
[16] PH Bundle, p.57
[17] PH Bundle, p.58

To allow the family to make private representations that witnesses have lied about that is wholly inimical to basic principles of natural justice.

36. Mr Anwar, is then noted[18] as having said "What is coming from the PIRC/Crown [REDACTED] – lied repeatedly to the family. [REDACTED] particularly difficult for the family to hear an [*sic*] see in disclosure what is being said". This is problematic, for two reasons.

37. First, it again involves allowing the family (*via* their lawyer) to make private allegations of mendacity on the part of public officers (from Crown and PIRC), without any visibility thereof or ability to contradict same.

38. Second, the reason for the redactions is entirely unclear. Said redactions have been queried, but all that has been said by the Inquiry is that the redacted passages do not refer to a person. The context is a serious allegation (of repeated dishonesty on the part of public officers) made in private representations to the Chair. The full context of what was said is important, and the insistence on leaving this redacted is a matter of further concern. This is a matter that will be returned to at the end of this application.

September 2024 onwards

39. On 4 September 2024, Mr Anwar wrote to the Deputy First Minister seeking an extension to the Terms of Reference, and saying inter alia:

> "Last Friday the Bayoh family met with the Chair of the Inquiry, Lord Bracadale and his legal team, at which a number of concerns as outlined below were raised, we now understand he is due to meet with you this week…
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> This … decision that is sought to be examined [viz: the decision by Crown Office not to bring criminal proceedings against any police officer involved in the arrest of Mr Bayoh] was taken on an incomplete and erroneous

[18] ibid

understanding of the evidence and failed to consider important issues such as race."

40. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

41. By letter of 6 September 2024, the Chair indicated that he had met with the Deputy First Minister, and said:

> "While he is yet to hear closing submissions and analyse the totality of the Crown evidence, the evidence raises certain questions about the Crown investigation in relation to
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> the understanding of the factual evidence;
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> the instructions given to expert witnesses; and
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> the absence of an examination of the issue of race."

42. On 16 September 2024, Mr Anwar wrote to the Deputy First Minister repeating the request for said extension to the Terms of Reference, and saying inter alia

> "However, [the Chair] does have a concern. While he is yet to hear closing submissions and analyse the totality of the Crown evidence, the evidence raises certain questions about the Crown investigation in relation to:
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> • the understanding of the factual evidence;
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> • the instructions given to expert witnesses; and
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> • the absence of an examination of the issue of race."

43. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

44. On 3 October 2024, Mr Anwar wrote again to the Deputy First Minister seeking the said extension to the Terms of Reference, and saying inter alia

"The Chair raised significant concerns with you that the evidence raises certain questions about the Crown investigation in relation to:

the understanding of the factual evidence;

the instructions given to expert witnesses; and

the absence of an examination of the issue of race."

45. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

46. On 25 October 2024, the Chair wrote to the Deputy First Minister, saying inter alia:

"My current thinking is as follows. Evidence heard by the Inquiry raised certain questions about the Crown investigation in relation to: the understanding of the factual evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race."

47. The Chair then wrote a further letter to the Deputy First Minister on 18 November 2024, saying:

"As I have not heard submissions on behalf of the Crown and have not yet conducted a full analysis of the evidence, I have not formed a concluded view in relation to the investigation by the Crown. That said, some of the evidence raised concerns about the Crown investigation in relation to: the understanding of the factual evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race. Since my meeting with you in September the Inquiry has heard further evidence from an expert instructed by the Crown which only reinforces these concerns. It is, I think, a reasonable inference that the matters giving rise to concern would have been integral to the decision not to prosecute. That raises a question as to whether the October 2018 decision was flawed on the basis of that it proceeded on a misunderstanding of the factual evidence; the instructions given to expert

witnesses were misconceived; and there was a failure properly to examine the issue of race."

48. On 5 December 2024, a further meeting took place, attended by the family and their legal representatives, Counsel to the Inquiry and the Chair. The purpose of the meeting was noted[19] as being for the Chair "to hear from the family on any issues they would like to discuss". By this point in time, the evidence stage of the Inquiry had concluded, although there remained the possibility of further evidence being necessary if the request to extend the TORs was granted. Submissions were anticipated as being required in early course. There is no proper basis for convening a private meeting, involving one Core Participant only, to hear from them "on any issues they would like to discuss". Doing so is wholly inimical to basic requirements of fairness and impartiality.

49. The Chair is then noted[20] as having discussed the family's application to extend the TORs, and his support thereof. Immediately thereafter, he asked the family "to discuss how they have been coping" (presumably, in connection with the application to extend and the delays caused thereby). That led to a discussion of how the delays were affecting the family and an expression of desire that the application be decided quickly.

50. There then followed[21] various expressions of gratitude to the Chair, underlining the impression of a situation in which the necessary distance between Chair and Core Participants had been elided.

51. Thereafter, the meeting is noted[22] as having involved a discussion as to the format of submissions; whether or not Ade Johnson would be able to make a statement (despite not having been led as a witness); an indication that this was likely to be allowed; and the structure of the report (which was indicated to have already been drafted, albeit in "very early stages"). No other Core Participant has been invited

[19] PH Bundle, p.65
[20] ibid
[21] PH Bundle, pp.65-6
[22] PH Bundle, p.66

to make representations as to the format of submissions. No other participant has been invited to make a personal statement on the impact of the events of 3 May 2015 (despite the fact that, as is obvious, many people have been impacted). No other participant has been advised that the report is already partly drafted, or invited to make representations as to how the report might be structured All of this is again indicative of a relationship between Chair and family which is far removed from that which would ordinarily be expected or required by the tenets of natural justice.

52. On 28 January 2025, in the course of the Judicial Review by the Chief Constable, some of the correspondence referred to above was disclosed to the other Core Participants.

53. On 29 January 2025, the inquiry emailed Core Participants as follows:

> "The Inquiry would also like at this early stage to clarify a specific point from a letter shared by Mr Anwar yesterday. The letter dated 4 September 2024 from Mr Anwar to the Deputy First Minister in the first paragraph states "Last Friday the Bayoh family met with the Chair of the Inquiry, Lord Bracadale and his legal team, at which a number of concerns as outlined below were raised, we now understand he is due to meet with you this week".
>
> This is erroneous. The Bayoh family and their legal team did meet with members of the Inquiry team (including Inquiry Counsel and the Solicitor) on 30 August 2024 but Lord Bracadale did not attend."

54. On 4 February 2025, following the conclusion of said Petition for Judicial Review, the Chair wrote a letter to the Chief Constable of Police Scotland, and copied this into other Core Participants. Therein, for the first time, the Chair disclosed *inter alia*:

> "Since the setting up of the inquiry I have from time to time met with members of the families as part of my commitment to keep them at the heart of the Inquiry."

55. It is now understood that there were five such meetings. These have been addressed above. The Chair had not previously disclosed such meetings. Such meetings happened in private, without notification (before or after) to other Core Participants or any discussion thereof at any of the evidential hearings. No other Core Participant was invited thereto. No other Core Participant has had the benefit of private meetings with the Chair. No disclosure of such minutes as were taken of such meetings was made until complaint of said meetings was made by the Applicants.

56. In the same letter, the Chair referred to the meeting of 5 December 2024, and said:

> "As to my meeting with members of the families of Mr Bayoh on 5 December 2024, this was not a meeting to discuss the proposed extension to the terms of reference… The only reference at this meeting to the application before the Deputy First Minister was an acknowledgement by me that the families had made the application and confirmation by them that they had seen my letter to the Deputy First Minister dated 18 November 2024; there was no further discussion of the matter."

57. That description is, with respect, not entirely accurate or complete. As is now clear from the Minute of the meeting of 5 December 2024, and as discussed above, the Chair, immediately after his acknowledgement that the families had made the application and confirmation that they had seen his letter to the Deputy First Minister dated 18 November 2024, asked the family "to discuss how they have been coping". That led to a discussion of how the delays in deciding the application for extension were affecting the family and an expression of desire that the application be decided quickly. There was, accordingly, "further discussion of the matter", which is hardly surprising as the avowed purpose of the meeting, as set out above, was "to hear from the family on any issues they would like to discuss".

58. On 6 February 2025[23], agents for the Applicants queried the revelation that the Chair had been meeting with the family of Mr Bayoh, and raised certain questions

[23] PB Bundle, p.70

as a result thereof. No reply would be received to this letter until 5 March 2025 (discussed further below).

59. On 25 February 2025, at a point in time when the Deputy First Minister had not yet decided whether or not to extend the Terms of Reference, the Chair wrote to the legal representatives of all Core Participants, recording that he had met with the Deputy First Minister and saying inter alia:

> "The Chair went on to refer to his letter of 18 November 2024 which identified certain aspects of the public interest which were immediately relevant to the Inquiry.
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> The first was the public interest in the examination of a potentially flawed prosecutorial decision. The Chair explained that he remained of the view that there are ***strong indications that the prosecutorial decision was flawed*** on the basis that:
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> • it proceeded on a misunderstanding of the factual evidence;
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> • the instructions given to expert witnesses were misconceived; and
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> • there was a failure properly to examine the issue of race."

60. On 5 March 2025, the Solicitor to the Inquiry responded to the said letter of 6 February 2025. Therein, the following assertion was made[24]:

> "The purpose of the annual meetings [with the family] was to address issues relating to the welfare of family members as the Inquiry progressed and the impact on family members of the processes and procedures of the Inquiry. The Chair made it clear that anything of an evidential nature would require to be examined in evidence in the Inquiry."

61. That explanation was plainly designed to allay concerns as to the meetings that had taken place. It is, with respect, neither accurate nor complete. The meetings

[24] PH Bundle, p.73

very clearly, and for the reasons given above, involved substantial discussions of evidential matters. They went far beyond pastoral or welfare meetings, and discussed matters of substance as opposed to mere procedure. The second sentence in the explanation quoted above seems designed to provide assurance that evidential matters were not discussed at such meetings (and rather "would require to be examined in evidence in the Inquiry"). None of the meeting minutes record any indication by the Chair that evidential matters could not be discussed, and on the contrary they clearly were. The Chair has thus heard repeated and firmly expressed concerns at to the actions and conduct of other key players in this Inquiry, which he was "humbled and honoured" to hear, and which he found "profoundly moving".

Application of the test of apparent bias to the foregoing

62. It is, presumably, accepted by the Chair that he is subject to the requirements of natural justice and that he therefor requires to avoid the appearance of bias (thus explaining why he protested such a suggestion when he considered it as having been made in the Petition for the Chief Constable).

63. The foregoing creates such an appearance. It is reiterated that the motion to recuse is brought purely on the basis of loss of confidence in the Chair, and in Mr Bhatt, on the basis of apparent (and not actual) bias. The *bona fides* of both the Chair and Mr Bhatt in complying with the requests of the family for such meetings is not questioned. However, such meetings are hugely problematic, from the point of view of the requirements for an appearance of fairness and impartiality.

64. Many of the comments discussed above suggest (or create the appearance) that the Chair and Mr Bhatt have pre-judged, or evinced a closed mind to, material issues in this inquiry: *Stubbs v The Queen* [2019] AC 868. Mr Bhatt indicated that the Inquiry would try to give the family what it wanted to achieve (which, as has been clear from the outset, involves criticism, and the eventual prosecution, of the arresting officers). The Chair has adopted the language of the family of Mr Bayoh and advocated their cause, as referred to in the correspondence set out above.

What started out as "certain questions" relating to the decision not to prosecute then moved to "concerns", and had by February 2025 become (without any further evidence being led) "strong indications that the prosecutorial decision was flawed". The Chair was plainly urging the Deputy First Minister to extend the Terms of Reference, and to include therein the prosecutorial decisions and also the Victims Right Review. He did so against a backdrop of having said (privately) that he was "humbled and honoured" to have heard Ade Johnson's descriptions of his concerns at the actions of police officers and others; that he was "profoundly moved" by the testimony of Kadi Johnson; that he had listened (privately) to the concerns of the family as to how they were treated on 3 May 2015; and that he had heard (privately) the concerns of the family on the central question for the Inquiry, being that of race. All of that points towards pre-determination.

65. Moreover, as already noted it is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein. The meetings described above are not indicative of meetings devoted to procedure or to the welfare of the family. They involve matters of substance and of evidence. They involve allowing the family and their lawyer to make representations and suggestions in private. The minutes read, with great respect, less like detached discussions of formalities, and more like consultations with a client.

66. One might test the complaints made herein by imagining that, rather than having met privately with the family, the Chair had met privately with the Applicants. If he had done so, and been seen to have been "humbled and honoured" to hear what PC Walker had told him, and that he had found the testimony of former PC Short "profoundly moving", the family would have been instantly able to point to apparent bias. The present situation is no different to that hypothesis. Justice requires to be even handed, and what would have been inappropriate for the Applicants is equally inappropriate for the family.

67. The case thus falls precisely within the four corners of *Kanda*, *cit.sup* in which the Privy Council confirmed (at pp.337-8), as is surely obvious, that "no one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing".

68. For these reasons, a fair-minded and informed observer, looking at the foregoing and understanding that the Chair had, following various private meetings with the family of Mr Bayoh, supported their attempt to extend the Terms of Reference on the basis that he considered that there were "strong indications that the prosecutorial decision [sc. the decision by Crown Office not to prosecute any of the officers involved in the arrest of Mr Bayoh] was flawed", would conclude that there was a real possibility that the Chair was biased: *Porter v Magill* [2002] 2 AC 357 at [103]. No cure is found in the fact that the Chair might ordinarily be expected to obey his judicial oath: "the interests of justice required not merely that he should not display bias but that the circumstances should not be such as to create in the mind of a reasonable man a suspicion of [his] impartiality" (*Bradford v McLeod*, *cit.sup* at p.247; : *Millar v Dickson, cit.sup* at [65]; *Porter, cit.sup* at [104]).

69. In closing, four final points are made.

70. In the first place, it is perhaps helpful to remind oneself that part of the function of the present Inquiry is to fulfil the requirements of a fatal accident inquiry. There would be no prospect of a Sheriff presiding over an FAI behaving in the manner discussed above. To the knowledge of counsel for the Applicants there is only one prior instance of a decision addressing the question of Sheriff in an FAI meeting privately with the family of a deceased. This was the FAI into the death of Warren Fenty (Case ABE-B204-20, Report dated 10 May 2024). There, the presiding Sheriff had become unwell, leading to substantial delays. The Sheriff Principal (Pyle) accordingly required to take over conduct of the FAI. He held a meeting with the mother of the deceased. The approach of the Sheriff Principal in so doing is in stark contrast to what is now known to have happened here.

71. Firstly, there was only one such meeting,

72. Second, the meeting was immediately announced to all other parties, allowing them to object thereto.

73. Thirdly, multiple protections were put in place. These are described in the Sheriff Principal's report (at [72]) as follows:

> "**Meeting with Mrs Fenty**
>
> Some parties' representatives were critical of my decision to meet Mrs Fenty without the other parties being present, such that a motion to recuse myself from the inquiry was made. I refused it. ***I of course readily accept that a judicial office holder should not meet parties in private without the attendance of all. That is a basic rule of natural justice***. I also of course readily accept that justice must be seen to be done. In other words, the perception of a reasonable bystander must be taken into account. However, the situation here was unprecedented. All parties were affected by the unconscionable delay, but as I have already said I considered that Mrs Fenty had been hit the hardest. For that reason, I considered that not only in the interests of justice but also out of common humanity she was entitled to an explanation for it directly from me. ***The sheriff clerk was present throughout and I was careful to advise Mrs Fenty, which I had to repeat on several occasions during the meeting (understandably so given Mrs Fenty's rightful concerns), that I could not discuss the merits. A full minute of the meeting was provided to all parties.*** I consider that for these reasons the meeting was appropriate and that justice was served – and was seen to be served."

74. Thus there are many and varied differences between that case and the present. In *Fenty*, the reason for the meeting was for the Sheriff Principal to explain the delays, the "fault" for which lay with the Court itself. The meeting was entirely transparent and open. It was fully minuted. There were no redactions to the minutes. There was no discussion of matters of substance. None of those factors are here apparent.

75. In the second place, there is the question of the redactions in the PH Bundle. The whole point (*per* said decision of Sheriff Principal Pyle) is that "a judicial office holder should not meet parties in private without the attendance of all": rather, all participants should be able to see what happened. Albeit there has been disclosure of the minutes of those meetings that were actually minuted, the lack of any minutes for the first meeting and the redactions undertaken to those minutes which were taken mean that such disclosure is incomplete. If the aim of disclosure of the PH Bundle was to place participants in the same position as if they had been at the meetings, that aim has failed. If the other participants had been at such meetings, the Chair would not have been able to ask them or their representatives to place their fingers in their ears for some of the meeting; but that is the ultimate effect of the redactions that have been made, and adhered to despite protest. As already noted, it is entirely unclear why it is thought appropriate to refuse to allow the other participants fully to understand (for example) what Mr Anwar was saying when he accused officers of the Crown and PIRC of having repeatedly lied to the family[25]. It is equally unclear why the other participants are not entitled to know what the Chair meant when he asked the family[26] "Is there anything we can do [REDACTED]?"

76. Thirdly, there is the particular position regarding PC Paton. There is a redaction in the minutes[27] regarding what seems to have been a discussion of his mental state. That redaction has presumably been effected in order to prevent disclosure of something that should not be disclosed: namely, the private information regarding PC Paton's mental state. It is accepted that the redaction was correctly applied: such private information should not be disclosed, to anyone. However, the meeting minute (as redacted) does indicate that this private information ***has*** been disclosed, albeit only to the Bayoh family. That is quite improper. There is no

[25] PH Bundle, p.58
[26] Ph Bundle, p.44
[27] PH Bundle, p.47

sensible basis upon which such disclosure has been allowed to the family, and not to anyone else.

77. For the avoidance of doubt, the Applicants are not asking for disclosure of that private information. They quite accept that it should not have been disclosed. Rather, the point is that it ***has*** been disclosed, but only to one party. That is again the antonym of a fair and impartial process.

78. Finally, a question arises as to the procedure that has been adopted to determine the issues raised herein. The Chair cannot be the ultimate arbiter of whether the Chair himself has acted fairly and impartially. The Applicants have seen the letter from the Chief Constable protesting the proposed procedure. Whilst they do not go as far to say that the hearing set for 12-13 June 2025 should not proceed (they accept that the Chair would be entitled to query a motion to recuse, and to require that these complaints be raised in a public *forum*), they do agree that if the Chair is tainted by apparent bias, as they contend, then this is something that should be clear to him (with the benefit of advice from his Counsel), and moreover that this is not something that he might avoid by deciding to the contrary and giving himself, as it were, a clean bill of health.

79. In these circumstances, and with the renewed expression of regret, the motion is made that the Chair and Mr Bhatt should recuse themselves from any further involvement in the Inquiry.

Roddy Dunlop KC

Counsel for the Applicants

7 May 2025