

IN THE SHEKU BAYOH PUBLIC INQUIRY

Submissions for the Coalition for Racial Equality and Rights

Re

Application for Recusal on behalf of (1) The Scottish Police Federation; (2) PC Craig Walker; and
(3) Ms Nicole Short

1. The Coalition for Racial Equality and Rights (CRER), like the Applicants, have the greatest respect for the Chair. CRER consider that the Chair, and his assessors, have conducted themselves with the utmost propriety and impartiality throughout the course of the Inquiry proceedings.
2. CRER retain their confidence in the Chair and all his assessors. There has been, CRER submit, no bias, whether apparent or otherwise. CRER are opposed to the Applicants' request and submit that the Chair and Mr Bhatt should refuse the invitation to recuse themselves from further involvement in the Inquiry.

Public Inquiries, Requirement of Impartiality and apparent bias

3. CRER note that, as a general rule, public inquiries are convened to address matters of public concern, as identified by the Terms of Reference. It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. A public inquiry does not determine issues between parties to either civil or criminal litigation but conducts a thorough investigation. An inquiry has to follow leads and is not bound by the rules of evidence (*R (Cabinet Office) v Chair of the UK Covid Inquiry* [2024] KB 319, at paragraph 52).
4. The Chair has a wide discretion bestowed upon him by the Inquiries Act 2005. The procedure under the 2005 Act is designed to be flexible and inquisitorial in nature (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry* 2025 SLT 205, at paragraph 30). Whilst remaining impartial, it is particularly important for an inquiry to build a good relationship with victims, survivors, and their families (*The Practical Guide to Public Inquiries*, Mitchell et al, page 110). In terms of Section 9(4) of the Inquiries Act 2005, the Chair and his

assessors are under an obligation during the course of the Inquiry not to undertake any activity that could reasonably be regarded as affecting their suitability to serve as members of the inquiry panel. Section 17(3) of the 2005 Act provides that in making any decision as to the procedure or conduct of the inquiry, the Chair must act with fairness.

5. CRER do not dispute that the fundamental principles of natural justice apply to inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry*, at paragraph 33). In determining where fairness lies in a public inquiry, there is always a balance to be struck (*R(Associated Newspapers Ltd) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para 55). It is of the greatest importance that an Inquiry should be, and seen by the public to be, as thorough and balanced as possible (*R (Associated Newspapers Ltd) v The Right Hon Lord Justice Leveson*, para 53).
6. The common law jurisprudence not only assists when considering the fundamental principles of natural justice but provides guidance on relevant factors to take into account in relation to Section 9(4) and act as a cross-check (*Congregation of the Poor Sisters of Nazareth v Scottish Ministers* 2015 SLT 445, at paragraph 28).
7. The applicable test is as set out by Lord Hope in *Porter v Magill* [2002] 2 AC 357, at paragraph 103: '*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased.*' The test is whether having regard to all the circumstances a fair minded observer would conclude that there was a real possibility that the Chair and his assessor were biased (*Porter v Magill*, at paragraph 104). This test of real possibility of bias is less rigorous than one of probability, it is a test which is founded on reality. The test is not one of any possibility of bias but of a real possibility of bias (*Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, at paragraph 36).
8. Before the question of whether a fair-minded and informed observer would conclude that there was a real possibility that the Chair was biased can be answered, it is necessary to know what qualities are possessed by this observer.

9. The knowledge and approach of the fair-minded and informed observer was set out by Lord Hope in *Helow v Secretary of State for the Home Department* 2009 SC HL 1, at paragraphs 1-3:

'[1] The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

[2] The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (p 509, para 53). Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

[3] Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.'

10. When applying the test, it is necessary to look at all the circumstances as they appear from the available material (*National Assembly for Wales v Condrón* [2006] EWCA Civ 1573, at

paragraph 50). The observer would be aware that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality (*R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, page 139). The real possibility of bias must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that judges can disabuse their minds of any irrelevant personal conditions or pre-dispositions. It must, however, never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial (*President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (7) BCLR (CC) 725, at page 723, as referred to in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, at paragraph 21).

11. Ultimately, any assessment whether an unlawful appearance of bias has been given has to take into account the nature of the functions of the Chair and his assessor acting in the present type of situation (*Turner v The Secretary of State for Communities and Local Government* [2015] EWCA Civ 582, para 17).

The instant case

12. The Applicants have set out, at paragraphs 12 to 61 of their submissions, the matters which it is submitted are indicative of apparent bias. The vast majority of these matters relate to meetings between the Chair, his assessors, and the inquiry staff, and correspondence arising from those meetings. CRER understand the Applicants' position to be that the meetings between the Chair and Bayoh family are, in and of themselves, indicative of apparent bias. The Applicants, at paragraph 67 of their submissions, state that the case falls precisely within the four corners of *Kanda*, in which the Privy Council confirmed (at pp.337-8) 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.*'
13. CRER submit that the Applicants' submissions in this regard fail to appreciate the fundamental distinction which takes the instant case outwith the four corners of *Kanda*: this Inquiry is an inquisitorial, not adversarial process. There will be no 'winners' or 'losers' from the Inquiry. There will be no findings of civil or criminal liability. Rather, the Inquiry is an attempt to establish the truth of the events at Hayfield Road on 3 May 2015, and the response to those

events. CRER note that the Applicants have not cited in support of their submissions any authority indicating an absolute prohibition on the Chair of a public inquiry from meeting with Core Participants, or families of individuals whose deaths are central to an inquiry.

14. As is outlined above, the test to be applied is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Chair and his assessor were biased. While the Applicants have set out at length the grounds upon which they submit apparent bias has been demonstrated, CRER submit, adopting the language of Lord Woolman in *Congregation of the Poor Sisters of Nazareth v Scottish Ministers*, at paragraph 33, that the grounds are flawed and incomplete.
15. The fair-minded and informed observer would be aware that, in terms of Section 2 of the Inquiries Act 2005, the inquiry will not determine civil or criminal liability. The Applicants grounds are incomplete because they leave out of account a variety of matters which would be within the knowledge of the fair-minded and informed observer. That observer would have access to all the documents on the Inquiry and Scottish Government website. The observer would have regards to the Inquiry's Terms of Reference. He or she would be able to see from the 'FAQ' section on the Inquiry's website that the Inquiry was inquisitorial and the focus of an inquiry is to examine what happened and work out what can be done to prevent similar events taking place in the future. The observer would note from that same page that the Inquiry's Terms of Reference were announced following submissions from the legal representatives of, *inter alia*, the Bayoh family and the Scottish Police Federation. It would be further noted from the 'FAQ' page that the law does not allow public inquiries to make findings of criminal or civil liability.
16. The fair-minded and informed observer would be aware that there have been other public inquiries where meetings have been held with families of the deceased whose deaths formed the basis, or part of the basis, for the Inquiry. The observer would be aware that in the public inquiry into the death of Stephen Lawrence, Sir William Macpherson of Cluny noted:

"Separate, short and informal meetings with Mr & Mrs Lawrence, and their Counsel and Solicitor; and with the Chairman and Deputy Chairman of the Police Complaints Authority; the Commissioner and Deputy Commissioner of the Metropolitan Police; the Director of Public Prosecutions; and officials from the Commission for Racial Equality were held very soon after

the Inquiry was formed. These were the obvious initial main parties to the Inquiry; and the purpose behind the meetings was for them and the Inquiry to discuss any immediate problems and concerns.”¹

17. The observer would be aware that in the ongoing inquiry into the deaths at Grenfell Tower, the Chair of that Inquiry, prior to the Terms of Reference being published, met with residents and survivors from Grenfell Tower². He or she would also be aware that three public meetings, at which the Chair was in attendance, were held as part of the consultation on the Terms of Reference³.
18. The observer would be aware that Lord Turnbull, as part of his work as Chair in the ongoing public inquiry into the Omagh bombing, has had contact with those who were directly affected by the bombing. The observer would be aware that Lord Turnbull considered that that contact made it plain to the inquiry that the trauma caused has been enduring and continues to have a most powerful impact⁴.
19. The observer would also be aware that the Chairs of both the United Kingdom⁵ and the Scottish⁶ Covid-19 public inquiries have met with bereaved families.
20. The observer would also be aware of the need for the Inquiry to retain the confidence of the Bayoh family. He or she would further be aware of the family’s rights under Article 2 of the European Convention on Human Rights. The Applicants’ submissions have failed to have regard to the fact that the Bayoh family’s Article 2 rights are engaged and that they must be

¹ *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny*, Appendix 1, paragraph 7.

² <https://www.bbc.co.uk/news/uk-40520596>

³ <https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-19-July-2017.pdf>
<https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-20-July-2017.pdf>
<https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-25-July-2017.pdf>

⁴ Omagh Bombing Inquiry, Transcript of Preliminary Hearing 30 July 2024, page 3 lines 10-14 <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/42/2024/07/2024.07.30-Omagh-Bombing-Inquiry-Preliminary-Hearing-Transcript-1-1.pdf>

⁵ UK Covid-19 Inquiry Opening Statement <https://covid19.public-inquiry.uk/wp-content/uploads/2022/07/Baroness-Hallett-Opening-Statement.pdf>

⁶ <https://www.covid19inquiry.scot/news/inquiry-chair-meets-bereaved-families-and-relatives-care-home-residents>

involved in the procedure to the extent necessary to protect their legitimate interests (*Al-Skeini v United Kingdom* (2011) 53 EHRR 18, at paragraph 167).

21. While the Applicants have founded upon comments made by the Chair, that he was humbled and honoured to hear the family's account, and that he found them profoundly moving, CRER submit that these remarks are a basic human courtesy to a family who have lost a loved one and are would not be considered by the observer to be indicative of bias. The observer would, of course, note comments made by Chairs of other inquiries, such as those of Lord Turnbull referred to above, and those of the Chair of the Lampard Inquiry, who stated that the commemorative and impact accounts which were received by her were powerful, and were to be given by people describing with dignity, pride and courage to those who have died⁷.
22. CRER submit that the fair-minded and informed observer, having considered all the facts and all the evidence available to him or her, would conclude that there was no real possibility that the Chair and his assessor were biased as a result of the meetings between the Chair, his assessor, and the Bayoh family, or any comments made at those meetings.
23. There are two other matters which CRER wish to comment upon. The Applicants, at paragraphs 22-25 of their submission, contrast the family of Mr Bayoh being at the heart of the Inquiry with the approach taken in relation to other Core Participants, particularly Ms Short, and the video presentation about Mr Bayoh. CRER submit that in this part of their submissions, the Applicants have lost sight of a fundamental issue: Mr Bayoh died on 3 May 2015. Neither Ms Short nor the other Applicants, or Core Participants, lost their lives that day. Unlike Ms Short or the other Applicants, the Bayoh family's Article 2 rights are engaged. The Inquiry's Terms of Reference are explicitly to establish the circumstances surrounding the death of Mr Bayoh and the extent, if any, to which the events leading up to and following his death were affected by his actual or perceived race. It is difficult for CRER to understand why the Applicants consider the video played at the beginning of the Inquiry to be problematic. The Applicants seek to distinguish Mr Bayoh from those who have lost their lives in other circumstances which are subject to Public Inquiries. The Applicants note that in those instances, the subjects of pen portraits were '*incontestably the innocent victim*'. It is incontestable that Mr Bayoh died on 3

⁷ The Lampard Inquiry, Transcript 25 November 2024, page 3, lines 12-16
<https://lampardinquiry.org.uk/wp-content/uploads/2024/11/Lampard-Inquiry-25-November-2024-AB-approved-26.11.2024.pdf>

May 2015. It is not clear to CRER what is meant by the Applicants when contrasting Mr Bayoh to incontestably innocent victims who have lost their lives. It would be deeply concerning to CRER if there is to be a suggestion by any or all of the Applicants that Mr Bayoh's own actions on 3 May 2015 meant that he in some way deserved to lose his life. Nonetheless, CRER submit that the fair-minded and informed observer would not conclude that this video gave rise to the real possibility of bias.

24. At paragraph 64 of their submissions, the Applicants submit that correspondence from the Chair in relation to the application to extend the Terms of Reference to include prosecutorial decision making points towards pre-determination. CRER note that the correspondence from the Chair in relation to the extension of the Terms of Reference comes after he has heard a great deal of relevant evidence. As the Chair set out in his letter to the Deputy First Minister on 18 November 2024, he had not formed a concluded view in relation to the investigation of the crime but some of the evidence raised concerns about the Crown investigation. In his letter to Core Participants of 25 February 2025, the Chair stated that there were strong indications that the prosecutorial decision was flawed.
25. CRER submit that the fair-minded observer would be aware that the Chair is required to approach his task with an open mind, not an empty one. The Chair has heard a great deal of evidence in relation to prosecutorial decision making. It is not indicative of pre-determination for the Chair to have concerns about what that evidence shows, or to consider that there were strong indications as to what the evidence shows. The fair-minded and informed observer would not ignore the part of the Chair's letter of 18 November 2024 where he stated that he had not formed a concluded view and would not only take account of that part of the letter where he stated that some of the evidence raised concerns.
26. CRER submit that the fair-minded and informed observer, having taken into account all relevant matters, including all the Terms of Reference, all the material available on the Inquiry website, the inquisitorial nature of the inquiry, the lack of any findings of civil or criminal responsibility, and the practices and procedures adopted by other public inquiries, would consider that there was no real possibility that the Chair and his assessors were biased.

27. CRER accordingly submit that the Chair and Mr Bhatt should decline the invitations to recuse themselves from any further involvement in the Inquiry.

Mark Moir KC

Kevin Henry, Advocate

21 May 2025