AAMER ANWAR & CO
SOLICITORS & NOTARIES

IN THE SHEKU BAYOH INQUIRY

SUBMISSIONS ON BEHALF OF THE BAYOH FAMILIES
FOR THE PROCEDURAL HEARING ON APPLICATION FOR RECUSAL

Introduction

Unlike a court of law, a Public Inquiry is established (s1 of the Inquiries Act 2005) s1 (IA05) where it appears to a Minister, including a Scottish Minister s1(2)(b) that:

> it appears to him that—
> (a) particular events have caused, or are capable of causing, public concern, or
> (b) there is public concern that particular events may have occurred.

Unlike a civil or criminal case in a court of law, a Public Inquiry has no power (as matter of vires) to rule on or determine any persons civil or criminal liability s2(1) IA05 but is not to be inhibited by in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes s2(2) IA05.

The Public Inquiry is an inquisitorial process: this means that the Inquiry is actively involved in the obtaining and assessing evidence. The process is not adversarial. But no doubt the nature of these matters, core participants will have differences of opinion or different views on evidence, but it is not the job of the Chair and other Pannel members to adjudicate on these issues, rather it is for the Chair to assess the evidence and to make recommendations based on their view of it.

As a reflection that a Public Inquiry is inquisitorial, those who have an interest in the proceedings are participants in the Inquiry rather than legal parties.

The Inquiry is a public body as defined by Section 6 of the Human Rights Act 1998, and as such it is obliged to act in a way compatible with the European Convention and Human Rights (ECHR) as incorporated into domestic law by the Human Rights Act 1998. Of relevance to the current issue, the Inquiry is under a duty in terms of article 2 in relation to conducting a thorough investigation into the death of Sheku Bayoh.

The duty of impartiality, and the legal test is defined in the statute.

Impartiality of the Panel

The definition of the Inquiry Panel is found in s3 IA05:

> (1) An inquiry is to be undertaken either—
>
> (a) by a chairman alone, or
>
> (b) by a chairman with one or more other members.
>
> (2) References in this Act to an inquiry panel are to the chairman and any other member or members.

The requirement of impartiality for an inquiry panel is set out in statute s9 IA05:

> The Minister must not appoint a person as a member of the inquiry panel if it appears to the Minister that the person has—
>
> (a) a direct interest in the matters to which the inquiry relates, or
>
> (b) a close association with an interested party,
>
> unless, despite the person's interest or association, his appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel.

S12(1) to (7) sets out circumstances in which a panel member may be removed in these circumstances, including subsection 3(c):

on the ground that the member has—

(i) a direct interest in the matters to which the inquiry relates, or

(ii) a close association with an interested party,

such that his membership of the inquiry panel could reasonably be regarded as affecting its impartiality;

Whilst in terms of s12(2) a member of an Inquiry panel may at any time resign his appointment by notice to the Minister, it is submitted that this should not be done in circumstances where the issue of partiality, actual or perceived, is the issue unless the Chair believed that he fell foul of the statutory test. To do otherwise would be to usurp the statutory function as set out in Section 9 of the Act, and to remove himself from office in circumstances not required or anticipated by the Act.

It is therefore submitted that if the Chair is considering the issue of whether or not he should recuse himself, the test is not the common law court test of "apparent bias" but the Public Inquiry statutory test that would have to be carried out by a Minister before being removed from office, namely can the Chair be seen to have a "close association" with the family such that his membership of the Inquiry panel could reasonably be regarded as affecting its (the panel's) impartiality.

No one has come near to making such an assertion, and rightly so as there is no evidence of an association with the family, close or otherwise. As stated in the opening paragraph of the submissions calling the Chair to recuse himself it is accepted that he is a man of the utmost integrity.

Esto the Court wishes to carry out the test for "apparent bias" it is clearly not met in the present circumstances.

These meetings cannot be categorised as secret meetings with the family. These meetings were referred to by the Chair in hearings (see letter of 29th April 2025 from Solicitor to the Inquiry which sets details out and the transcripts where the Chair mentions the meetings and expresses his condolences to the family reminding all parties that they are at the heart of the inquiry). These meetings were also publicised in the press and also on social media.

The family are at the heart of the Inquiry. Doubtless this is a recognition of the Article 2 duty on this inquiry to ensure that there should be an effective official investigation due to the fact that Mr Bayoh, a man suffering a mental health crisis, died in police custody. Those who remain are entitled to a robust and thorough investigation, answering the questions the family are legally entitled to answers to.

As the Chair stated in the transcript of update dated 30th April 2021 (Doc 2 of Bundle) a lengthy period of time had elapsed without the family receiving answers to fundamental questions that they were entitled to. He also stated at the PH (see Document 8 paragraphs 33-40 at page 38 of Bundle 2) that the article 2 requirement was such on the Inquiry that the family of the deceased person must be involved in the process. As the Solicitor to the Inquiry set out at P72 of the Bundle in the letter of the 5th March 2025 "*The engagement of the families with the Inquiry is crucial to the effectiveness of the Inquiry in fulfilling its terms of reference. If the inquiry failed to obtain and retain the confidence of the families its effectiveness would be prejudiced. Over the years from 2015 the families lost confidence in the various state institutions with which they had dealings – Police Scotland, the Police Investigations and Review Commissioner, and the Crown Office. There was a real prospect that they would not engage at all with the Inquiry processor at some point would cease to engage with it. The Inquiry has been mindful of the obligation under article 2 ECHR to involve the next of kin in the Inquiry. From the beginning the Chair has publicly expressed his intention to keep the families at the heart of the inquiry. Core Participants have publicly expressed their support for this approach*".

The letter of 8th November 2021 is a letter which is compassionate and appropriate: Mr and Mrs Johnson talked of the traumatic journey from the day of Sheku Bayoh's death till the Inquiry. The idea that a Chair acknowledging that the family members of Sheku Bayoh shared with them their story is 'somehow wrong', is against a background of every public body which they had come into contact with the family failing them in one way or another.

The comments made by the family are only repetitions of comments made in open hearings in 2021, which were heard by all Core Participants, who were advised by the Chair that that he was in discussions with family members. No issues were raised with this by any parties.

Other meetings were a matter of public record, being recorded in the press.[1]

Again, no issue was taken by any Core Participants or any members of the public.

This is perhaps not surprising as it is in fact, commonplace for Chairs to meet with families of the deceased who are core participants, speak to them about their experiences, as a simple google search would reveal. Examples include the Scottish Covid-19 Inquiry,[2] UK Covid-19 Inquiry[3], Vale of Leven Inquiry[4], Scottish Hospitals Inquiry[5] and Grenfell Tower[6].

We have also asked solicitor Imran Khan KC in the Public Inquiries that he has been involved in, whether the Chair has met with the family who are core participants. He has confirmed in writing the following:

1. Stephen Lawrence Inquiry chaired by Sir William Macpherson
2. Zahid Mubarek Inquiry chaired by Mr Justice Keith
3. Victoria Climbie Inquiry chaired by Lord Laming
4. Undercover Policing Inquiry chaired by Mr Justice Mitting[7]

Observations on the submissions made on behalf of SPF, Walker and Short

The law on apparent bias as it relates to public inquiries is not clearly made out by reference to the authorities in paragraph (4). The paragraph proceeds on the basis that all "decision makers' are operating under the same circumstances in the same sort of cases. They are not.

[1] https://www.theguardian.com/uk-news/2022/nov/22/sheku-bayoh-family-facing-despicable-racism-says-inquiry-chair; https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-63715727; https://www.bbc.co.uk/news/articles/ckgz7rrj50ro
[2] https://www.bbc.co.uk/news/uk-scotland-63787175; https://jerseyeveningpost.com/morenews/uknews/2022/11/29/lord-brailsford-pressed-reset-button-on-covid-19-inquiry-families-say/; https://www.covid19inquiry.scot/news/inquiry-chair-meets-bereaved-families-and-relatives-care-home-residents
[3] https://www.bbc.co.uk/news/uk-england-birmingham-67220936; https://covid19.public-inquiry.uk/news/every-story-matters-inquiry-visits-birmingham-to-hear-peoples-pandemic-experiences-new-contracts-awarded/; https://covid19.public-inquiry.uk/news/inquiry-thanks-the-thousands-of-people-who-shared-their-views-in-its-public-consultation/
[4] https://digital.nls.uk/pubs/scotgov/2016/9781784128449.pdf
[5] https://www.hospitalsinquiry.scot/news/lord-brodie-meets-legal-representatives
[6] https://www.grenfelltowermemorial.co.uk/january
[7] See Appendix 1

As aforementioned, a Public Inquiry does not determine civil or criminal liability nor does it have adversarial parties. As such the dicta in authorities which relate to determinations of civil and criminal liability is not apt for the present circumstances. Whilst *Doherty*, decided in 1997 as referenced in paragraph (5) may be good authority for a criminal case, it does not inform as to what the test is in a Public Inquiry. Further, this meeting was "private" in the sense it was a meeting between the Sheriff and the witness. The circumstances in which the Chair met the family could not have been less private – there were solicitors for the Inquiry and family present, counsel for both and also on occasion admin staff.

Further, the case of *Kanda v Malaya* 1962 AC 322 was a civil case where there was a determination of rights. As stated "*No one who has lost a case will believe he has been fairly treated if the other side had access to the judge without his knowing*". Again, the concepts of impartiality cannot be moved from one form of hearing to another without consideration of the nature of the hearing. This Inquiry will not determine whether a party wins or loses. Again, as aforestated, there was no secrecy to these meetings.

Whilst the statutory requirement of impartiality is noted in the submissions, the test is not addressed, rather the Chair is invited to proceed on the basis of the common law of natural justice. It is not clear why the statutory test in respect of impartiality is not addressed.

The "reasonable man" test is mentioned but not given separate consideration. The reasonable person is not unduly suspicious, not naïve, they are taken to know all the facts before the decision maker, including what happened at these meetings and the purpose for which these meetings were carried out.

The grounds for recusal

November 2021

It is not understood what is meant by the classification of these meeting as private. They took place with legal representatives of the family, CTI, STI. There was no discussion of evidence. It is not clear when other CPs obtained s21 notices and whether all parties received these at the same time. The fact that the Chair listened to the family and latterly expressed a view on this is nothing more than common decency and a recognition of the article 2 duties upon the Inquiry.

April 2022

Again, the meeting was not private and no evidence was discussed. Again, it appears that the context of the nature of a public inquiry into the death of a man in police custody is not properly considered when issue is taken with the Chair describing the opening video as "a very strong start" to the hearings" – the video is about the life of Sheku Bayoh from his friends and family perspective. Such pen portraits in Inquiries are not uncommon and Chairs frequently comment on the contents of such matters (such as the videos at the beginning of modules in the UK Covid Inquiry and Scottish Covid Inquiry.) as to how they have been affected. Nothing said to the family about this was any different from the public display of condolences to the family.

May 2022

Paragraph 22 of the submissions fail to acknowledge the fundamentally different rights of the family as Core Participants in terms of article 2 ECHR and the duties to the family that the Public Inquiry as a public body must ensure they have effective participation. It is suggested that Ms Short is entitled to ask why she is not "at the heart of the Inquiry". The answer is simple: she did not die in police custody nor has she had her Article 2 rights breached by an unconscionable wait to find out answers to question about Sheku Bayoh's death which the family are entitled to as a matter of law.

Paragraph 24 suggests that the pen portrait of Mr Bayoh's life "is problematic" on the basis that other pen portraits in other Inquiries are where "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". Firstly, the pen portrait was shown now some years ago. No objection was taken at the time and no submission that this was "problematic" was raised. Secondly the issue of who was the "wrongdoer" exposes a fundamental misunderstanding of what the job of the Inquiry is. Mr Bayoh was a man who died in police custody. It is clear, and even suggested by a number of civilians and officers who were present, that he may have been suffering from a mental health crisis. The post-mortem makes clear that that sudden death occurred "whilst being restrained". It is the job of the Inquiry to examine the circumstances of his death as per the terms of reference. For the avoidance of any doubt it will come to be submitted when appropriate to do so that Mr Bayoh was in the midst of a mental

health crisis and ought to have been met with a proper analysis of his state and treated accordingly as a medical emergency.

Further at paragraph 24, the assertion that the Chair has dealt differently with witnesses appears not to specify in what way this is so. The questioning of some witnesses and the decision not to call others is a matter for the Chair and apparent bias cannot be suggested without an evidential basis for it. Impartiality does not mean treating all people in the same way. Had that been so it might have been argued that treating accommodations made for witnesses to give evidence for example remotely or in private were not being impartial. This is clearly not the case.

November 2022

It is not clear on what basis it is asserted that there was 'plainly discussion of evidential matters" or that they discussed "matters of substance". It can hardly be surprising to any Core Participants that the belief of the family is that what happened on the 3rd of May 2015 should never have happened and that race was an issue. The family have spoken about this publicly and in the press and the terms of reference reflect that the issue of race is a live one.

The suggestion at paragraph 27 that Mr Bhatt saying that "I "don't have the magic wand to change the world but what we can is try to help achieve what you want" is " redolent of partiality and unfairness" because no other Core Participant was told this does is not correctly analysed. Being impartial and fair does not mean that all Core Participants are told the same thing. What the family want is answers to the questions they have been asking since the day Sheku Bayoh died. Paragraph 28 does not disclose any bias.

The categorisation of the statement of Ade Johnson as evidence, or the statement of Mr Anwar as a "submission" is wrong. The Chair was not sitting to hear evidence or for submissions to be made to him. Moreover, as per paragraph 31, Kadi Johnson is correct to state that they were the "victims" – they lost their brother. The "helping of Mr Bayoh" is getting to the truth: the family have repeatedly asked for the truth.

January 2024

The Chair indicating he was "profoundly affected" by the evidence of Kadi Johnson is no different from comments made by other Chairs about evidence from core participants. It is relatively common that comment is passed by the Chair in public inquiries, especially to those who have lost loved ones. The characterisation of the statements made by the family being "private representations" are not correct. Again, it can come as no surprise to any Core Participant that the family consider the way they were treated was inappropriate to say the least. At paragraph 36-38, again, the characterisation as "private allegations of mendacity" is incorrect. Again, it cannot be a surprise to any core participant that the family consider that the PIRC and the Crown were not truthful in certain aspects.

September 2024

Again, the submissions fail to differentiate the fact that the Public Inquiry owed an article 2 duty to the family which was being discharged by such a meeting. The extension of the TOR by the family did not require to be shared with anyone but the Minister, and the Chair did not need to consult with anyone but the Minister. Both the Minister and the Chair are wholly entitled to express their views on whether the TOR should be extended. There is no statutory basis on which the other Core Participants had to be involved in any way in that process. It is suggested that the family was being given special treatment by being advised for example that the drafting of submissions was in early stages. Such information can hardly be suggested to be giving some advantage. All the Core Participants are legally represented. If they wanted to make representations about how submissions should be done, or timescales or structure they are free to do so. The family, in the exercise of their article 2 rights are proactive in their requests. This does not mean that the Chair and or the Panel shows apparent bias by responding to that.

In relation to paragraph 57 any discussions as to "how they were coping" is no doubt a reflection on the fact that the continued delay was and is a continuing breach of the families' article 2 rights.

It is submitted when one considers the reasonable person, fair minded and neither unduly naïve nor unduly suspicious, appraised of all the information that someone who had been present at

the meetings would know and understanding the law and duties on a public inquiry in relation to the family of a person who died in custody, there would be no question that the way the family have been treated in particular in meeting with the Chair and allowing him to hear them does not affect the impartiality of the Chair in any way.

Repeatedly it was made clear in public and covered in national press that this was occurring. It is referenced in the Chair's remarks to the Inquiry and not one member of the public, or Core Participant has considered it an issue till this time.

Like the argument in race matters "we treat everyone the same" so we are not racist, the request to recuse confuses and conflates the concept of impartiality with treating everyone equally. Paragraph 66 exemplifies the position clearly "justice requires to be even handed". The fact is that the article 2 rights of the family as a person who has lost a loved one suffering from a mental health episode in police custody whilst being restrained places them in a different position from other core participants. The Chair has a duty in respect of him which in indicated that he was going to discharge and was discharging by meeting them.

It should be made clear that in some of the meetings the Chair left after he had heard from the family, and did not sit in for some of the discussions. Had he done so in any event nothing discussed was such that would give rise to an apparent lack of impartiality or apparent bias (if there is any difference which, it is submitted, there is not).

Paragraph 68 suggest that the Chair as is characterised "supporting" the extension of the terms of reference is an incorrect analysis of the situation and, it is submitted not the view a reasonable person who was knowledgeable about the job of the Chair and the law on the matter would form. The Act does not restrict who can seek a change to the terms of reference, if indeed an application had come from the Chair, and he expressed a view on why he thought this correct then that would be absolutely appropriate. However, the fact is that the Chair and Minister consulted after the Minister was asked to extend the terms of reference and he did what was absolutely appropriate and necessitated by the statute S5(3) and (4) IA05:

> (3) The Minister may at any time after setting out the terms of reference under this section amend them if he considers that the public interest so requires.

(4) Before setting out or amending the terms of reference the Minister must consult the person he proposes to appoint, or has appointed, as chairman.

Whilst not wishing to take time in these submissions in respect of other substantive legal argument, given the evidence in relation to the way the Crown dealt with the matter of prosecution it cannot seriously be suggested anything other than the evidence to date is suggestive of strong indications that the prosecutorial decision was flawed. The characterisation of the flawed prosecutorial decision is characterised in the submission to recuse as "the decision by Crown Office not to prosecute any of the officers involved in the arrest of Mr Bayoh" is imputed by those who make the submission. Amongst other things, fundamental flaws which breach article 2 are also found in the failure of the prosecuting authorities to consider the issue of race in any way. That alone could be productive of a fundamentally flawed prosecutorial decision.

In relation to the "four final points":

1. Whilst the Public Inquiry fulfils the questions posed in an FAI, that of course does not make it one. It does not convert it to an adversarial process, in a court, with different duties arising to parties (rather than CPs) under the Human Rights Act 1998. The remit of the Inquiry is broader, its powers to set its own rules and conduct its inquiry as it sees fit. The dicta from cases in an adversarial process cannot be lifted and applied to a different process without careful examination of those differences, which has not been done here. Examples of the differences in the rationale include The Chair of this Public Inquiry is not sitting a judge in a court or tribunal – the dicta in relation to the "judicial office holder' meeting with "parties" cannot be transposed to a non-judicial role where there are no parties but rather core participants.

2. It is posited "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," then the redactions should not have been made. It is not clear if this forms part of the argument that the Chair is not seen to be acting in a way which appears impartial. If so, it does not bear analysis. The redactions are made properly and in accordance with necessity in respect of the duties incumbent on the Inquiry in the same way that all the redactions have been made in disclosure.

3. If the foregoing point is to suggest that all parties ought to be placed in the same position and there should be no redactions, the submission is fundamentally undermined by the acceptance that some redactions are appropriate. The proposition that the family were given information about Mr Paton that was not appropriate is not well founded.

4. Paragraph 78 is difficult to follow. Those who wrote it are making an application to the Chair for the chair to recuse himself, yet are also suggesting that this not a matter for him to consider. It is submitted that the current procedure is the appropriate one to follow as made clear in the response to the letter to the Chief Constable by the Solicitor to the Inquiry.

For the foregoing reasons it is submitted that :

1. The test in relation to impartiality is within the 2005 Act and as such that should be the legal test which is applied to any suggestion that the inquiry Chair and Mr Bhatt have not been impartial in their actings by having meetings with the family.

2. The statutory test is not addressed but in application of the issues raised in the submission it does not come anywhere close to having a basis for reaching the statutory test.

3. If the common law test is to be considered the meetings and actions of the Chair and Mr Bhatt do not give rise to apparent bias or as stated in paragraph 78 whether "the Chair himself has acted "fairly and impartially." The submissions have failed to take into account the differing nature of a Public Inquiry to that of a Court or Tribunal and the difference between parties in an adversarial process and an inquisitorial one and the different duties incumbent upon the Chair in respect of the article 2 rights of the family.

4. The motion ought to be refused.

Dr Claire Mitchell KC

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22 May 2025