In the matter of the Inquiries Act 2005

And in the matter of the Inquiries (Scotland) Rules 2007

The Sheku Bayoh Inquiry

SUBMISSIONS OF COUNSEL TO THE INQUIRY

Representation:

Scottish Police Federation; Ex-PC Craig Walker & Ex-PC Nicole Short:[1]	Roddy Dunlop KC
The Families of Sheku Bayoh:[2]	Claire Mitchell KC
Good, Smith & Tomlinson:	Dan Byrne KC & Carla Fraser
Maxwell, Gibson & McDonough:	Shelagh McCall KC
Alan Paton:	Brian McConnachie KC & Laura Anne Ratcliffe
Chief Constable of Police Scotland:[3]	Maria Maguire KC, Lisa Henderson KC & Suzanne Lambert
Gary McEwan & Conrad Trickett:	Duncan Hamilton KC
Patrick Campbell:	M.A. MacLeod KC
Solicitor General for Scotland:[4]	Alastair Duncan KC
Coalition for Racial Equality & Rights:[5]	Mark Moir KC & Kevin Henry
Counsel to the Inquiry:[6]	Jason Beer KC

Issues:[7] [**a**] Whether the chairman of a public inquiry should determine an allegation of apparent bias made against himself; [**b**] Whether this hearing should take place; [**c**] Whether the chairman of a public inquiry should determine allegations of apparent bias made against the assessors in a public inquiry; [**d**] The right test for determining allegations of apparent bias in the context of a public inquiry; [**e**] The qualities of a fair-minded and informed observer; [**f**] What a fair minded and informed observer would understand as to the nature of a public inquiry; and [**g**] Issues relating to (i) Mr Bhatt and (ii) Mr Fuller.

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[1] Hereafter "the SPF".

[2] Hereafter "the Families".

[3] Hereafter "the Chief Constable".

[4] Hereafter "the Solicitor General".

[5] Hereafter "the CRER"

[6] Hereafter "CTI".

[7] These are very much reduced to shorthand form and should not be taken to be a complete or exhaustive definition of the relevant issues, nor the order in which they necessarily fall to be determined.

A. Introduction

1. These are the submissions of CTI appointed to represent the Inquiry at the hearing on 12th and 13th June 2025 to determine the application of the SPF that (i) the Chair of the Inquiry should recuse himself; and (ii) one of the Inquiry's Assessors, Raju Bhatt, should also recuse himself.[8] They address the following issues:
    a. The determination of an allegation of apparent bias by the person against whom the allegation is made (Section B below);
    b. The necessity of submissions from Core Participants and of a hearing (Section C below);
    c. The determination of an allegation of apparent bias against the assessors of a public inquiry (Section D below);
    d. The test for determining allegations of apparent bias in the context of a public inquiry (Section E below);
    e. The qualities of the fair minded and informed observer (Section F below);
    f. What a fair minded and informed observer would understand as to the nature of a public inquiry (Section G below);
    g. Issues concerning the position of (i) Mr Bhatt, and (i) Mr Fuller (Section H below).

2. As will be seen from the detail of the submissions below, they focus upon issues of law concerning apparent bias and fairness and of the law and practice of public inquiries – albeit on occasions references are made to the facts and circumstances of this Inquiry. That is because (i) the Chair of the Inquiry and each of the Assessors are filing Notes which addresses certain factual issues, (ii) the Chair in due course will consider and address factual issues in his ruling, and (iii) it is not the principal function of CTI – in the present context – to seek to persuade or convince the Chair what conclusion should be drawn from the facts (as disclosed by the documents and the Notes) insofar as they relate to the Chair.[9]

[8] One of the other Core Participants has recently added Michael Fuller to the list of those who should recuse themselves.

[9] In particular where the Core Participants themselves offer a full range of views.

B. The determination of an allegation of apparent bias by the person against whom the allegation is made

3. The Chief Constable previously submitted that it was not open to the Chair of the Inquiry to determine the SPF's application.[10] Thus, the Chief Constable submitted:

> Whilst a decision maker could decide voluntarily to recuse themselves because of the appearance of bias, it is not for the decision maker to determine that they are or are not biased in fact…
>
> It is illogical to consider that the Chair remains immune from any suggestion that he, likewise, should not be part of any decision-making process in such a hearing.
>
> [emphasis added]

4. As was subsequently observed by the Deputy Solicitor to the Inquiry,[11] the Chief Constable's position appeared to be that if a decision-maker (whether a judge in litigation; a member of a tribunal; or the chair of an inquiry) is faced with an allegation that they are apparently biased, then they must either agree with the suggestion and recuse themselves from all further participation in the proceedings, or recuse themselves from the decision as to whether a fair-minded person would conclude there to be a real possibility of bias. That suggestion was plainly wrong in law (a search of legal information databases discloses hundreds of cases - in Scotland, England & Wales, and across the Commonwealth - where the decision-maker was alleged to have been apparently biased or was alleged to have acted in a procedurally unfair manner and proceeded to determine that issue themselves).[12]

5. The Chief Constable has not maintained her submission. Indeed, quite the opposite: (i) she has said that the SPF's application is "misconceived" insofar as it relates to Mr Bhatt;[13] (ii) she has said that the application by the SPF insofar it relates to the Chair

[10] Chief Constable's letter of 2nd May 2025 to the Inquiry (copied to all Core Participants) (PH-00021).

[11] Inquiry's letter of 6th May 2025 to the Chief Constable (copied to all Core Participants) (PH-00022).

[12] The fact that the decision was then challenged on appeal, by way of judicial review or through a statutory route of challenge is hardly the point.

[13] Chief Constable, [28].

"calls for an answer";[14] and (iii) she has said that she needs to hear from the Families and the Inquiry before setting out her position at the hearing.[15]

6. No other Core Participants have aligned themself with the point previously taken by the Chief Constable.[16]

7. It is the procedurally correct approach to take for the Chair to determine the application that he should recuse himself (rather than, as the SPF first appeared to contemplate, issuing a petition in the Court of Session preventing the Chair from having any continuing role in the Inquiry (and seeking interim relief pending the hearing of the petition)). Quite aside from the fact that habitually such applications are determined by the decision-maker whose conduct is called into question, as will be seen below, the law requires consideration of the proceedings as a whole, rather than simply looking at the issue or conduct about which immediate complaint is made - in the context of a long-running public inquiry, determining the issues of apparent bias and fairness within the Inquiry (rather than raising them outside the Inquiry for the first time) will allow this more rounded approach to be taken.

8. Finally, on this issue, it is noted that the SPF state that:
    a. "The Chair cannot be the ultimate arbiter of whether the Chair himself has acted fairly and impartially".[17] This is agreed – and it is not suggested that the Chair is the ultimate arbiter of any of the issues raised by the application: plainly any Core Participant has the right seek to challenge any decision by way of judicial review.
    b. "Whilst they do not go as far to say that the hearing set for 12-13 June 2025 should not proceed…they do agree that if the chair is tainted by apparent bias…this is not something that he might avoid by deciding to the contrary and

[14] Chief Constable, [11], [41] and [51].

[15] Chief Constable, [26].

[16] There is a slightly confusing sentence in [9] of Mr McEwan's submissions and [7] of Mr Trickett's submissions: - that they support "…the submissions that the question of whether apparent bias is established is plainly not one for either the Chair or his Counsel…" This seems rather at odds with the balance of the submissions.

[17] SPF, [78].

giving himself, as it were, a clean bill of health".[18] This is rather tautological, but the sense of what is understood may be suggested is agreed: if the chair believes that the test for apparent bias is satisfied, that is the end of the matter - he cannot then decide that he is not apparently biased, nor can he decide that as a matter of fact that he will act fairly and impartially.

C. The necessity of submissions from Core Participants and a public hearing

9. The Chief Constable previously submitted to the Inquiry that it should not hold a hearing to determine the SPF's application for recusal, and instead that the issue should be determined by the Chair, or by independent counsel advising the Chair,[19] on the basis of the SPF's draft submissions (alternatively further submissions from the SPF) and the records of the meetings).[20]

10. The Chief Constable's position – that the issues raised by the SPF should be determined on the papers, and having regard only to what the SPF had submitted – would not have been fair (ironically, determining an issue on the basis of one set of representations is one of the very things that was complained about in the Chief Constable's claim for judicial review of Scottish Ministers relating to disclosure concerning a decision to amended the Inquiry's Terms of Reference).
    a. Only the SPF had previously made submissions on this issue. A fair process requires that all of those with a proper interest in the Inquiry should be able to make reasoned submissions, especially in relation to such an important issue. It is not clear why the Chief Constable wanted the Chair to take a decision on the basis of only one set of arguments, namely those made by the SPF.
    b. The SPF's submissions were made at a stage when there had not been disclosure of the materials relating to the five meetings held by the Chair with the families of Mr Bayoh. That disclosure has now occurred. Taking a decision on the basis

[18] SPF, [78].

[19] The suggestion that the hearing was not necessary because independent counsel could advise on the SPF's submissions, and they could "…advise the Chair that there is apparent bias, in which case what is the purpose of the hearing?" misunderstands the functions of the chair of an inquiry and counsel instructed by them: the decision falls to be made by the Chair, not by their counsel.

[20] Chief Constable's letter of 2nd May 2025 to the Inquiry (copied to all Core Participants) (PH-00021).

of one set of submissions that were prepared before the disclosure of such material would also not have been fair.

c. It was suggested by the Chief Constable that "If one Core Participant has an issue, that is not going to be resolved by asking other core participants their views…" The principal purpose of holding a hearing is not to "resolve" the concerns of the Core Participant which has made a submission of apparent bias by allowing other Core Participants the opportunity to set out their views. It is to ensure fairness (a duty imposed on the Chair by s17(3) of the Inquiries Act ("*the 2005 Act*")) and to seek to place the Chair in the best position possible to make a fair and balanced decision.

D. <u>The determination of an allegation of apparent bias against the assessors of a public inquiry</u>

11. The SPF submissions proceed on the basis that the decision as to whether an assessor should recuse himself from continuing to act as an assessor falls to the assessor to make.[21] Other Core Participants either adopt that submission as part of their adoption of the SPF's submissions, or do not address the issue at all.

12. As a preliminary point, the issue arises as to whether an assessor ought to make the decision whether or not to recuse themselves from a public inquiry, or whether that decision falls to be made by the Chair of the Inquiry under s11(5) of the 2005 Act (with the consent of Scottish Ministers).

13. Both Raju Bhatt and Michael Fuller were appointed by Scottish Ministers, rather than the Chair, in accordance with s11(2)(a) of the 2005 Act.

14. Under the 2005 Act the decision as to whether an assessor must be recused from further participation in a public inquiry falls only to the chair of the inquiry, but not the Assessor themselves.

15. The 2005 Act draws a distinction between the inquiry panel on the one hand and assessors on the other.

[21] SPF, [3].

a. The inquiry panel is, according to the interpretation provisions in s43(1) of the 2005 Act, to be read in accordance with s3(2) of the 2005 Act, and consists of (i) the chair and (ii) and "any other member or members" - the latter phrase meaning those members appointed in accordance with s3(1)(b) and s4(1) and (3) of the 2005 Act.
b. An assessor is a person appointed in accordance with s11 of the 2005.
c. An assessor is *not* a member of the inquiry panel.

16. Section 12 of the 2005 Act contains detailed provisions as to the duration of the appointment of members of the inquiry panel (but not assessors). In particular:
    a. A member of an inquiry panel remains a member until the inquiry comes to an end, or he or she dies: s12(1).
    b. A member of an inquiry panel may resign his or her appointment at any time: s12(2).
    c. The Minister may terminate the appointment of a member of the inquiry panel: s12(3)-(7).

17. By contrast, in relation to assessors:
    a. There is no provision stating that they must remain an assessor until the inquiry comes to an end (i.e. no equivalent to s12(1)); and
    b. There is no provision stating that they may resign their appointment (i.e. no equivalent to s12(2)).

18. Instead, the power to terminate their appointment is expressly given to the chair under s11(5) (albeit only with the consent of the Minister if the Minister made the appointment):

> The chairman may at any time terminate the appointment of an assessor, but only with the consent of the Minister in the case of an assessor appointed by the Minister.

19. For all of these reasons, it is for the Chair to determine whether to terminate the appointment of assessors rather than the assessors doing so themselves. If the Chair determined to seek to terminate such appointments in this Inquiry, as the Assessors

were appointed by Scottish Ministers, the consent of Scottish Ministers would be required.

E. The test for determining an allegation of apparent bias in the context of a public inquiry

20. This is a central issue. The Core Participants have adopted a range of approaches.[22]

Families' submission: recusal only permissible if a "close association" is established

21. The Families submit that (i) the common law test of apparent bias does not assist in determining the circumstances in which a member of an inquiry panel should recuse themselves in a public inquiry;[23] (ii) although s12(2) of the 2005 Act permits the member of an inquiry panel to resign their appointment at any stage – by notice to the Minister, such a panel should not do so unless they were satisfied that the grounds for a Minister to exercise their powers of termination under ss12(3)-(7) of the 2005 Act were made out;[24] and (iii) and in the present context that would involve the chair determining that he had a "close connection" the family such that his membership of the inquiry panel could reasonably be regarded as affecting its impartiality.[25]

22. There are a range of problems with this submission.

23. First, s12(2) of the 2005 Act ("A member of an inquiry panel may at any time resign his appointment by notice to the Minister") is widely drawn and apt to permit a member of an inquiry panel to resign their appointment for a broad range of reasons, including because they are satisfied that they should recuse themselves from further involvement in the inquiry on the grounds of apparent bias or fairness.

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[22] Many Core Participants rely in their submissions on decisions made by the High Court and the Court of Appeal of England and Wales, cases determined by the House of Lords and Supreme Court on appeal from such decisions, and inquiries conducted in England & Wales. This is appropriate in circumstances where (i) the 2005 Act applies across the United Kingdom; (ii) there is a general presumption of interpretation that statutes applying across multiple UK jurisdictions—such as England and Wales and Scotland—should be interpreted consistently, unless there is a clear reason not to do so; and (iii) the cases and inquiries relied on provide may useful assistance to the Chair. These submissions adopt the same approach.

[23] Families, p3 (second full paragraph).

[24] Families, p3 (first full paragraph).

[25] Families, p3 (second full paragraph).

24. Second, the powers set out in ss12(3)–(7) of the 2005 Act are exercisable by the Minister – they vest powers in the Minister, and set out the grounds on which they are to be exercised by the Minister, and not by members of an inquiry panel.

25. Third, s12(2) of the 2005 Act draws no express link between the exercise of the power of resignation in that subsection with the exercise of the powers of the Minister in ss12(3)-(7) of the 2005 Act.

26. For all of these reasons, it is submitted that the Chair should not accede to this aspect of the Families' submissions.

SPF submission: ss9 and 17 of the 2005 Act impose the same requirements as were "laid down in *Kanda*"

27. The SPF submits that the application of the presumption that Parliament is taken to have known what the law was prior to enacting legislation means that, by enacting ss9 and 17 of the 2005 Act, Parliament "…may be taken as having decided to impose the same requirements of natural justice on the Chair" that were "laid down in *Kanda*".[26]

28. There are a range of problems with this submission too.

29. First, the principle of statutory interpretation upon which the SPF relies arises if the court is satisfied that the common law rule in question is juridically well founded. But the SPF have pointed to no such well-founded common law rule as it applies to public inquiries. Indeed, for the reasons set out later in these submissions,[27] the lifting of principles derived from authorities concerned with bodies which are adjudicative of legal rights and their application to the different context of inquisitorial proceedings is controversial and problematic.

30. Second, what fairness requires is *always* fact and context specific. Thus, in *Lloyd v McMahon* [1987] AC 625, Lord Bridge held at 702:

[26] SPF, [10].

[27] See paragraphs 80 to 135 below.

> The so-called rules of natural justice are not engraved on tablets of stone: to use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

31. Third, the Explanatory Notes state in relation to s17(3) of the 2005 Act that "Subsection (3) requires the chairman to act fairly throughout the inquiry. This serves to underline the duty that already exists in the common law."[28] There is no suggestion, here or elsewhere, that there was any intention to incorporate an amorphous and unsettled list of "rules of natural justice" by the enactment of s17(3). Instead, what Parliament has done is to reflect the more general duty to be fair.

32. Fourth, the 2005 Act was an Act "to make provision about the holding of inquiries" – it gave effect to proposals contained in a Government consultation paper, dated 6th May 2004 entitled "Effective Inquiries", which itself arose out of a memorandum, submitted to the House of Commons Public Administration Select Committee as part of its "Government by Inquiry" investigation.[29] There is no mention in any of those materials of the identification of *Kanda* as the single case the principles of which it was intended to reflected in ss9 and 17 of the 2005 Act.

33. For all of these reasons, it is submitted that the Chair should not accede to this aspect of the SPF's submissions.

Porter v Magill

34. It is clear that the leading authority on the approach to be taken when an allegation of apparent bias is made against a decision maker who adjudicates upon legal rights is *Porter v Magill* [2002] AC 357.[30]

[28] See the *Explanatory Notes* to the 2005 Act, paragraph 33.

[29] See the *Explanatory Notes* to the 2005 Act, paragraph 3.

[30] It has been cited approvingly by the House of Lords, Supreme Court and Privy Council some 47 times since it was decided in December 2001.

35. The House of Lords decided that the test for apparent bias described by Lord Goff in *R v Gough* [1993] AC 646, at 670,[31] which had been the subject of criticism by courts in the Commonwealth and was in conflict with the approach taken in Scotland, fell to be modified – giving the leading speech in the House of Lords, Lord Hope held:

> [**102**] In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p711A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp726H-727C:
>
> > "85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."
>
> [**103**] I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg

[31] "…having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

> court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.
>
> [emphasis added]

36. Accordingly, it is now well established that there are two stages to the process. First, one must ascertain the relevant facts which have a bearing on the suggestion that the decision-maker has the appearance of bias. Second, one must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker is biased. The second stage is objective.

37. In applying the *Porter v Magill* test it is important to understand what the word bias means. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see *e.g. Bubbles & Wine v Lusha* [2018] EWCA Civ 468, at [17]; and *Secretary of State for the Home Department v AF (No2)* [2008] 1 WLR 2528, at [53].

38. It has been emphasised time and again that the *application* of the test for apparent bias is intensely fact sensitive: see e.g. *Belize Bank Limited v Attorney General of Belize* [2011] UKPC 36 at [73] (*per* Lord Kerr).

Considerations of cost and inconvenience

39. Some of the submissions by the Core Participants mention the time that has already elapsed since the death of Mr Bayoh, the costs and resources already devoted to the Inquiry, and the likely further delay and cost in the event of the Chair recusing himself.

40. However, the consequences of a decision to recuse should *not* be brought into account in determining whether to recuse. That is because if the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, at [11] (*per* Lord Steyn).

Statements by applicants of a loss of confidence or faith

41. The SPF, and some of those that support it, state on occasions in their submissions that they have lost faith or confidence in the Chair (or the Inquiry), often peppering such comments with statements that they have respect for the Chair and make the application with regret.[32]

42. These statements of the subjective views of participants fall to be left out of account: If the legal test is not satisfied, then the objection to the decision-maker must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: *Resolution Chemicals Ltd v H Lundbeck A/S* [2014] 1 WLR 1943, at [40].[33]

Need to consider the judge's conduct in the proceedings as a whole

43. In the context of proceedings which are adjudicative of legal rights, it is necessary to look at the conduct of the judge as a whole across the proceedings, rather than simply focussing on at the issue or conduct about which immediate complaint is made – see, for example *Singh v Secretary of State for the Home Department* [2016] 4 WLR 183, *per* Davis LJ at [36]: "It is necessary to consider the proceedings as a whole in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased."

44. In *Re Z (A Child) (Recusal)* [2022] 4 WLR 78 the Court of Appeal built on this principle, by holding that the fair minded and informed observer would look at the conduct of the judge more generally in the proceedings, in particular the other decisions that he or she had made – see [95]:

> … in considering the proceedings as a whole to determine whether there was a real possibility that the court was biased, the fair-minded and informed observer would look at the judgment delivered at the end of the hearing under scrutiny and at the extent to which it was supported by the evidence. We recognise that, as Black LJ observed in *Re G*, supra, at paragraph 52,

[32] SPF, [1]-[2]; Smith, Good & Tomlinson, [1]; Maxwell, Gibson & McDonough, [3] and [7]; Paton, [1]; Campbell [3] and [6]; and Solicitor-General, [111].

[33] The same applies to statements by others that they retain their faith in the Chair and the Assessors.

> "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence".
>
> Nevertheless, in considering the question of apparent bias in this case, it is relevant to note that the judge rejected a number of submissions made on behalf of the father. In particular, he refused to make a final child arrangements order; he rejected the father's contention that A should not meet the twins at this stage; and he dismissed the father's application for an order restricting the mother's exercise of parental responsibility of A. He also encouraged the father to relent and give his agreement to the making of a family assistance order.
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> [emphasis added]

Accounts by the person against whom the allegation of bias is made

45. A decision-maker may properly set out information relevant to a recusal application, but this should not include an explanation of how such information impacted on their thought processes, nor should it include any protestation that they did act fairly: see *e.g. Locobail (UK) Limited v Bayfield Properties Limited* [2000] QB 451 at [19].

No allegation of actual bias

46. It is not clear why, in addition to focussing on the content of the records of the five meetings, some of the submissions also contain "real world examples" of the conduct of the Inquiry, not of the Chair, more generally including:
    a. The disclosure by the Inquiry to the families of Mr Bayoh of a summary of the s21 notices served by the Inquiry, but not giving such disclosure to any other Core Participant;
    b. The use of pen portraits (in the course of which a video was played);
    c. The disclosure of documents (and the provision of notices of criticism) to witnesses before they gave evidence; and
    d. The nature and style of the examination of witnesses.

47. Either these are examples of conduct which those who support the application submit are evidence of actual bias of the Chair – i.e. they demonstrate that what was said in the meetings, or the impact of the meetings themselves, was translated into the conduct by the Chair within the Inquiry - or they are not.

48. The SPF, and those that support the SPF's application, are at pains to stress in their submissions that they make no allegations of actual bias and that they have the greatest respect for the Chair.

49. In these circumstances, the Chair may properly proceed on the basis that none of these facts and matters are prayed in aid of the allegation of apparent bias, nor that they are relied on as evidence that goes to support the application.

50. If, contrary to the submissions set out above, the Chair judges that the allegations of unfairness raised in relation to the conduct of the Inquiry Legal Team ("*ILT*") require to be determined, then the following submissions are made in relation to issues of inquiry practice and procedure.

Differential treatment by the Inquiry in relation to summaries of s21 Notices served by the Inquiry

51. The SPF alleges that:[34]

> …the provision to the family of the s21 notices does not involve treating the Core Participants equally. Other Core Participants had asked for sight of the s21 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 have been shared with the family and yet denied to others. From the very outset, accordingly, the family was treated differently from other participants.
>
> [emphasis added]

52. This allegation of differential treatment – disclosing s21 notices to the family, and not to other Core Participants – is made in error:
    a. On 1st November 2021 the families, through their solicitor, asked the Inquiry for a "schedule of the s21 notices".[35]
    b. On 3rd November 2021 the Inquiry sent to the families' solicitor a 14-page schedule setting out an "overview of the s21 notices that we have issued to date".[36]

[34] SPF, [15].

[35] PH-00033

[36] PH-00033, PH-00033(a).

c. On 4th November 2021 – i.e. the very next day - the Inquiry sent the very same 14-page schedule to all Core Participants.[37]

53. In fact therefore, the Inquiry's treatment of the families and the other Core Participants was the same in this regard.

The use of pen portraits (which include the playing of a video)

54. The SPF submit as follows:[38]

> 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.
>
> 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.
>
> [emphasis added]

55. The premise of this submission is incorrect – there are in fact many examples of where a pen portrait has been used in the very context of an inquiry into alleged police misconduct which has resulted in the death of a citizen and where the facts are hotly in dispute. These include the following.

56. **The Anthony Grainger Inquiry**: This was an inquiry under the 2005 Act established on 17th March 2016 by the Home Secretary.[39] It was chaired by His Honour Judge Thomas Teague KC.[40] Mr Grainger had been shot dead by a police officer on 3rd March 2012. He was unarmed, but believed by police on intelligence to be in

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[37] PH-00034, PH-00034(a).

[38] SPF, [23] and [24].

[39] Inquiry launched into the death of Anthony Grainger

[40] A Circuit Judge and later the Chief Coroner of England & Wales.

possession of a firearm. The facts were keenly disputed, in particular as to the veracity and meaning of the intelligence upon which reliance was placed, and the honesty of the police officer's belief that he has seen Mr Grainger reach for a weapon and that he believed that his and his colleagues' lives were in danger. The public inquiry heard a pen portrait of Mr Grainger, including statements from (i) his mother, and (ii) his partner.[41]

57. **The Jermaine Baker Inquiry**: This was an inquiry under the 2005 Act established on 12th February 2020 by the Home Secretary.[42] It was chaired by His Honour Clement Goldstone KC.[43] Jermaine Baker had been shot dead by a police officer on 11th December 2015 near to Wood Green Crown Court, the police believing that he was part of an armed plot to snatch defendants awaiting sentence from the prison van. The facts were hotly in dispute, in particular whether the police officer honestly and reasonably believed that Mr Baker was reaching for a firearm. The public inquiry heard a pen portrait about Mr Baker, which included (i) a video, (ii) evidence from Mr Baker's mother (which included "Nobody needed to die on 11 December 2015…When I look at what happened that day, I see Jermaine being treated by the police officers in the same way as by the school teachers and others in his life. He wasn't seen as a human being whose life was unique and valuable. The value of his life was forgotten in these officers' plan and in the end his life was written off by the premature and unreasonable judgement of [the police officer who shot Mr Baker]"; and (iii) evidence from Mr Baker's partner.[44]

58. **The Azelle Rodney Inquiry**: This was an inquiry under the 2005 Act established by the Secretary of State for Justice and Lord Chancellor on 30th March 2010.[45] Mr Rodney was fatally injured by an armed police officer on 30th April 2005 whilst conducting a "hard stop" of the vehicle in which he was travelling. The public inquiry was later to find that the officer, E7, had "no lawful justification" for shooting Mr

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[41] Anthony Grainger Inquiry - 20th January 2017, internal pagination pages 1 – 12 (pages 1 – 3 of the pdf).

[42] Inquiry launched into the death of Jermaine Baker

[43] A retired Senior Circuit Judge and former Resident Judge of Liverpool Crown Court.

[44] Jermaine Baker Inquiry - 16th June 2021, internal pagination pages 138, line 7 – to page 161, line 2 (pages 35 – 41 of the pdf).

[45] Inquiry launched into the death of Azelle Rodney

Rodney and he was later tried for murder at the Old Bailey. The public inquiry heard a pen portrait of Mr Rodney, from Mr Rodney's mother.[46]

59. This reflects the Chief Coroner of England & Wales's Guidance No.41 on the *Use of Pen Portrait Material*. In particular:[47]

> In inquests heard by a coroner and a jury, photographs and other imagery of the circumstances of the death may well form part of the evidence placed before the court. In such circumstances, families may well wish to include some photographs or imagery from the life of the deceased. The type of material to be permitted, the amount of it and the timing of its admission will be a matter of judgment for the coroner.

60. Nothing which happened when the commemorative evidence about Mr Bayoh was given in this Inquiry on 19th May 2022 went further than any of the above, nor departed from this guidance.[48]

61. Additionally, it seems that complaint is taken that the Chair said at the opening of the Inquiry that that the families of Mr Bayoh would be at the heart of the Inquiry.[49] Aside from the points taken by others as to whether any true comparator can be drawn between the family of a person who died and other Core Participants (as the Chief Constable puts it: "[She] recognises that the Families of Mr Bayoh are in a different position from other Core Participants…it is crucial that the Families remain at the heart of the Inquiry"[50]), it is notable that the approach taken by the Chair is in no way unusual or out of the ordinary. It reflects what the Chief Constable herself said in her Opening Submissions and in her Interim Closing Submissions: "The Chief Constable, who is present here today, has asked that I address my first remarks to you, his family. You are at the heart of this Inquiry"[51] and "You are at the heart of this Inquiry and the Chief Constable wishes to acknowledge the courage, the strength and the dignity you have

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[46] Azelle Rodney Inquiry - 4th September 2012, page 146 onwards.

[47] Chief Coroner's Guidance No.41, paragraph 4(iv) (and also see, with effect from 1st January 2025, paragraphs 14 – 21 of Chapter 5 of the Chief Coroner's Guidance for Coroners on the Bench).

[48] Sheku Bayoh Inquiry - 19th May 2022, page 3, line 1 – page 16, line 1.

[49] SPF, [22].

[50] Chief Constable, [5], under the heading "The families at the heart of the Inquiry".

[51] Chief Constable's Opening Statement, SBPI-00091, page 2, under the heading "Address to the family".

shown throughout."[52] It in fact reflects what the SPF itself said in its oral Opening Statement to the Inquiry: "The Chair has indicated that he wants the family to be at the heart of the Inquiry. That is **clearly correct and appropriate given** what the Inquiry will consider and the likely emotional toll on the family. It would, however, be naive to think that the events of that day have not had a material impact on the lives and families of the officers who attended the scene that day" (emphasis added).[53] It reflects the approach taken in most public inquiries involving death and injury over the last 20 years or so. And it reflects the approach advocated so strongly by the former Chief Coroner of England & Wales when speaking about inquests:[54]

> My predecessors and I have often spoken of putting the bereaved at the heart of the process. The Government of the day used a similar expression in the position paper it issued in advance of the 2009 Act. But a duty to put the bereaved at the heart of the process cannot exist in a vacuum. It presupposes the existence of a prior duty to the deceased. Surely, the ultimate reason for the centrality of bereaved families is that the coroner's inquest exists to discharge a posthumous duty to the dead whom they represent? That is why I like to say that it is the deceased, and by extension the bereaved, who should be at the heart of the process.

The disclosure of documents (and the provision of notices of criticism) to witnesses before they gave evidence; and

62. The Solicitor General makes two points of substance about the disclosure of documents (and the provision of notices of criticism) to witnesses before they gave evidence that she then seeks to translate, by way of comparison, with how matters proceeded in this Inquiry.

63. First, in paragraph 99 of her submissions, she suggests that the fair minded and informed observer would consider that the *Salmon Principles* "…are an authoritative source for understanding some of the of the key indicators of fairness in an inquiry". This is in error. Much has changed in 59 years since the publication of the *Salmon Principles*. The second principle - "Before any witness who is involved in an inquiry is called as a witness, they should be informed of any allegations made against them and

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[52] Sheku Bayoh Inquiry – 27th June 2023, page 33, lines 22 – 25.

[53] Sheku Bayoh Inquiry - 11th May 2022, page 60, lines 6 – 22.

[54] Lecture by the Chief Coroner: Death and Taxes – the past, present and future of the coronial service, para 75.

the substance of the evidence in support of them" – is not a feature of modern public inquiries. In any event, the warning letter process set out in rr13-15 of the Inquiry Rules 2006 and rr12-14 of the Inquiry (Scotland) Rules 2007 sets out what fairness requires in this regard. In more detail:

a. It is decades since adherence to the *Salmon Principles* has been regarded as essential indicators of fairness in a public inquiry – see for example Lord Justice Beatson speaking extra-curially: "Since 1982 the majority view in Britain is that the Salmon Commission's six cardinal principles for the protection of individuals introduced significant and often inappropriate features of adversarial proceedings to statutory inquiries…"[55]

b. In any case, the requirements of fairness in this regard are set out in the 2006 or 2007 Rules. These make it clear that whilst a warning letter *may* be sent to a person because they might be criticised during the inquiry proceedings (r12(1)(a) of the 2007 Rules), the only duty is not to include significant or explicit criticism of a person in the inquiry report unless that person has been sent a warning letter.

c. In the many inquiries – 35 in my estimation – that have been initiated under the 2005 Act in the 20 years since its enactment none of them have undertaken the process envisaged by the second *Salmon Principle*.[56]

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[55] *Should judges conduct public inquiries?*, page 40.

[56] Billy Wright Inquiry (Lord Ranald McLean); Robert Hamill Inquiry (Sir Edwin Jowitt); Public Inquiry into the E.coli O157 outbreak in South Wales (Professor Hugh Pennington); the ICL Inquiry (Lord Brian Gill); Inquiry into the circumstances of the Death of Bernard (Sonny) Lodge (Barbara Stow); Baha Mousa Inquiry (Sir William Gage); Fingerprint Inquiry (Sir Anthony Campbell); Penrose Inquiry (Lord George Penrose); Public Inquiry into the Outbreak of Clostridioides difficile in Northern Trust Hospitals (Dame Deidre Hine); Vale of Leven Hospital Inquiry (Lord Ranald Mclean); Al-Sweady Inquiry (Sir Thayne Forbes); Azelle Rodney Inquiry (Sir Christopher Holland); Mid Staffordshire NHS Foundation Trust Public Inquiry (Sir Robert Francis KC); the Leveson Inquiry (Sir Brian Leveson); Litvinenko Inquiry (Sir Robert Owen); Anthony Grainger Inquiry (HHJ Thomas Teague KC); the Renewable Heat Incentive Inquiry (Sir Patrick Coghlin); Jermaine Baker Inquiry (HHJ Clement Goldstone KC); Independent Inquiry into Child Sexual Abuse (Professor Alexis Jay); Manchester Arena Inquiry (Sir John Saunders); Edinburgh Tram Inquiry (Lord Hardie); Infected Blood Inquiry (Sir Brian Langstaff); Grenfell Tower Inquiry (Sir Martin Moore-Bick); Brook House Inquiry (Kate Eves); Scottish Hospitals Inquiry (Lord Brodie); Scottish Child Abuse Inquiry (Lady Smith); UK Covid 19 Inquiry (Baroness Hallett); Undercover Policing Inquiry (Sir John Mitting); Jalal Uddin Inquiry (HHJ Thomas Teague KC); Thirlwall Inquiry (Lady Justice Thirlwall); Muckamore Abbey Hospital Inquiry (Tom Kark KC); Lampard Inquiry (Baroness Kate Lampard);

Accordingly, the fair minded and informed observer may draw the conclusion that the approach taken to adherence to the second *Salmon Principle* was no different in this Inquiry than in the 35 other inquiries undertaken pursuant to the 2005 Act.

64. Second, in paragraph 100 of her submissions, the Solicitor General suggests that the fair minded and informed observer would wish to consider examples about the taking of evidence in an inquiry context and suggests that they might settle on the approach taken in the Stephen Lawrence Inquiry in 1998, where notices of allegations and "access to all potentially relevant documents" was given to witnesses prior to them giving evidence.[57]

65. It is not clear why the Solicitor General has suggested that the fair minded and informed observer consider the approach taken in an inquiry conducted 27 years' ago, which stands alone amongst the dozens of public inquiries conducted between that time and now (including the 35 or so inquiries conducted under the 2005 Act), and which followed an entirely different model of questioning (as the Solicitor General observes). The Chair may conclude that, of all of the comparators available, the fair minded and informed observer would be very unlikely to have selected this inquiry of all inquiries as a useful example about the taking of evidence. They are much more likely to look towards the approach taken in the vast majority of inquiries over the question of giving advance notice of allegations or criticisms to witnesses before they give evidence, and conclude that it is the same as the approach taken in this Inquiry.

The nature and style of the examination of witnesses

66. The Solicitor General makes two points of substance about the questioning of witnesses at public inquiries that she then seeks to translate, by way of comparison, with how matters proceeded in this Inquiry.

Independent Inquiry relating to Afghanistan (Lord Justice Haddon-Cave); Omagh Bombing Inquiry (Lord Turnbull); Dawn Sturgess Inquiry (Lord Anthony Hughes); Post Office Horizon IT Inquiry (Sir Wyn Williams).

[57] The Stephen Lawrence Inquiry Report, [3.5] and [3.7] on pp24 and 25 of the pdf.

67. First, the Solicitor General suggests that the fair-minded and informed observer might find observations written by Sir Richard Scott in an edition of the 1995 Law Quarterly Review[58] in relation to the questioning of witnesses "…of some interest"[59] when examining the questioning undertaking by CTI in this Inquiry.[60] This seems unlikely. A fair-minded and informed observer would more likely see this article (which began as a speech by Scott to the Chancery Bar Association) as part of the debate (battle) between him and Geoffrey Howe, a witness who gave evidence to Scott's Arms to Iraq Inquiry, over whether the procedures at that Inquiry were fair that was played out over the pages of *Public Law* in the mid-1990s. The fair-minded and informed observer would instead have regard to the approach taken after the advent of the 2005 Act and the 2006/2007 Rules in the 35 or so inquiries listed above.

68. Second, in paragraph 107 of her submissions the Solicitor General states that: "…by direction issued on 23 January 2023, the Chair indicated that it would not be appropriate for a CP representative, in effect, to object to evidence other than in exceptional circumstances." The Inquiry's email of 25th January 2023[61] highlights that there were issues with Counsel for Core Participants interrupting proceedings. It contains guidance on how this should be undertaken in the future. The Chair's Note concerns interruptions in the course of evidence being taken. Other options were available. The option referenced in the guidance note is contacting the legal mailbox. It is understood that this was used regularly and the ILT normally responded in the course of the hearings. There was another formal option (oral 9 rule process) and informal (speaking to CTI in the break). It was in these circumstances that it was stated that only in exceptional circumstances should Counsel for a Core Participant interrupt Counsel to the Inquiry during evidence taking from a witness.

Overall

69. The problems with picking selected instances of the conduct of the ILT in the course of the Inquiry, quite aside from the points made above, are (i) the difficulties of

[58] *Procedure at Inquiries – the Duty to be Fair* (1995) 111 LQR 596.

[59] Solicitor General, [101].

[60] Solicitor General, [102].

[61] PH-00062, PH-00062(a).

adjudicating upon the fairness of the Inquiry as a whole (rather than picking incidents or vignettes about which a single or a group of core participants are concerned), and (ii) the existence of a set of other complaints about the fairness or correctness of decisions that the Chair made which, in broad terms, did not advance the interests of the families. Yet this is not a competition or a comparative exercise – and it is certainly not one which can act – as the Solicitor General suggests - as method of either allaying or affirming any concerns arising from the fact and contents of the five meetings.

70. By way of example, what place or role do the following decisions have in the exercise of allaying or affirming such concerns:

    a. **Appointment of person with expertise in race**: the Families proposed that the Inquiry should appoint as a member of the Inquiry team a person with expertise in issues of race. The Chair declined to do so.

    b. **Undertakings**: In January 2022 the Inquiry received a request on behalf of certain of the Core Participant police officers that he should seek an undertaking from each of the Lord Advocate and the Chief Constable in respect of evidence given to the Inquiry by the officers. The undertaking sought from the Lord Advocate was that no evidence given to the Inquiry by these officers would be used against them in any criminal proceedings or when deciding whether to bring such proceedings. A similar undertaking in respect of misconduct investigation and proceedings was sought from the Chief Constable. After a process for filing written submissions, a hearing for oral submissions was held on 22nd February 2022. Senior Counsel for the Families of Sheku Bayoh opposed the requests and submitted that the Chair should not make them. On 1st March 2022 the Chair issued a decision stating that he would seek undertakings from both the Solicitor General and the Deputy Chief Constable. The names of the officers on whose behalf he made the request are set out in the decision. In the event, both the Solicitor General and the Deputy Chief Constable refused to give undertakings.

    c. **The evidence of Alan Paton**: Mr Paton made an application, supported by medical evidence, for the use of special measures in respect of taking his evidence – *viz.* that his evidence should be pre-recorded and later played in the hearing room/broadcast. The Families opposed the application. The Chair

granted the application, and so Mr Paton's was pre-recorded and the recording was later played and broadcast at the Inquiry. The families then made an application to question under r9 of the 2007 Rules - the Chair permitted a number of lines of questioning and ordered that these would be pursued by CTI in a further pre-recorded hearing. The pre-recorded tape of that r9 examination was due to be played and broadcast at the Inquiry, but the day beforehand Mr Paton requested a delay in the playing of the recording as he wished to make representations about the conditions in which it should be played. The Chair agreed to postpone the playing of the tape. At the beginning of the hearing the next day the Chair made a public statement indicating that the playback of the r9 examination would be continued at a later date to permit a written application to be made on behalf of Mr Paton. In response to this statement members of the families walked out of the hearing room.[62] Subsequently Mr Paton made an application for a restriction order under s19 of the 2005 Act in respect of the conditions in which the pre-recorded tape of the r9 examination should be played. This was opposed by the Families and the BBC. The Chair made a Restriction Order and on 26th May 2023 the pre-recorded tape of the rule 9 examination was played under the conditions set out in the Order.

d. **The Sallens report**: On 11th July 2024 the Chair made a Restriction Order in respect of a report prepared by John Sallens. The Restriction Order was sought by the SPF and individual officers. The report by Mr Sallens was prepared in the aftermath of 3rd May 2015 on the instructions of Professor Peter Watson. The application was opposed by the legal representatives of the Families. The Chair held that it was subject to legal professional privilege.

F. <u>The qualities of the fair minded and informed observer</u>

71. The authorities are clear as to the approach that a decision-maker should take when applying the second, objective, part of the *Porter v Magill* test and have set out important

[62] Later that day Kadi Johnson was quoted on the BBC website as stating: "We are so upset. We came here today to hear his evidence. We feel he has special treatment over everybody else, and we are asking, why is that? They promised us that we would be at the centre of this but at the moment we are not feeling like that. We have waited seven years. Why should we wait any longer?" PH-00065.

guidance on the qualities that the fair minded and informed observer is to be taken to possess, all of which qualities the decision-maker should bring into account when making their decision.[63]

72. First, the fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious": see Kirby J at [53] of *Johnson v Johnson* (2000) 201 CLR 488, approved by Lord Hope and Baroness Hale in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, at [17] and [39] respectively.

73. Second, the fair minded and informed observer "…is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument": see *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2].

74. This principle may be of significance in the present context for a range of reasons.

75. In the first place, the SPF was prepared in its draft Petition to mount an allegation of bias on the basis of the *fact* of the Chair having met the families: the *fact* of the meetings was said to amount to sufficient grounds for the Chair to recuse himself, irrespective of what happened at the meetings.

76. In the second place, that is the opposite of what each of the Core Participants (save for the Chief Constable, Garry McEwan and Conrad Trickett[64]) has done in their submissions. Many of them have been prepared to draw inferences, or conclusions, or conclusions drawn from inferences, on the basis of what they have read. This can be problematic. By way of example:
    a. The SPF submit that at the meeting on 18th January 2024 "….the Chair is noted as having said to Kadi Johnson that he was "profoundly affected" by her evidence. That is suggestive of pre-determination. Had it been publicly (in the

[63] *Cf Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [1]: "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…she has attributes which many of us might struggle to attain to."
[64] And PIRC, who have filed no submissions.

course of the Inquiry hearings) it would have been the subject of challenge. As it was said privately, no challenge was possible" (emphasis added).[65]

b. This is then later changed by the SPF into an allegation that "The Chair has thus heard repeated and firmly expressed concerns at [sic] to the actions and conduct of other key players in this Inquiry…which he found 'profoundly moving'" (emphasis added);[66] and that the Chair "…was 'profoundly moved' by the testimony of Kadi Johnson" (emphasis added).[67]

c. Other Core Participants make a similar allegation to the SPF: "[The Chair] expressed to the family in private that he had been "profoundly affected" by their public evidence (January 2024)";[68] and "At a further meeting on 18 January 2024 *inter alia* the Chair commented on how he was profoundly moved by the evidence of one family member".[69]

d. Putting aside for one moment the hardening up of the language by the SPF from that which is contained in the record of the meeting, and the suggestion in paragraph 61 of the SPFs submissions that what the Chair found "profoundly moving" was "repeated and firmly expressly concerns" – i.e. seeking to lift the phrase and apply it to a range of evidence, in fact the note in the record of the meeting,[70] is a reference to the former Chief Constable being affected – profoundly - by what Kadi Johnson had said, not to the Chair being so affected.

e. On Day 2 of the Inquiry, 11th May 2022, Senior Counsel for the former Chief Constable said in her opening statement:[71]

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[65] SPF, [33].

[66] SPF, [61].

[67] SPF, [64].

[68] Good, Smith & Tomlinson, [25].

[69] Paton, page 4 (middle paragraph) – presumably the hardening up of the language here is as a result of reading and then reproducing the SPF's error, rather than independently making the same error.

[70] The full quotation is PH-00008, page 1, first full paragraph:

> "This hearing will of course take place against background of former C[hief] C[onstable] accepting that P[olice] S[cotland] is institutionally racist. Worthy of note that evidence C[hief] C[onstable] heard at this Inquiry one of the drivers in reaching that conclusion. Profoundly affected by your evidence Kadi."
> (emphasis added and abbreviations decoded)

[71] Chief Constable's Opening Statement, SBPI-00091, [5.1].

> "The Chief Constable was powerfully affected by Kadi's statement yesterday that she does not feel safe in Scotland, that she fears for her children and for her nieces and nephews."

f. And in his interim closing submissions of 23rd June 2023 the Chief Constable said:[72]

> "The Chief Constable made a commitment to listen to the experience of the families of Mr Bayoh and members of the community. Having heard the evidence to date, he was satisfied that a proper and fair assessment of the organisational learning and awareness as at 3 May 2015, in the recently formed Police Service of Scotland, was such that there was a systemic issue. This was seen in the evidence of the families of Mr Bayoh, the evidence that some diversity training did not appear to have been retained and, importantly, in the fact that there appeared to be a lack of awareness of some officers of the importance of not treating everyone the same. That approach to equality fails to address cultural needs, sensitivities and concerns of individuals. That is an institutional matter. It means that it is a failing of the organisation and not individual officers."

g. It follows that what is attributed to the Chair was not an expression of what he made of Kadi Johnson's evidence at all. He was repeating that which the former Chief Constable had said – i.e. fairly summarising the points in paragraphs (e) and (f) above.

77. Third, the fair minded and informed observer is not swayed by the subjective opinions of those that make the complaint about the apparent bias of the decision maker, instead looking for objective evidence – see e.g. *Helow* at [2]: "…the 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."

78. Fourth, the fair minded and informed observer is not complacent either – see e.g. *Helow* at [2]: "…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

[72] Chief Constable's Interim Closing Submissions, SBPI-00345, [74].

have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially":

79. Fifth, the fair minded and informed observer knows that the context in which the decision falls to be made is critical and actively seeks information about that context – see e.g. *Helow* at [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."

G. What a fair minded and informed observer would understand as to the nature of a public inquiry

The inquisitorial nature of a public inquiry

80. A number of the Core Participants have made the point that a public inquiry established under the 2005 Act is inquisitorial in nature. But it is insufficient merely to state this. It is necessary to examine closely the ways in which such an inquiry is inquisitorial, what that actually means, and the consequences when it is said that the law that governs *inter partes* litigation should be lifted and applied in the determination of an application of this kind.

81. Beginning then with the ways in which an inquiry is inquisitorial, these are manifold. Amongst them are the following:

82. First, there are no pleadings, statements of case, or other written instruments by and through which the parties determine the relevant issues to be tried. Instead, the inquiry itself determines, within the scope of its terms of reference, the lines of enquiry that it

wishes to pursue, and gathers evidence that is potentially relevant to those lines of inquiry.[73]

83. And note the important point made by the former Chief Coroner of England & Wales when speaking about the position that obtains in inquests:[74]

> One of the problems in the past has been imprecise use of terminology, which has led to misunderstanding and an unnecessarily polarised debate. You hear people say that inquests are adversarial. Very often, they use the word "adversarial" in a sense that is very different from the sense in which I would use it. They may mean "contentious" or "controversial". There is no doubt that some inquests are controversial and contentious; we all know that, although I would say it is a clear minority. When I use the word "adversarial" I am talking about who controls the process, and that is why it is an important distinction. In adversarial proceedings, in the strict legal sense of the word, it is the parties who control the proceedings. The prosecution in a criminal case decides what charges to bring and what evidence to adduce; the defendant decides whether to give evidence and call witnesses, and does not have to do either. The same goes for civil proceedings, so the parties are in charge. In inquisitorial proceedings it is the judge who is in charge. We talk about "the coroner's inquest" in a way you would never talk about "the judge's trial". The coroner is there not to adjudicate but investigate…
>
> [emphasis added]

84. Second, a public inquiry does not make findings as to civil or criminal liability: s2(1) of the 2005 Act. In short, it does not determine the legal rights of any person. In the context of inquests, Lord Lane, LCJ famously held[75] in *R v South London Coroner ex parte Thompson* (1982) 126 SJ 625:

> Once again it should not be forgotten that an inquest is a fact-finding exercise and not a method for apportioning guilt....at an inquest it should never be forgotten there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused

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[73] And note the decision of the Divisional Court in *R (Cabinet Office) v Chair of the UK Covid19 Inquiry* [2024] KB 319 that public inquiries should be given latitude when exercising compulsory powers under s21 of the 2005 Act to seek information that a party in civil proceedings would not be ordered to disclose.

[74] Evidence to Justice Select Committee, response to question 19 on p14 of the pdf.

[75] The passage has been cited approvingly many times since 1982, both in the context of inquests and inquiries – too many for repetition herein.

defends, the judge holding the balance or the ring whichever metaphor one chooses to use.

85. The coronial process bears many similarities with that of a public inquiry (*cf* the rather different role, conduct and status of a Fatal Accident Inquiry ("*FAI*") pursuant to the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016. ("*the 2016 Act*") For example:

    a. Under s19(1) of the 2016 Act: "The sheriff has all such powers in relation to inquiry proceedings as a sheriff, under the law of Scotland, inherently possesses for the purposes of the discharge of the sheriff's jurisdiction and competence and giving full effect to the sheriff's decisions in civil proceedings." There is no equivalent provision under the Coroners and Justice Act 2009 (a coroner's court is an inferior court of record and for example has no power to punish conduct which may amount to contempt but was committed outside the court precincts of the court – instead, proceedings must be brought in the High Court or the Court of Session for contempt (like an inquiry under the 2005 Act: see s36 of the 2005 Act).

    b. Under section 20(3) of the 2016 Act: "The rules of evidence which apply in relation to civil proceedings in the sheriff court (other than a simple procedure case) apply in relation to an inquiry." By contrast, the strict rules of evidence to do not apply in a coroner's court,[76] much like the position in a public inquiry under the 2005 Act (see the following paragraphs).

    c. The Chair of an inquiry presides over both the investigative and judicial phase of the proceedings, as in a coroner's investigation and then inquest. Thus: "The role of the coroner differs from the procurator fiscal with the coroner presiding over both the investigation and the judicial proceedings."[77]

86. Third, a public inquiry is not bound by the rules of evidence. This is very well established.

[76] R v Divine, ex parte Walton [1930] 2 KB 29 at p36; R v Manchester Coroner, ex parte Tal [1985] 1 QB 67, pp84-85.

[77] Thematic Review of Fatal Accident Inquiries (August 2016), para 32 on p11 of the pdf.

87. The starting point is probably the judgment of Ellicott J, in the Federal Court of Australia, in *Ross v Costigan* (1982) 41 ALR 319 at 334-335:[78]

> In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence….
>
> [emphasis added]

88. The Privy Council cited this passage from *Ross v Costigan* approvingly in *Douglas v The Right Honourable Sir Lynden Oscar Pindling (Bahamas)* [1996] AC 890: see the judgment of the Board of the Privy Council, delivered by Lord Keith of Kinkel at [15].

89. Later still, in *Mount Murray Country Club Ltd v Commission of Inquiry into Mount Murray* [2003] STC 1525 the Privy Council applied *Ross v Costigan* in upholding the facility of an inquiry under the Inquiries (Evidence) Act 1950[79] to obtain information as to the tax affairs of an individual.

90. Finally, in *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319 the Divisional Court held at [52]:

> It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence.
>
> [emphasis added]

91. Fourth, a public inquiry is not required to adopt any standard of proof, so long as it acts fairly. See, for example, the comprehensive analysis of this issue by CTI in the Undercover Policing Inquiry,[80] adopted by the late Sir Christopher Pitchford in the Undercover Policing Inquiry:[81]

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[78] The decision was affirmed by the General Division of the Federal Court: *Ross v. Costigan (No. 2)* (1982) 41 ALR.

[79] The Manx equivalent of the UK's Tribunals of Inquiry (Evidence) Act 1921.

[80] UCPI: The Standard of Proof at pages 5-24 of the pdf.

[81] *Ibid.* at pages 1-4 of the pdf, especially at [10] and [11].

> In establishing the factual background against which the Inquiry will offer recommendations as to future conduct and management it seems to me likely to be more conducive to the public good if I am free to express my state of mind as to the existence (or non-existence) of a fact without being bound to any particular standard of proof. As the counsel team put it at paragraph 38 of their note, recent public inquiries have adopted "a flexible and variable approach to the standard of proof so as to enable a full and nuanced approach to the determination of facts".

92. Fifth, a public inquiry has documents and information disclosed to it (whether voluntarily, pursuant to a request under r9 of the Inquiry (Rules) 2006 or r10 of the Inquiry (Scotland) Rules 2007, or pursuant to s21 of the 2005 Act), assesses and analyses it, and may disclose *some* of it to the Core Participants.

93. Sixth, a public inquiry does not follow the norms that operate in conventional litigation concerning communications between the inquiry and core participants. This is reflective of the fact that in an inquiry the chair and their legal team are the inquisitors, and are not adjudicating upon the cases of parties or determining legal rights. Thus, in conventional litigation, any communication about a matter of substance or procedure between a part to the proceedings must be disclosed to, and if in writing (whether in paper or electronic form) be copied to the other party or parties or their legal representatives unless there is a compelling reason not to so.[82] Yet in a public inquiry the inquiry commonly communicates with each of the Core Participants (through formal letters, via email, at meetings, or conversations between counsel) without involving every other Core Participant in the enterprise – this is because there are no parties, and instead the inquiry is undertaking an inquisitorial process.

94. Seventh, the way in which a public inquiry adduces oral evidence is quite unlike the approach taken in conventional litigation. The Inquiry Panel, CTI or Solicitor to the Inquiry play a significant role, and presumptively ask all of the questions: see r10(1) of the 2006 Rules and r9(1) of the 2007 Rules. Core Participants have no *right* to ask questions: see s10(2)-(5) of the 2006 Rules and r9(2)-(5) of the 2007 Rules.

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[82] In civil proceedings in England & Wales: see Part 39.8 of the Civil Procedure Rules 1998 (breach of which the court takes seriously – see e.g. *Debenham-Schon v Anchor Hanover Group* [2021] EWHC 3023 (QB) at [20] – [24]).

95. This is to be contrasted with the rights enjoyed in litigation – an aspect of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, at para 32: "Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."

The Consequences

96. Turning then to what this means and the consequences. It would be unthinkable if a court decided to conduct an investigation itself, deciding what lines of inquiry to pursue, and which issues to examine. It would be unthinkable if a court declined to determine the civil or criminal liabilities of the parties. It would be unthinkable if a court declined to adopt or apply the rules of evidence. It would be unthinkable if a court declined to adopt the standard of proof applicable to the proceedings before it. It would be unthinkable if a court was provided with disclosure of all of the documents of the parties appearing before it, and then decided which of those documents ought then to be disclosed to the other parties in the litigation. It would be unthinkable if a court decided to write to just one of the parties before it.

97. Thus, it has been emphasised that it is inappropriate and inapposite to lean on the approach taken in adversarial proceedings when determining the legality or fairness of inquisitorial proceedings:

    a. For example, in *R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire* [2019] QB 1218 (in considering the application of the burden of proof that ought to be applied to a conclusion of suicide in an inquest), the Court of Appeal held at [25]:

> It is elementary, but nevertheless essential to emphasise in view of the issues arising on this appeal, that inquests are not to be regarded as litigation. They are not. They are not criminal proceedings. They are not civil proceedings. There are no "trials" and strictly no "parties" as such at all: rather, there are "interested persons". The procedural rules and procedural safeguards which may be applicable in criminal or civil proceedings do not apply. As its name connotes, an inquest is essentially, even if not entirely, inquisitorial in nature: the object being to investigate the particular death or deaths (conventionally: "who, when, where, how?"). Thus

> – whilst the position can perhaps sometimes in practice appear to be less than clear-cut in some particularly highly charged inquests – it is not an adversarial procedure, let alone a criminal procedure, at all.

b. See also to like effect the decision of a Divisional Court (Burnett LJ and Holroyde J) in *Wilson v HM Senior Coroner for Birmingham & Solihull* [2015] EWHC 2561 (Admin), at [26] and [27]:

> An inquest is an inquisitorial process and not comparable to a criminal trial or civil proceedings… Fairness in an inquest must be fashioned in an environment where there are no pleadings and in which those given leave to appear as interested persons do not have a case to put…The rules of evidence applied in criminal and civil proceedings do not apply. Questions of fairness to those involved in inquest proceedings must be judged against all these essential features and also in the context that the statutory scheme prohibits a finding of criminal liability on the part of a named person, or of civil liability.
>
> [emphasis added]

98. Against this background, is it unthinkable that the chair (and the assessors) of an inquiry should meet with the families of the alleged victims of wrongdoing in the absence of other Core Participants and, in the course of this meetings, the families express view on issues of substance (including evidence and procedure)?

Contrast with the SPF's approach

99. The SPF's application is advanced on the ground that the law that applies to decision-makers who adjudicate upon legal rights is directly applicable to the inquisitorial proceedings of a public inquiries: see paragraphs 4 – 8 of the SPF's submissions in particular. That approach does not hold in the light of the manifold differences between the proceedings identified above.

100. It is against this background that the four cases listed in paragraph 8 of the SPF's submission[83] fall to be examined and whether they support the suggestion made by the SPF that "The test of apparent bias has been applied in several cases involving public inquiries" (emphasis added):

[83] Drawn from the longer list at paragraph 4 of the SPF's submissions.

a. *Errington v Minister of Health* [1935] 1 KB 249: this was not a case concerning a public inquiry. The facts were that a slum clearance order was confirmed by the Minister after he had privately consulted the officials of the relevant Town Council about its perceived need to demolish the buildings rather than reach an agreement with the owner of the property about repairing them. The explanation given by the officials was that the buildings had defective foundations and were thus effectively unrepairable. This explanation satisfied the Minister but the owner never had any opportunity to make any representation about the officials' explanation and the order was therefore quashed.

b. *Hibernian Property Company Limited v Secretary of State for the Environment* (1974) 27 P & CR 197: this was not a case concerning a public inquiry. The facts were that objectors to a compulsory purchase order had not had the opportunity of commenting on information taken by the inspector from other objectors in the course of her site inspection.

c. *Furmston v Secretary of State for the Environment* [1983] JPL 49: this was not a case concerning a public inquiry. The facts were that, after a site meeting, the county council's representative remained talking to the inspector with an open file, which clearly could be taken to relate to the case.

d. *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205: this was not a case concerning a public inquiry. The facts were that a conversation occurred between council officers and the Inspector and this formed a ground of appeal by an objector to the compulsory purchase order that the inspector was considering.

101. On analysis, therefore, none of these cases involved a public inquiry and cannot, as both the SPF and the Solicitor General seek to do, simply be read across *mutatis mutandis* to the different context of a public inquiry.

<u>The approach of other inquiries to meeting privately with families</u>

102. Instead, on the present issue, the fair-minded and informed observer would have regard to the approach in other inquiries.

103. Although doubtless other examples could be identified, the following inquiries are of note.[84]

104. **The Nottingham Inquiry:** The Nottingham Inquiry was announced by the Prime Minister on 12th February 2025. No terms of reference were announced at that time. The identity of the Chair of the Inquiry, Her Honour Deborah Taylor,[85] was subsequently announced publicly on 22nd April 2025.[86] Again, no terms of reference were announced. That very same announcement stated, however, that:

> The Chair, a retired senior circuit judge, has already engaged with survivors and victims' families, and taken views on the draft Terms of Reference, which will be laid in due course.

105. The solicitor for the families issued a press release about this on the same day, 22nd April 2025:[87]

> We have seen the draft Terms of Reference for the Inquiry, and proposed amendments to them which are being considered. We are hopeful that when finalised, they will ensure this Inquiry is able to get the answers to the questions we and many others have been asking.
>
> …Having had the opportunity to meet with the Chair, we are confident that transparency and accountability can now be achieved, and that this Inquiry can ensure lessons are learned, and lead to real change to prevent events like that in Nottingham in 2023 from happening again.

106. And so, before she was appointed, before the terms of reference were announced, before the terms of reference were disclosed in draft to any other putative core participant or other interested person, the Chair of the Inquiry had a private meeting with (i) the families, (ii) the legal representative(s) of the families, and (iii) the survivors (i.e. those who were injured in the attack).

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[84] The inquiries identified are where there is some publicly available reference to meetings with family groups having occurred.

[85] A retired Senior Circuit Judge and former Resident Judge of Southwark Crown Court.

[86] Government announcement of appointment of Chair of Nottingham Inquiry.

[87] Hudgells announcement of 22 April 2025.

107. It accordingly seems that (i) they were shown the draft terms of reference of the Inquiry, (ii) their views on the draft terms of reference were sought, (iii) the Inquiry was considering those views, and (iv) whatever transpired at the meeting gave the solicitor for the families' confidence.

108. In her Opening Statement (delivered by way of video message on 22nd May 2025), the Chair of the Inquiry additionally disclosed that the Inquiry had formulated a list of questions which the Inquiry would answer, and again the families and the survivors had been given private access to it and allowed to make private submissions as to the content of those questions.[88]

109. Accordingly, the families and survivors have met with the Chair of the Inquiry, have been given the opportunity to make private submissions as to an instrument as fundamental as the Terms of Reference themselves, and have been given the facility to make private submissions as to the very questions which the Inquiry will answer in the course of its work.

110. **The Omagh Bombing Inquiry:** The Omagh Bombing Inquiry was set up by the Secretary of State for Northern Ireland under the Inquiries Act 2005 on 2nd February 2023.[89] The Chairman of the Inquiry is Lord Turnbull, who was appointed as a judge of the Court of Session and High Court of Justiciary in Scotland in 2006 and appointed to the Inner House of the Court of Session and Court of Appeal in 2016.

111. The Inquiry held a preliminary hearing on 30th July 2024. In the Opening Statement made by Lord Turnbull on that day he said:[90]

> Of course, almost 26 years have now passed since the events of that day. However, the contact which I and members of the Inquiry team have had with some of those who were directly affected by the bombing has made it plain to us that the trauma caused has been enduring and continues to have a most powerful impact.

[88] Chair's Opening Statement in Nottingham Inquiry

[89] Secretary of State announces independent statutory inquiry into Omagh bomb

[90] Transcript of Preliminary hearing in the Omagh Bombing Inquiry - 30th July 2024, page 3 of the pdf.

> 31 lives were lost, and life-changing and other serious injuries, both physical and mental, were cruelly inflicted on many others.
>
> It is right, therefore, that the interests and concerns of all of those who suffered the loss of loved ones and those who suffered injury should be at the heart of the work conducted by this Inquiry.
>
> [emphasis added]

112. **The Scottish COVID-19 Inquiry:** It seems that both of the Chairs of the Scottish COVID-19 Inquiry, first Lady Poole and then Lord Brailsford, met privately with some of the families of those who lost their lives.

113. The terms of reference of the Inquiry, and the appointment of Lady Poole as its Chair, were announced on 14th December 2021.[91] Lady Poole was (and remains) a Senator of the College of Justice. It seems that in January 2022 Lady Poole met privately with some of the families of those who lost their lives in the course of the pandemic.[92]

114. Lord Brailsford was appointed chair of the Scottish COVID-19 Inquiry with effect from 28th October 2022.[93] Lord Brailsford was (and remains) a Senator of the College of Justice. Within a very short period of time after his appointment, Lord Brailsford also met privately with bereaved families and relatives of care home residents (the announcement was on 1st December 2022), the Inquiry stating:[94]

> The discussions have allowed Lord Brailsford to provide an update on the Inquiry's progress and learn more about their experiences during the pandemic in Scotland, and how they and their relatives were impacted by the lockdowns and other restrictions, such as those in residential care settings.
>
> Lord Brailsford said: "I am extremely grateful for the opportunity to meet bereaved families and the relatives of care home residents, and very much appreciate them sharing with me their harrowing accounts of the losses they have suffered. I have learned a great deal and their experiences will be at the heart of the Inquiry's investigations.
>
> [emphasis added]

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[91] Announcement of the Scottish Covid Inquiry

[92] Courier article of 6th October 2022

[93] Lord Brailsford appointed Chair of the Inquiry

[94] Inquiry Chair meets bereaved families and relatives of care home residents

115. At the Inquiry's Preliminary Hearing on 28th August 2023, Counsel to the Inquiry added:[95]

> Both Lord Brailsford and I have had the honour of meeting members of both the Scottish Covid Bereaved and Care Home Relatives Scotland. In those meetings we heard distressing accounts of the loss of loved ones, the circumstances experienced both before and after that loss and the impact of being separated from loved ones, particularly in circumstances where that loved one had a compromised understanding of the reasons for that separation or isolation.
>
> [emphasis added]

116. **The Southport Inquiry:** The Southport Inquiry was announced by the Home Secretary on 20th January 2025.[96] On 7th April 2025 the Home Secretary announced the appointment of Sir Adrian Fulford PC[97] as the Chair of the Inquiry, along with the terms of reference of the Inquiry.

117. By the same announcement, the Home Secretary explained that:[98]

> "Sir Adrian Fulford has been appointed as the chair following consultation with the victims and families of those killed or affected by the attacks and plans to travel to meet them as a first priority."

118. **The Lampard Inquiry:** In 2023, the Essex Mental Health Independent Inquiry, led by Baroness Kate Lampard, was granted statutory status under the Inquiries Act 2005 and re-launched as the Lampard Inquiry.

119. The inquiry investigates the deaths of mental health inpatients in Essex between 2000 and 2020. Baroness Lampard met with bereaved families to understand their experiences and concerns, ensuring their voices are central to the inquiry's work. These private meetings have been crucial in shaping the inquiry's approach and focus.

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[95] Scottish Covid-19 Inquiry - Transcript of Preliminary Hearing, page 3 of the pdf (internal page 7, lines 13 – 21).

[96] Home Secretary's announcement of the Southport Inquiry

[97] A retired judge of the Court of Appeal of England & Wales, former Vice-President of that Court and former judge of the International Criminal Court.

[98] Home Secretary's announcement of 7 April 2025

120. At the Preliminary Hearing of the Inquiry on 9th September 2024 Baroness Lampard said the following:[99]

> In my statement of approach to the Terms of Reference, I referred to the courage, resilience and strength that the families have demonstrated in these most tragic of circumstances, including in bringing to light some of the matters I will be looking into. I again acknowledge the instrumental role of the families in the creation of this independent statutory Inquiry. Without their dedicated and tireless campaigning, it is unlikely that we would be here today. I am grateful to have met with a number of families to hear about their experiences, their concerns and, most importantly, about the person they lost.
>
> [emphasis added]

121. It is against *this* background that a fair minded and informed observer may judge the five meetings that the Chair held with the families of Mr Bayoh, noting the common practice to discuss matters of substance (both procedural and evidential) in private meetings with one group of core participants – so much is clear even from the publicly available material as to these meetings, without disclosure of any records of interviews. This included: their experience of the events that are to be examined in evidence by the Inquiry (Scottish Covid-19 Inquiry, Lampard Inquiry), taking accounts of the events under examination by the Inquiry (Scottish Covid-19 Inquiry), taking views on issues as fundamental as the terms of reference inquiry itself, and the issues which the inquiry should explore (Nottingham Inquiry) and the impact that this has had upon them (Scottish Covid-19 Inquiry; Omagh Bombing Inquiry; Lampard Inquiry).

Natural justice

122. The SPF relies to a significant extent on an allegation that the meetings with the Families were in breach of the "tenets of natural justice" or the "principles of natural justice".[100]

123. The authorities emphasise the importance of the context, and in particular the nature of the relationship of the parties, in determining what exactly "natural justice" requires in the circumstances of any particular case (the cases speak of a certain vagueness in the term, as if it has a Protean quality): one size certainly does not fit all.

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[99] Transcript of Preliminary Hearing of Lampard Inquiry - 9th September 2024, pages 6 and 7 of the pdf.

[100] SPF, [4], [7], [9], [10], [35], [51], [62] and [73].

124. Thus, for example, in *Russell v Duke of Norfolk* [1949] 1 All ER 109 Lord Tucker at 118 held:

> There are… no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

125. These observations were approved by the Privy Council in *Ceylon University v Fernando* [1960] 1 WLR 223 and then by the House of Lords in *Re K (Infants)* [1965] AC 201. See also *R v Gaming Board for Great Britain, ex p. Benaim* [1970] 2 QB 417 per Lord Denning MR:

> It is not possible to lay down rigid rules as to when the principles of natural justice are to applies nor as to their scope and extent.

126. The Chair ought therefore to be careful in acceding to, or placing weight on, overly broad statements such as "…the fundamental principles of natural justice apply to inquiry proceedings",[101] "It is, presumably, accepted by the Chair that he is subject to the requirements of natural justice…"[102] "It does not appears to be in dispute that the Chair is subject to a requirement to…conform to the requirements of natural justice",[103] "We agree that the Inquiry is subject to the rules of natural justice"[104] or "It is not in doubt that the principles of natural justice apply to the conduct of the Inquiry."[105]

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[101] CRER, [5].

[102] SPF, [62].

[103] Chief Constable, [35] (the reference to it not appearing to be in dispute must be a reference to there being no dispute between the Chief Constable and the SPF).

[104] Messrs Good, Smith and Tomlinson, [2].

[105] Solicitor General, [9]. It is noted that the Solicitor General cites three sources in support of this proposition in her FN1 – as to these: (i) s17(3) of the 2005 Act says nothing about the principles of natural justice – it imposes *inter alia* a requirement on the chair as to the procedure or conduct of the inquiry to act with fairness; (ii) in *Greater Glasgow Health Board v Chairman Scottish Hospitals Inquiry* 2025 SLT 205 Lady Wise made no such finding – the Petitioner made a similar submission to the Solicitor General herein – see [11] and [12] of the judgment, but at Lady Wise did not incorporate that into her decision, instead holding at [33] that "Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings"; and (iii) the Court of Appeal in *R v Lord Saville of Newdigate & Others* [2000] 1 WLR 1855 does not mention

127. These broad statements do not assist with what the *content* or *scope* of any principles of natural justice are, nor as to whether they apply in the context of the proceedings of a public inquiry. Instead, fairness is the touchstone by which the impugned conduct ought to be judged, not the principles lifted from *inter partes* litigation or those concerned with the determination of legal obligations.

128. *R (Associated Newspapers Ltd v The Right Honourable Lord Justice Leveson* [2012] EWHC 57 (Admin) is a particularly striking example of how the duty of fairness may be applied in the unusual context of a public inquiry. The Chairman decided that certain witnesses could in principle give their evidence anonymously (i.e. with their identities known to no person – the public, the Core Participants, Counsel to the Inquiry, or the Chairman – so that their evidence could not properly be tested and no contrary evidence adduced). In a challenge to this decision, which in part relied on the suggestion that the approach would "contravene the principles of natural justice"[106] a three judge Divisional Court decided the case instead by reference to the principle of fairness: see [34], [35], [36], [37] and [41]. In dismissing the challenge, the Divisional Court held:

> [**53**] Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced **as is practically possible**. If the Chairman is prohibited from admitting the evidence of journalists wanting to give evidence anonymously, there will be a gap in the Inquiry's work, although the material (or similar material) is already in a real sense in the public domain...If the court ruled that the Chairman could not lawfully admit evidence of the kind under consideration, and his report reflected that fact, the result would be that the Inquiry would not have examined a raft of available material. There would be cause for concern that in those circumstances the Inquiry would have failed in a significant regard to achieve its terms of reference, and the credibility of its findings and recommendations would be lessened. It would be open to the criticism of not having heard the full story.
>
> [**54**] It has to be stressed that this is an inquiry; it is not the same as a criminal trial or a disciplinary proceeding. Mr Warby said that the newspaper organisations are "in the dock" and in a metaphorical sense

natural justice from start to finish in its judgment (i.e. whether at paragraphs 32E & 38 – cited by the Solicitor General – or otherwise).

[106] Judgment, [33(1)].

> that is true; but it is true because an inquiry has been set up to try to explore as fully as it can the culture and the practices of the newspaper industry in the light of things which have given rise to public concern.
>
> [**55**] In determining where fairness lies in a public inquiry, **there is always a balance to be struck**. I am not persuaded that there is in principle something wrong in allowing a witness to give evidence anonymously through fear of career blight, rather than fear of something worse. Fear for a person's future livelihood can be a powerful gag. Nor am I persuaded that the Chairman acted unfairly and therefore erred in law in deciding that on balance he should admit such evidence, subject to his considering it of sufficient relevance and being satisfied that the journalist would not give it otherwise than anonymously.

129. It will be noted that each of the obligations – to be balanced, and to fair – are in the words of the Court of Appeal qualified in the context of a public inquiry: "to be balanced as is practically possible" and "where fairness lies in a public inquiry, there is always a balance to be struck…"

Kanda v Government of Malaya

130. It seems clear from the SPF's submissions that significant reliance is placed on the decision of the Privy Council in *Kanda v Government of Malaya* [1962] AC 322. In such circumstances, it repays to give close attention to the decision, in which Lord Denning delivered the judgment of the Judicial Committee.

131. A board of inquiry chaired by a senior official had considered evidence about the appellant police officer's conduct at a criminal trial, and the board of inquiry's report was highly critical of the police officer. When disciplinary proceedings were later brought against the police officer before a more junior adjudicating officer to whom the board of inquiry's report was provided, the appellant was not given a copy nor allowed any opportunity to deal with it. Only on the fourth day of the later court hearing, and at Mr Kanda's instance, did he receive a copy. The Judicial Committee of the Privy Council framed the question as whether the hearing by the adjudicating officer was vitiated by his being furnished with the board report without Mr Kanda being given any opportunity to correct or contradict it (p336). The Committee decided the case on the basis that the complaint was a breach of the right to be heard, rather than an allegation of bias (p337).

132. At pp337-338 Lord Denning held:

> The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that Report without Inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and indeed before the Courts in Malaya proceeded on the footing that this depended on this further question: Was there a "real likelihood of bias", that is, "an operative prejudice, whether conscious or unconscious", on the part of the adjudicating officer Mr. Strathairn against Inspector Kanda? …
>
> In the opinion of their Lordships, however, the proper approach is somewhat different. 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. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.
>
> If the right to be heard is to be a real right which is worth anything, it must carry with it a right **in the accused man** to know **the case which is made against him**. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L. C. in *Board of Education v. Rice* [1911] A.C. at p. 182 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that **the judge or whoever has to adjudicate** must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. 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…

133. Note the language "accused man" and "the case which is made against him" and "adjudicate" and "lost a case". All of these are redolent of the application of the principles of natural justice in adjudicative proceedings which, for the reasons set out above, are proceedings quite unlike those of an inquisitorial public inquiry.

134. Note additionally that (i) the case was not decided on the basis of principle against apparent bias; (ii) the context was very different from the present proceedings; and (iii) the law on apparent bias has in any event developed since *Kanda* was decided.

Drawing the threads together

135. In conclusion, it is submitted that the Chair should determine the present motion by application by determining what fairness required (in terms of the conduct of the content of the meetings themselves) and requires (in terms of a broad overarching determining principle); should have regard to the law on apparent bias as set out above when determining what fairness required and requires; should not seek out the tenets of "natural justice" (including the principle of the "right to be heard") and then work out what those tenets mean in the present context – they have grown up in the different context of adjudicative proceeds (first judicial, and then administrative); the Chair should have regard to the special nature and features of inquiry proceedings – they are *sui generis*; and should pay close regard to the approach taken in comparable inquisitorial and public inquiry proceedings in determining how the fair minded and informed observer would regard the conduct in issue here.

H. The position of the Assessors

The role performed by an Assessor

136. The role of an assessor in a public inquiry is set out in s11 of the 2005 Act:

> The chairman may appoint one or more persons to act as assessors to assist the inquiry panel in relation to any matter.

137. An assessor therefore *assists* the Inquiry Panel (here, the Chair), and does not lead the Inquiry or make decisions. They have none of the duties under for examples s17 (evidence and procedure) or s18 (public access to inquiry proceedings and information), nor the powers under s19 (restriction orders) or s21 (powers of production) possessed by the Inquiry Panel.

138. Significantly, an assessor has no responsibility for the production, submission or publication of the inquiry report under ss24 and 25 of the 2005 Act: in particular,

the duty to determine the facts and make recommendations rests with the Inquiry Panel alone: s24(1)(a) and (b).

139. The Inquiry has produced a Protocol on the Role and Appointment of Assessors that reflects the limitations of the role of the Assessors in this Inquiry.[107]

The position of Mr Bhatt

140. Specific submissions in relation to Mr Bhatt are made in paragraph 27 of the SPF's submissions:

> 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".
>
> [emphasis added]

141. This is the sole basis on which recusal of Mr Bhatt is sought.

142. The Chair may wish to have regard to the following facts and matters:

a. The nature and position of an assessor (as out in paragraphs 136 to 139 above), in particular the limited range of functions performed and the fact that they have no responsibility for writing the Inquiry report.

b. As to the record of the meeting of 21st November 2022 itself – (i) the record of the meeting should be read as a whole, and (ii) the phrase about which complaint is made ("…but what we can is try to help achieve what you want…") should read in the context of the words which appear around it and what had already transpired in the conversation.

c. What should *not* be done is that 12 words are lifted from the record of the meeting as if they stood alone and then a meaning attributed to them.

    i. The Chair may consider that this is what the SPF seek to do in paragraph 64 of their submissions – they say that the subject matter of what Mr

[107] Inquiry Protocol on the Role and Appointment of Assessors

Bhatt was indicating he/the Inquiry would help to achieve was "…criticism, and the eventual prosecution, of the arresting officers" (the SPFs inclusion of these words in parentheses after the words attributed to Mr Bhatt – and linked by the word "which" – makes it clear that this is their suggestion).

ii. The Chair may consider that this is what Mr Paton does in his submissions too. He submits[108] "Indeed Mr. Bhatt addressing the family and their representative stated, 'but what we can (do) is try to help [you][109] achieve what you want. It could not be clearer that what the family want is for police officers, including Alan Paton, to be prosecuted" (emphasis added). And so, like the SPF, Mr Paton has selected an aim or a desire for himself to which he says that Mr Bhatt's indication must relate.

d. The fuller relevant part of the note in which these words appear is as follows:[110]

> **AJ:** …..Things like "come back where you came from"…How are they going to build impact – if nothing done about it, start to feel ok, part of life. It is not ok. What happened on 3 May 2015 should never have happened. **All asking for** is to get the truth. Plunged more into seeing how society is. Colour of skin. Day to day re-living the incident. This on top of it, it is crushing us. It is a heavy load to carry.
>
> ….
>
> **AA:** Over the years have had to come used to regular death threats and racist abuse. Debilitating. Attempt as a lawyer – stop you doing what you are doing. I don't think it is acceptable but learned to know/expect it. I can't begin to think what this is like for a family. It is done to stop the family coming. Only so much the family can take. Incredibly important statement made.
>
> **RB:** Sad to hear what I am hearing – won't come as a surprise. What we can do is support you – don't have the magic wand to change the world but what we can is **try to help achieve what you want**. Hopefully you get the strength to face. Would be lying to you if I was to say the Inquiry can stop this. Lived reality when put head above parapet. Process is stressful. Hearing will have

[108] Paton, page 2, 2nd paragraph from the bottom, last two sentences.

[109] This word does not appear in the record of the meeting – Mr Paton has inserted it into the quotation.

[110] PH-00007.

been very draining. **In order to get to the bottom** – this is the process we have.

[emphasis added]

e. It follows that Mr Bhatt's comment – that we can try to help you achieve what you want was said – after Mr Johnson had actually said what the family wanted, namely to get to the truth. The Chair may consider that there is on the face of the records of the meeting a plain relationship between the request and the reply; and there is nothing objectionable in either the request or the reply. Put another way, the Chair may find that that is how the fair minded and informed observer would read this record of the meeting.

f. The record of the meeting goes on to record a further comment attributed to Mr Bhatt, namely that "Process is stressful. Hearing will have been very draining. In order to **get to the bottom** – this is the process we have." A fair-minded reader might understand this to be a second reference to the families' stated desire of wishing to get to the truth – i.e. "to the bottom of it". [emphasis added]

g. There is an additional point: Mr Bhatt has provided a Note[111] in which he makes the position crystal clear: "In order to avoid any doubt, and for the sake of completeness, I can confirm that the family's stated objective of getting to the truth was precisely what I had in mind when I said to them that the inquiry could support them and try to help them achieve what they wanted." The Chair may consider that this puts the matter beyond doubt – the fair-minded observer may not only note the explanation given, but also that its coincidence with what an objective and fair-minded reader would take from the notes.

The position of Mr Fuller

143. Only one Core Participant – Mr Paton – makes an application for the recusal of Mr Fuller.

[111] PH-00060.

144. Mr Paton refers in his submissions to three meetings: (i) the meeting on 13th April 2022;[112] (ii) the meeting on 21st November 2022;[113] (iii) the meeting on 18th January 2024; and[114] (iv) the meeting on 5th December 2024.[115]

145. Mr Paton then submits:

> While it is accepted that Michael Fuller may not have actively participated in the meeting**s** his role is one of assisting the decision maker.
>
> He has been present during the meeting**s** and heard those comments being made by [the] family, Chair and Mr Bhatt and made no intervention or attempts to close down the conversations[.]
>
> The risk is that he would be influenced by what he has seen and heard and if apparent bias is shown, he may too be tainted therefore it follows that he too should recuse himself.
>
> [emphasis added]

146. The first point to make is that Mr Paton is in error in repeatedly suggesting that Mr Fuller was present in more than one of these three meetings (i.e. the "meeting**s**"). He was not: as the record of the meeting makes clear, he was only present during the meeting of 21st November 2022.[116]

147. The second point is that the submissions made above in relation to Mr Bhatt's position apply *a fortiori* in relation to Mr Fuller: if, on a proper analysis, a fair-minded and informed observer would conclude that, rather than displaying bias, Mr Bhatt was simply stating that the Inquiry would try to assist the families to get the truth, then there is no basis for arguing that the fair-minded and informed observer would conclude that Mr Fuller was also apparently biased by failing to challenge Mr Bhatt.

148. Finally, Mr Fuller has made it quite clear in his Note[117] as to the approach that he takes to the Inquiry: this resonates with the observation of the Chief Constable that

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[112] Paton, page 1, last paragraph – page 2, second paragraph.

[113] Paton, page 2, third paragraph – page 4, first paragraph.

[114] Paton, page 4, second paragraph.

[115] Paton, page 4, final paragraph – page 5, first paragraph.

[116] PH-00007.

[117] PH-00059.

"The Minutes disclose that he has provided proper and fair independent advice to the Chair in respect of 'race' and stressed the importance of taking an evidence-based approach."[118]

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2nd June 2025

[118] Chief Constable, [29]. It should also be noted that Chair has done exactly the same in the course of the meetings: (i) At the meeting on 4th November 2021 he explained that the evidence would be laid out in public at the public hearings and the family would hear the evidence and form their own views about it; (ii) at the on 13th April 2022 he told the members of the families present that they would give evidence in due course about the information which they had provided in the meeting; and (iii) at the meeting on 5th December 2024 he explained that the Inquiry's report would be based on the evidence heard.