

Conduct and procedure hearing

Note by Chair

Importance of family participation

[1] When the Inquiry was set up it became clear to me that the participation in the Inquiry by the families of Sheku Bayoh was of the greatest importance. They were next of kin. The terms of reference directly related to them in two respects: first, in respect of their treatment in the course of the investigations conducted by Police Scotland, the Police Investigations and Review Commissioner (PIRC) and the Crown Office and Procurator Fiscal Service (COPFS); and, second, in respect of the issue of race.

[2] Sheku Bayoh was a black man who died after contact with the police. Members of the families of Sheku Bayoh are predominantly black. Concerns about the death of black men after contact with the police featured in the public domain nationally and internationally. Over a number of years the families had called for a public inquiry into the death of Sheku Bayoh. On 12 November 2019 the Cabinet Secretary for Justice Humza Yousaf announced that the Scottish Ministers would establish a public inquiry:

“As members will be aware, Mr Bayoh’s family have been calling for a Public Inquiry for a number of years and the First Minister made clear it was definitely an option. When I met the family last year, I assured them that this Government shared the family’s commitment to getting answers.”

The Cabinet Secretary recognised the importance of the issue of race:

“For any independent scrutiny of this case to be rigorous and credible, it must address the question of whether or not Mr Bayoh’s race played a part in how the incident was approached and dealt with by the Police.”¹

[3] As core participants the families would be able to make opening and closing submissions; participate in suggesting lines of investigation to be pursued by the

¹ PH-00066

Inquiry; engage in the procedure under rule 9 of the Inquiries (Scotland) Rules 2007 allowing them to propose lines of questioning for counsel to the Inquiry to pursue; and seek leave to examine witnesses. If the families were not taking part in these procedures the effectiveness of the Inquiry would be seriously undermined.

[4] I also noted that in the years after 2015 the families had publicly lost confidence in each of Police Scotland, PIRC and COPFS. Whether the loss of confidence in any of these organisations was justified is not relevant at this stage.

[5] Overall, it seemed to me that if the families did not have confidence in the Inquiry and failed to engage with and participate in it, the viability of the Inquiry would be threatened. That was particularly the case in the light of the statement made by the Cabinet Secretary for Justice in announcing the Inquiry that the families had been calling for an inquiry for years and his stress on the importance of the context of race. There would be a significant impact on the credibility of the Inquiry's ability to fulfil the aspect of the terms of reference relating to race if the predominantly black next of kin of Sheku Bayoh were not participating in the Inquiry. I considered that there was a public interest in obtaining and retaining the confidence of the families in the Inquiry.

[6] Given the fragility of the confidence of the families in the Inquiry at various stages, I consider that meeting them on an annual basis did contribute to obtaining and retaining their confidence in the Inquiry and securing their evidence. I consider that, if I had not had meetings with them, there is a high probability that they would have stopped participating and would have walked out of the Inquiry.

[7] Although the meetings with the families were private, I did not consider them to be secret. On a number of occasions the Inquiry and members of the families made public reference to the meetings.

[8] As to meetings with other core participants, on 24 September 2021 I met the Solicitor General to discuss issues arising from the ingathering of evidence.² On 4 October 2021 at her request I had a telephone call with the Solicitor General following up on the meeting.³ There was no suggestion that any core participants other than the families would not engage with the Inquiry.

November 2020 - November 2021

[9] Between 30 November 2020 when the Inquiry was set up and the first preliminary hearing on 18 November 2021 the Inquiry was engaged in gathering evidence. By the autumn of 2021 I was becoming increasingly concerned about the fragility of the confidence of the families in the Inquiry. It appeared that the Inquiry had not gained the trust of the families and that there was a danger of them not participating and walking away from the Inquiry. I was concerned about the damage which would result from them leaving. In these circumstances I saw a meeting with the families as an opportunity to gain their confidence and persuade them to engage with and participate in the Inquiry.

Meeting 4 November 2021

[10] From recollection this meeting was attended by the three sisters of Sheku Bayoh: Kadi Johnson, Kosna Bayoh and Adama Jalloh, along with Kadi's husband, Ade Johnson. They were accompanied by members of their team of legal representatives. I was accompanied by senior counsel to the Inquiry and the solicitor to the Inquiry.

[11] The agenda for the meeting was provided by the families.⁴ Receiving an agenda allowed me to assess in advance whether the issues they raised were appropriate for

² PH-00064; PH-00064(a)

³ PH-00063; PH-00063(a)

⁴ PH-00001; PH-00020

me to address. I did not consider that the agenda contained anything that was inappropriate.

[12] On the day of the meeting I formed the impression that the members of the families present were frustrated and angry with the Inquiry. Even after they arrived at the building it was not clear whether they would participate in the meeting. It was only after a considerable delay that they entered the meeting room.

[13] The purpose of the meeting, and subsequent meetings, was to reassure them and encourage them to participate in the Inquiry. After offering condolences I explained the ways in which they would be at the heart of the Inquiry.⁵ I also offered them an opportunity before the evidence began to make a presentation about Sheku Bayoh, who he was and what he meant to them.

[14] After a tour of the building I gave them an opportunity to speak about their experience and the frustrations they had felt.⁶ I did not intend to elicit evidence. Inevitably some of what they said included information that related to the terms of reference. The purpose was to allow them to speak freely as part of the process of building trust and confidence in the Inquiry and to demonstrate that the Inquiry was listening. I did not regard this as receiving evidence. It was not recorded. I took no notes of what they said and there is no record of the meeting. I am unable now to recall the details of what they told me. When I met members of the families on 13 April 2022 I described the accounts that they had given me as “very powerful” but went on to explain to them that I would wish them to give evidence in due course.⁷

⁵ PH-00002

⁶ PH-00002

⁷ PH-00006

[15] Also in the meeting on 4 November 2021 I told the members of the families present that the evidence would be laid out in public at the public hearings and they would hear the evidence and form their own view about it.⁸

[16] On the first day of hearings, 10 May 2022, in explaining that the purpose of that day was to allow family members an opportunity to communicate to the Inquiry and the public the person Sheku Bayoh was, what he meant to each of them and the impact on each of them of his death, I went on to indicate that:

“I would expect certain members of the family to give evidence in hearing three in relation to what happened after the death and in the course of the investigation into it...”⁹

In due course each of Kadi Johnson, Ade Johnson, Adama Jalloh and Kosna Bayoh gave written statements of evidence to the Inquiry and Kadi Johnson gave oral evidence.¹⁰

[17] Thereafter, I addressed a number of aspects of the processes and procedures of the Inquiry.¹¹

[18] From the outset of the Inquiry I encouraged core participants to engage with the Inquiry and make suggestions as to how it should conduct its investigation.¹² In accordance with that process the legal representatives of the families had raised concerns about the level of knowledge and expertise in relation to race within the Inquiry team and had proposed that I should appoint as a member of the Inquiry team a person with expertise in race. The item on the agenda was directed at the issue of training persons in the Inquiry in relation to race.¹³ My speaking note is

⁸ PH-00002

⁹ Day 1/3/13

¹⁰ SBPI-00236; SBPI-00248; SBPI-00233; SBPI-00231; Day 34

¹¹ PH-00002

¹² PH1/7/15

¹³ PH-00020

directed to the level of expertise within, or available to, the Inquiry.¹⁴ I stated that I was prepared to consider the proposal to appoint an in-house expert. The statement in my letters to members of the families that I had heard their concerns about race was a reference to the discussion arising from the agenda point and my speaking note.¹⁵ I did not intend to discuss evidence in relation to race and there is no suggestion in the agenda, my speaking note or the letters that evidence in relation to race was discussed. In the event, I subsequently decided not to appoint an in-house expert and to proceed on an evidence-based approach. I had regard to the considerable experience of my assessors in race-related matters and, in addition, I appointed an additional junior counsel with experience in areas of race and discrimination.

[19] After the meeting on 4 November 2021, while it appeared that the families had been somewhat reassured by the meeting, concerns about the fragility of the confidence of the families in the Inquiry remained and I sent family members a letter which was designed to reinforce the importance of them participating in the Inquiry and the commitment of the Inquiry to finding the truth.¹⁶

[20] I have already explained the context of the reference to their concerns about race. As to the reference to being “humbled and honoured” that they had shared the story of their loss and the frustration they feel at the subsequent actions of the police and those investigating the death of Sheku Bayoh, the focus was on their loss and their frustration.¹⁷ I wanted to communicate to them that the Inquiry would be compassionate and would listen.

¹⁴ PH-00002

¹⁵ PH-00003; PH-00004; PH-00005

¹⁶ PH-00003; PH-00004; PH-00005

¹⁷ PH-00003; PH-00004; PH-00005

[21] These letters were not disclosed to other core participants. I now understand that at a later stage the legal representatives of Alan Paton requested sight of the letter which was refused by the solicitor to the Inquiry.¹⁸ No representations were made to me as to whether the letters should be disclosed.

[22] In the course of the meeting on 4 November 2021 I referred to an impasse in which the Crown had refused to consent to disclosure of documents by Police Scotland and that that had been resolved.¹⁹ This was the issue discussed in the course of my meeting and telephone call with the Solicitor General, noted above. At the meeting on 24 September 2021, which was held remotely, I was not accompanied by any member of the Inquiry team. My speaking note is available.²⁰ A similar speaking note is available in respect of my telephone conversation on 4 October 2021.²¹

Cancellation of meeting 24 February 2022

[23] A follow up meeting with the family to discuss the form which their presentation about Sheku Bayoh would take was initially scheduled for 24 February 2022. As I would be considering my decision on the request on behalf of a number of police officers for undertakings from the Solicitor General and the Deputy Chief Constable on that date, I considered that it was inappropriate for me to meet the families and postponed the meeting until later. In her email to the family legal representatives the deputy solicitor to the Inquiry stated:

“Given that he is currently considering the issue of the undertakings we think it is best to reschedule to after he has issued his ruling. You will appreciate that we need to guard against any possible perception of partiality. Although the meeting is not to discuss the undertakings sought the Chair thinks it would be more appropriate to have the meeting next week.”²²

¹⁸ PH-00040(b)

¹⁹ PH-00002

²⁰ PH-00064(a)

²¹ PH-00063(a)

²² PH-00010

In the event, the meeting took place on 13 April 2022.

Meeting 13 April 2022

[24] This was essentially a follow-up meeting to discuss the presentation which had been mooted at the earlier meeting. I told them that this was the opportunity to tell me, the core participants and the public about Sheku Bayoh, who he was, what he was like, what he meant to them and the impact of his death on them.²³ I described it as an opportunity to give a pen portrait of Sheku Bayoh. At the earlier meeting I had told them that this had been done in other public inquiries.²⁴

[25] As I was aware that members of the families had been forthright in the past I was concerned to ensure that they would not say anything inappropriate in the circumstances in the course of the presentation. I wanted a member of the legal team of the Inquiry to see the video and what they intended to say. I told them that I did not want anything that might provoke interruption or objection.²⁵

Meeting 21 November 2022

[26] I had been advised before the meeting that members of the families, including younger members had been subjected to racist abuse online and in writing. The first part of the meeting consisted of a discussion about that abuse.²⁶ This did not relate to evidence in relation to race. On the following day I made a public statement condemning racist abuse of the families:

“I want now to turn to another matter. It has come to my attention that core participants in this Inquiry have been subject to abuse on social media or in writing. I abhor such abuse, whatever its source and against whomever it is directed. Recently it has been reported to me that the family of Sheku Bayoh

²³ PH-00006

²⁴ PH-00002

²⁵ PH-00006

²⁶ PH-00007

and their solicitor have been subjected to racist abuse. I am sure that everyone associated with this Inquiry will agree with me that such behaviour is despicable and entirely unacceptable. In some instances it may amount to hate crime. In every instance it causes the recipients and members of their family, some of whom may be quite young, pain, distress and harm. The families of Sheku Bayoh remain at the heart of this Inquiry. The Inquiry strongly condemns such treatment of them and calls for it to cease.”²⁷

[27] Both the assessors Raju Bhatt and Michael Fuller attended this meeting. This was the only meeting attended by the assessors. The assessors were appointed under section 11 of the Inquiries Act 2005 to assist me. They are not members of the Inquiry panel. As chair I am the only member of the Inquiry panel. Raju Bhatt was a solicitor practising in London who had considerable experience of dealing with bereaved families. The contribution of Raju Bhatt at this meeting was made in the context of the discussion about racist abuse suffered by members of the families. Mr Bhatt said, “What we can do is support you – don’t have the magic wand to change the world but what we can do is try to help achieve what you want”.²⁸ I understood that to be a reference back to a comment made by Ade Johnson, “All asking for is to get to the truth”. Mr Bhatt also said that the hearing will have been very draining adding, “In order to get to the bottom – this is the process we have”. It seemed to me that the reference to getting “to the bottom” was consistent with a search for the truth. I note that in his Note Mr Bhatt confirms my understanding of his remarks.²⁹

[28] Ade Johnson made comments about examination of witnesses by senior counsel to the Inquiry including “presenting evidence that contradicts their statements”.³⁰ I understood that to be a comment on the approach adopted by counsel to the Inquiry rather than a discussion of the evidence. He then asked what happened if a witness lied under oath and I explained that that was a matter for the Crown to decide.

²⁷ 23/5/5

²⁸ PH-00007

²⁹ PH-00060

³⁰ PH-00007

[29] The families had indicated that they wanted to raise certain matters in relation to the post-mortem report.³¹ In my state of knowledge at that time I found what was said by Ade Johnson somewhat confusing and I had difficulty in understanding what the issue was. I explained that preparation was ongoing for the hearing on cause of death which was scheduled for May 2023. The matter was resolved by counsel to the Inquiry indicating that the family should raise their concerns through the normal channel through their solicitor.

[30] It was not appropriate for Mr Anwar to refer to the matters relating to the post-mortem examination but he was immediately interrupted by senior counsel to the Inquiry who indicated that these were issues to be explored in preparation for the cause of death hearing.³²

[31] In May 2022 I considered an application by the legal representatives of Alan Paton, a retired police officer who had been an attending officer on 3 May 2015, for the use of special measures for taking his evidence, namely, that his evidence should be pre-recorded and later played in the hearing room and broadcast. The application was supported by medical evidence. The legal representatives of the families opposed the application. Having considered the application and the opposition of the families I granted the application.³³ The evidence of Alan Paton was pre-recorded on 13 June 2022. The tape was played and broadcast on 21 June 2022.³⁴

[32] I was aware that members of the families were unhappy and angry at my decision to allow special measures. I took the opportunity at the meeting on 21

³¹ PH-00007

³² PH-00007

³³ [Decision by Chair on restriction order application](#)

³⁴ 20/1/4

November 2022 to explain to them that there would be times when I would have to make decisions with which they would not agree.³⁵ I explained that I always made the decisions based on evidence and gave reasoned decisions.

[33] Zahid Saeed gave evidence on Friday, 13 May 2022.³⁶ In March 2022 he had provided a written statement to the Inquiry.³⁷ In the course of his evidence he repeatedly claimed not to remember things about which he had given evidence in the written statement only two months before. Senior counsel to the Inquiry sought to put some pressure on him and in the course of that said to him, “The biggest help you could be to your friend, your brother [Zahid Saeed referred to Sheku Bayoh as his “brother”³⁸], Shek, right now is to help the Chair understand some of what you said in your statement and that is the biggest help you personally could be to him and I would like you to help”.³⁹ Mr Saeed responded by saying “To who? To Shek? Or to the inquiry?” Counsel then said, “the biggest help you could be to Shek right now is to tell the Chair the whole truth about everything that happened so he can consider it all”. Mr Saeed continued to fence with the questions, trying to avoid answering them. I formed the view that Mr Saeed was prevaricating. I warned him about this and directed him to answer the questions.⁴⁰ He did then begin to answer questions but after a time resorted to claiming that he could not remember. Senior counsel to the Inquiry indicated that she wished to end the examination and explore whether his evidence could be taken in an alternative environment or other arrangements might be put in place.⁴¹ I acceded to that motion. I was also mindful of the limited powers that the chair of an inquiry has in relation to dealing with prevaricating witnesses.

³⁵ PH-00007

³⁶ 4/1/10

³⁷ SBPI-00071

³⁸ 4/3/14

³⁹ 4/25/20

⁴⁰ 4/27/13

⁴¹ 4/31/11

[34] It was against that background that Kadi Johnson raised the comparison of the treatment of Zahid Saeed and Alan Paton.⁴² She stated that the families felt that there was a lot of attention given to Alan Paton and that they were surprised that he had been given such privilege. She contrasted their sense that a lot of attention had been given to Alan Paton while Zahid Saeed had been dealt with firmly.

[35] I explained that my decision in relation to Alan Paton had been made on the evidence available to me. In doing so I did not release any personal data. I understood the remark by senior counsel to the Inquiry at the meeting, “Maybe I did push him – encouraged him to help SB” as a reference to the examination of Zahid Saeed set out above.⁴³

[36] Ade Johnson said that Alan Paton had been “given the opportunity to say not going to sit across the table from a black family – but happy to jump out of a van.”⁴⁴ That was an inappropriate remark. I brought the meeting to an end almost immediately. From time to time in the meetings a member of the families or their solicitor would say something that was inappropriate which could not have been anticipated. On the occasions when that happened I did not engage with the statement, or I, or senior counsel to the Inquiry, would move the discussion quickly on. On this occasion I brought the meeting to a close. It is natural that emotions from participating in an inquiry into the death of a loved one would sometimes flare up. I did not wish to cause more distress by interrupting. It seemed a more diplomatic alternative to deal with these situations by moving quickly on.

⁴² PH-00007

⁴³ PH-00007

⁴⁴ PH-00007

[37] At the end of the meeting Ade Johnson commented on the approach to questioning by senior counsel to the Inquiry in relation to race.⁴⁵ At the preliminary hearing on 18 November 2021, a year before this meeting, senior counsel to the Inquiry had given notice of the approach she intended to take:

“In this Inquiry, we will be carefully examining every choice made, every action and omission, and asking whether the fact that Mr Bayoh was a black man made a difference. We will be asking: had Mr Bayoh been white, would he and his family have been treated in the same way? Had Mr Bayoh been white, would the investigations have proceeded in the same way? Had Mr Bayoh been white, would different choices have been made about the appropriate course of action? At every stage, we will be making this comparison and asking ourselves that question.”⁴⁶

[38] On 22 November 2022 in an interview to the press Kadi Johnson referred to meeting me on 21 November 2022 and said, “But we welcome a meeting with Lord Bracadale yesterday and his condemnation of racist abuse to our family and threats made to our lawyer”.⁴⁷

[39] At the conclusion of the playing of the pre-recorded evidence of Alan Paton on 21 June 2022 I heard an application by the legal representative of the families for questioning under rule 9.⁴⁸ I permitted a number of lines of questioning and ordered that these would be pursued by counsel to the Inquiry in a further pre-recorded hearing. That hearing took place on 29 September 2022.

[40] The pre-recorded tape of the rule 9 examination was due to be played and broadcast on 8 December 2022. On 7 December 2022 the legal representatives of Alan Paton requested a delay in the playing of the pre-recorded tape as they wished to make representations about the conditions in which the tape should be played. I

⁴⁵ PH-00007

⁴⁶ PH1/26/13

⁴⁷ PH-00016

⁴⁸ 20/194/20

agreed to postpone the playing of the tape. At the beginning of the hearing on 8 December 2022 I made a public statement indicating that the playback of the rule 9 examination would be continued to permit a written application to be made on behalf of Mr Paton.⁴⁹ In response to this statement members of the families walked out of the hearing room.

[41] 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?”⁵⁰

This reminded me of how fragile the confidence of members of the families in the Inquiry could be.

Meeting 18 January 2024

[42] The record of the meeting includes an entry “Profoundly affected by your evidence Kadi”. This is not a reference to my reaction to the evidence of Kadi Johnson. I was referring to the reaction of the Chief Constable to her evidence. The record of the meeting should be read:

“This hearing will of course take place against the background of former CC accepting that PS is institutionally racist. Worthy of note that evidence CC heard at this Inquiry one of the drivers in reaching that conclusion. [he was] Profoundly affected by your evidence Kadi.”⁵¹

This is a reference to submissions made by senior counsel for the Chief Constable.

On Day 2, 11 May 2022 senior counsel for the Chief Constable in her opening statement said:

⁴⁹ 32/1/3

⁵⁰ PH-00065

⁵¹ PH-00008

“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.”⁵²

In the interim closing submissions, senior counsel for the Chief Constable said:

“73. The second issue which is a question for the police service as an organisation, however, was a matter which, as part of the anti-racist strategy, needed to be addressed by the Chief Constable.

74. 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.”⁵³

[43] This meeting was largely directed at the impact of the Inquiry on the members of the families. Kosna Bayoh described the experience as very challenging and draining.⁵⁴ I asked about the welfare of Sheku Bayoh's mother. Kadi Johnson said that the Inquiry had been very hard for their mother. Members of the families described the impact that listening to the evidence had on them. Members of the family spoke of personal issues that arose from their engagement with the Inquiry. Welfare and impact issues arose from the day-to-day engagement with the Inquiry, and members attended every day, but also from the nature of the evidence they heard. It was sometimes difficult to separate these issues.

⁵² 2/32/9

⁵³ SBPI-00345

⁵⁴ PH-00008

[44] Ade Johnson made a number of criticisms in relation to disclosure.⁵⁵ Mr Anwar made a comment that representatives of the PIRC and the Crown had lied repeatedly to the family.⁵⁶ He made this remark in the course of the discussion about disclosure. I considered that to be an inappropriate thing to say in the meeting and I quickly moved the meeting on to a discussion about changes of hearing days which were causing members of the family difficulties.

Meeting 5 December 2024

[45] This meeting took place at a time when a number of months had elapsed since the application for extension of the terms of reference had been made by the families. At this meeting there was no substantive discussion of the application to extend the terms of reference. I directed the discussion towards welfare issues and how members of the families had been coping.⁵⁷

[46] Ade Johnson asked if the family would be given an opportunity to make a presentation from a personal perspective “to express the impact this inquiry has had on the family”.⁵⁸ I understood that to be a reference to the process and experience of going through the Inquiry rather than a reference to the impact of the events of 3 May 2015.

[47] I explained that the report would be based on evidence heard.⁵⁹ The discussion in the report moved on to whether there would be “easy-to-read” version and whether it might be published in different languages. The discussion then moved on to issues about the building.

⁵⁵ PH-00008

⁵⁶ PH-00008

⁵⁷ PH-00009

⁵⁸ PH-00009

⁵⁹ PH-00009

[48] On 5 December 2024 the media manager for the Inquiry was quoted in the BBC:

“A spokeswoman for the Sheku Bayoh Inquiry said Lord Bracadale had stated throughout that the families of Sheku Bayoh were ‘at the heart of’ the Inquiry.

An important part of this commitment is providing opportunities for them to meet the chair from time to time. Lord Bracadale held a private meeting with members of the family today.”⁶⁰

References to evidence in the meetings

[49] At the meeting on 4 November 2021 I explained that the evidence will be laid out in public at the public hearings and the family would hear the evidence and form their own views about it.⁶¹ At the meeting on 13 April 2022 I told the members of the families present that they would require to give evidence in due course about the information which they had given me.⁶² At the meeting on 5 December 2024 I told them that the report would be based on the evidence heard.⁶³

Application for extension of terms of reference

[50] On 13 June 2024 members of the families of Sheku Bayoh met the Deputy First Minister. They requested the Deputy First Minister to extend the terms of reference to include the prosecutorial decision. I was unaware of their intention to make such a request. On 13 August 2024 the Deputy First Minister wrote to me indicating that she wished to have a discussion with me about the request made at her meeting with members of the families.⁶⁴ I agreed to meet the Deputy First Minister on 5 September 2024.⁶⁵

⁶⁰ PH-00017

⁶¹ PH-00002

⁶² PH-00006

⁶³ PH-00009

⁶⁴ PH-00054

⁶⁵ PH-00025

[51] On 29 August 2024 the solicitor for the families wrote to me explaining the basis for the application.⁶⁶ Mr Anwar asserted, first, members of the families wished to know the whole truth; second, that a public body such as COPFS “ought to be transparent about and accountable for, its decisions”; and, third:

“This decision that is sought to be examined was taken on an incomplete and erroneous understanding of the evidence and failed to take into account important issues such as race.”

[52] In preparation for my meeting with the Deputy First Minister on 5 September 2024 I reviewed the evidence which had been led within the current terms of reference. That evidence came close to but did not include an examination of the prosecutorial decision. I reviewed the evidence of James Wolfe KC, the then Lord Advocate; Ashley Edwards KC, Crown Counsel; the members of COPFS who had been involved in the investigation and precognition of the case; and the report prepared by Martin Graves, an expert in officer safety training instructed by the Crown.⁶⁷ This review raised concerns about the approach of the Crown to the factual evidence about the restraint of Sheku Bayoh. In particular, I was concerned as to whether, where there was conflicting evidence about the restraint, the Crown had developed hypotheses based on different accounts, including a hypothesis reflecting the Crown case at its highest, and sought the view of the expert on the different hypotheses, or whether they had allowed the expert to arrive at his own conclusions on the evidence from the material supplied to him. My provisional view was that the evidence seemed to point towards the latter approach. Although Mr Graves had noted that some of the issues in relation to the case were evidence of fact and it would be for the investigator or court to decide which were correct and which were not, it appeared from the body of his report that he had based his findings on his own analysis of the facts from the raw materials provided to him. That could have a bearing on reliance to be placed on the report of the expert.

⁶⁶ PH-00053

⁶⁷ COPFS-00024

[53] As to the absence of an examination of the issue of race in the course of the investigation and precognition, I had regard to the evidence of senior members of COPFS as well as the former Lord Advocate, James Wolffe. John Logue, the Crown Agent, said “I would agree that you could not consider the question of criminality without considering the question of race”.⁶⁸ Lindsay Miller, Deputy Crown Agent, and Stephen McGowan, a senior official, agreed.⁶⁹ Both Ms Miller and Mr McGowan were critical of the absence of the examination of the issue of race in the precognition.⁷⁰ James Wolffe KC expected that the Crown would scrutinise the evidence for indicators of racial motivation or racial issues. He said, “The question I’m asking myself... is why questions of racial motivation wouldn’t be at least potentially relevant to the question of whether or not the evidence supported criminal charges.”⁷¹

[54] It seemed to me that there was a reasonable inference that the matters giving rise to concern would have been integral to the decision not to prosecute. I concluded therefore that there was a substantive issue relating to the prosecutorial decision examination of which by the Inquiry might be in the public interest. As was set out by the solicitor to the Inquiry in her letter to core participants dated 6 September 2024, I explained to the Deputy First Minister that I considered that there was a substantive issue.⁷²

[55] On 4 October 2024 Martin Graves gave further evidence, in the course of which he appeared to confirm that in relation to the restraint of Sheku Bayoh he had formed his own view on the facts from the material supplied to him. For example:

⁶⁸ 97/56/5

⁶⁹ 99/76/10; 98/91/5

⁷⁰ 99/53/5; 98/56/3; 98/62/19

⁷¹ 100/77/24

⁷² PH-00025

“Q ... was it ever explained to you by the Crown that it appeared from the eyewitness evidence that there were different factual versions emerging of what actually happened in Hayfield Road and they could not all be true and accurate, but different witnesses said different things and that it would not be for you to make up your mind which version you preferred.

A Yes, I took into consideration all the - - I had access to all the witness statements so I used those to blend and look at the timeline to make my own - form my own opinions”.⁷³

...

“Q Looking at the top of page 8 [COPFS-00008], it appears that the Crown has set out perhaps two factual scenarios, two possibilities here, one that an officer believed to be PC Walker appeared to be lying lengthwise on top of Mr Bayoh or that the same officer appeared to be lying beside Mr Bayoh. Can you help the Chair understand what...you understood the crown to be asking you in regard to those two factual possibilities?

A I believe that was them - - their review of the CCTV footage once the compilation, the timeline compilation had been done, that was their interpretation of two possible opinions on that video and I was asked or I was under the impression from that I was asked as to which one I believed was correct or if I had a different view, to express that opinion”.⁷⁴

This evidence of Mr Graves strengthened my concern in relation to the approach of the Crown.

[56] On 14 October 2024 the Deputy First Minister wrote to me seeking written clarification of my current position on whether the terms of reference should be extended.⁷⁵ In particular, she wished to know my view as to whether any extension should cover only the first prosecutorial decision also include the decision flowing from the Victims’ Right to Review (VRR). In addition she wished an indication of the impact of altering the terms of reference at this stage in the Inquiry’s progress. It also emerged from this letter that on 4 September 2024 the solicitor for the families had submitted a written request to the Deputy First Minister.⁷⁶ On 22 October 2024 I wrote to the Deputy First Minister asking for sight of this letter.⁷⁷ In the event, I did

⁷³ 120/20/3

⁷⁴ 120/21/22

⁷⁵ PH-00055

⁷⁶ PH-00032

⁷⁷ PH-00057

not have sight of this letter until 28 January 2025 when it was disclosed to the Inquiry and core participants. On receipt of the letter it was immediately obvious that it contained an error in respect that Mr Anwar stated that I had met the family on 30 August 2024. I instructed the solicitor to the Inquiry to issue a correction.⁷⁸

[57] The letters dated 16 September 2024 and 3 October 2024 from Mr Anwar to the Deputy First Minister were also disclosed to the Inquiry for the first time on 28 January 2025.⁷⁹

[58] On 25 October 2024 I issued to core participants a provisional view on the requested extension of terms of reference and invited submissions.⁸⁰ A number of core participants lodged submissions. I did not write to the Deputy First Minister on 25 October 2024.

[59] On 18 November 2024 I wrote to the Deputy First Minister setting out my position, including my view that the VRR should be included.⁸¹ In the period between my meeting with the Deputy First Minister on 5 September 2024 and this letter I had heard the additional evidence of Martin Graves outlined above. I indicated that that evidence had reinforced my concerns. As to whether it was in the public interest for the terms of reference to be extended I dealt with the matter cautiously:

“There is therefore *a case* that the Inquiry, which has already examined the investigation by the Crown up to but not including that decision, should examine the October 2018 decision and the ensuing VRR. I consider that it *may* be in the public interest for the inquiry to do so.”

I expressed my increasing concerns about the impact of delay and additional expense.

⁷⁸ PH-00028

⁷⁹ PH-00030; PH-00031

⁸⁰ PH-00026

⁸¹ PH-00027

[60] In the Note prepared by the Solicitor General for the Deputy First Minister, dated 13 December 2024, disclosed to the Inquiry on 31 January 2025, in which she explains that she would not “stand in the way of an examination of the prosecutorial decision-making”, the Solicitor General states that without making any concession as to the validity of the concerns, “I take the views of the Chair extremely seriously. I consider that his concern that there was a failure on the part of the Crown to properly examine the issue of race is particularly grave”.⁸²

[61] On 14 January 2025 the Deputy First Minister wrote to me indicating that she wished to have a further discussion with me once final responses from all core participants had been received.⁸³ She explained that the families now wished the VRR to be included in any extension of the terms of reference and she outlined a development in relation to the position of the Solicitor General who now consented if the Deputy First Minister considered that it was in the public interest to extend the terms of reference.

[62] On 16 January 2025 I wrote to the Deputy First Minister noting these developments and assuring the Deputy First Minister that if she was otherwise minded to grant the extension the Inquiry would be able to carry out the work despite the difficulties outlined in my letter dated 18 November 2024.⁸⁴

[63] On 22 January 2025 the Deputy First Minister disclosed to the Inquiry the Note by the solicitor general referred to above.

[64] On 17 February 2025 I had a meeting with the Deputy First Minister. In the course of the meeting I set out my final thoughts and views identifying relevant considerations that pointed in favour of extension and others which pointed in the opposite direction. In her letter of 25 February 2025 to core participants the solicitor

⁸² PH-00051

⁸³ PH-00056

⁸⁴ PH-00058

to the Inquiry set out what I said to the Deputy First Minister.⁸⁵ As to my reference to there being “strong indications”, having regard to what appeared to be clear additional evidence from Martin Graves and the evidence of the former Lord Advocate and very senior officials in COPFS about the lack of examination of race, that seemed an appropriate description. I also noted the comment about my concerns set out by the Solicitor General in her Note for the Deputy First Minister quoted above. My view, however, remained subject to the caveat in the letter dated 18 November 2024 that I had not yet heard submissions on behalf of the Crown and had not yet conducted a full analysis of the evidence.⁸⁶ It remained a provisional view.

[65] Again, on the public interest issue I expressed myself cautiously:

“These considerations, without reference to other aspects of the public interest, *might tilt the balance* in favour of granting an extension.”⁸⁷

I went on to identify a number of considerations that would weigh in favour of refusing the extension, including:

“An important consideration to take into account would be the impact of any delay on all core participants, including in particular, the welfare of individual police officers and retired police officers.”

Evidence of Martin Graves

[66] The main purpose of the examination of Martin Graves in October 2024 was to take evidence from him in relation to training.⁸⁸ In the light of my concern as to whether Mr Graves had expressed his expert opinion on hypotheses provided to him by the Crown or had arrived at his own conclusion on the facts it was appropriate to give him an opportunity to clarify his position.

⁸⁵ PH-00029

⁸⁶ PH-00027

⁸⁷ PH-00029

⁸⁸ Days 118, 119 and 120

[67] It is in the nature of an inquisitorial and investigative inquiry that issues may be revisited or addressed as the knowledge of the Inquiry develops. On 22 November 2022 I made the following observation:

“It is also important to bear in mind that this is an inquisitorial and investigative Inquiry. It is of a rolling nature and involves an iterative process. As the Terms of Reference are extensive, it is necessary for me to break the hearings into blocks, but these blocks are not hermetically sealed and there will be a degree of overlap. Issues may be revisited...”⁸⁹

[68] The Inquiry has flexible procedures. Where the oral evidence of a witness raises any issue that gives a core participant concern, various options are available, both informal and formal. In the course of the evidence counsel for core participants can approach counsel to the Inquiry informally at breaks and raise matters with them. That was done on a daily basis. Counsel for the Solicitor General informally approached counsel to the Inquiry in this way on a number of occasions.

[69] A formal process is available under the *Guidance in making submissions in the course of a hearing*:

“Where, in the course of a hearing, a matter arises in respect of which the legal representative of a core participant wishes to make a submission, the following guidance will apply:

- In most cases it should not be necessary to interrupt the proceedings to make an immediate oral submission. Counsel for the core participant should send an email to the legal enquiries mailbox ... explaining the purpose of the proposed submission and why they require to make that submission orally rather than in writing.
- On receipt of the email the solicitor to the inquiry will make counsel to the inquiry aware of the application and place it before the chair. This will generally be done at the next break. The chair will decide (a) whether, and, if so, when, an oral submission may be heard; or (b) whether the matter should be dealt with, at least in first instance, by a written submission. It may be that as part of this process counsel to the inquiry will have a discussion with counsel for the core participant.

⁸⁹ 23/3/1

- There may be exceptional circumstances, in which there is an urgent, pressing need for counsel for a core participant to raise a matter during a hearing. In these circumstances counsel should explain to the chair the basis of the urgency and why the email procedure set out above cannot be complied with.”⁹⁰

[70] The legal enquiries mailbox was monitored throughout the evidence. This process was used regularly by the legal representatives of core participants.

[71] After the examination of a witness by counsel to the Inquiry is complete I give an opportunity to counsel for core participants to make an application under rule 9 to examine the witness.⁹¹

[72] Where, after the evidence of the witness is complete, the legal representatives of a core participant still have concerns it is open to them to move for recall of the witness. In the course of the Inquiry a number of witnesses were recalled. Alternatively, the legal representative can provide further information to the Inquiry and invite the Inquiry to obtain a further written statement from the witness under rule 8.

[73] None of these steps were taken on behalf of the Solicitor General in respect of the evidence of Martin Graves given in October 2024.

Concern about the manner in which evidence has been adduced

[74] Evidence in the Inquiry was introduced in a series of blocks between May 2022 and October 2024. In total, the Inquiry heard around 120 days of evidence. On a number of occasions in the course of the Inquiry the Solicitor General wrote to me raising various issues. That correspondence included expression of concerns about

⁹⁰ PH-00062(a)

⁹¹ [Questioning of witnesses](#)

steps being taken by the Inquiry. On no occasion between May 2022 and May 2025 has the Solicitor General raised with me any concern about the manner in which evidence has been adduced, or the way in which counsel to the Inquiry have questioned witnesses from Police Scotland, PIRC and COPFS. No such concerns were raised in her interim closing submissions.⁹² If the Solicitor General had concerns about these issues I would have expected her to have raised them with me, either in correspondence or by seeking a procedural hearing at which her concerns could be examined. In addition, in the Notes for the Deputy First Minister prepared by the Solicitor General dated 13 December 2024 and 22 January 2025 there is no suggestion of any concerns relating to the way in which the evidence had been adduced.⁹³

[75] The evidence of the COPFS witnesses was taken in a block beginning 16 April 2024. By then the evidence of the witnesses from Police Scotland and PIRC had already been introduced. The Solicitor General had earlier raised an issue as to whether certain parts of the precognition documents fell outside the boundary of the terms of reference imposed by the phrase “up to but not including” the prosecutorial decision. As the hearing approached, discussion of the issue between senior counsel to the Inquiry and senior counsel for the Solicitor General failed to achieve agreement and I appointed a procedural hearing. The procedures of the Inquiry are flexible. If the Solicitor General had concerns about the way in which the evidence of the witnesses from Police Scotland and PIRC had been adduced, and was concerned that a similar approach might be taken to the COPFS witnesses, she could have raised these at the procedural hearing.

The campaign by the families

⁹² SBPI-00335

⁹³ PH-00051

[76] Members of the families and their solicitor have over the years on many occasions made public statements about aspects of the actions of police officers, representatives of PIRC and representatives of the Crown. These have been extensively covered in the press and media. As an experienced judge I would, and would be expected to, put any coverage which I had read or seen out of my mind in assessing the evidence.

No substantive decision on evidence

[77] I have not yet made any substantive decision on the evidence. I have yet to hear closing submissions on the evidence. In analysing and assessing the evidence I will require to take the submissions into account.

Alastair P Campbell

The Rt Hon Lord Bracadale

2 June 2025