Thursday, 12 June 2025

(10.00 am)

(Proceedings delayed)

(10.04 am)

Housekeeping

LORD BRACADALE: Good morning. The Assessors are not attending in person today, but they will be able to follow proceedings remotely.

The Scottish Police Federation and two other core participants lodged a written application moving me to recuse myself as Chair of the Sheku Bayoh Inquiry on the ground that my conduct in meeting, on a number of occasions, members of the families of Sheku Bayoh has given rise to the appearance of bias against the applicants.

All core participants have had an opportunity to make written submissions and a number have done so. I appointed this procedural hearing for oral submissions.

As Senior Counsel to the Inquiry also attended the meetings, I have appointed Mr Jason Beer KC as Senior Counsel to the Inquiry for the purpose of dealing with the application.

Mr Beer has lodged written submissions, and I have prepared a note explaining the history, nature and context of the meetings. All the submissions and my note will be published on the Inquiry's website.

Counsel have been allocated up to 40 minutes for oral submissions, and I would be very grateful if they can keep within that limit. I shall now ask Mr Beer to deal with any preliminary matters. Mr Beer.

MR BEER: Thank you, Sir. For the reasons you have given, I appear as Counsel to the Inquiry. Also appearing today to make submissions -- and I realise, of course, the irony of me introducing them whereas I am the new boy in town -- are, firstly, the Dean of the Faculty on behalf of the Scottish Police Federation and ex-PCs Walker and Short, Mr Byrne KC on behalf of Messrs Good, Smith and Tomlinson, Mr Stewart KC on behalf of Mr Paton, Mr Duncan KC on behalf of the Solicitor General for Scotland, Mr Moir KC on behalf of the Coalition for Racial Equality and Rights, and Ms Mitchell KC on behalf of the families of Sheku Bayoh.

There are a number of other advocates present in the room today, who I hope will forgive me for not introducing them as they are not making oral submissions today.

You'll be aware that the six organisations and groups of individuals I have just listed have made written submissions in accordance with directions made by you, alongside written submissions made by others, who I shall list. Written submissions were made by Ms McCall KC on behalf of Sergeant Maxwell and PCs Gibson and McDonough. Written submissions were made by Ms Maguire KC, Ms Henderson KC and Ms Lambert on

behalf of the Chief Constable of Scotland. Written submissions were made by Mr Hamilton KC on behalf of Chief Superintendent McEwan and Chief Superintendent Trickett. Written submissions were made by Mr Macleod KC on behalf of Temporary Assistant Chief Constable Campbell, and a letter was received from the Police Investigation and Review Commissioner, stating that they did not propose to make submissions.

All of those submissions and PIRC's letter, alongside the written submissions that I have filed, as you have said, either have been or will be uploaded shortly to the Inquiry's website so that any person with an interest in the Inquiry, whether a member of the public or the media, can read them and follow the issues and the argument if they so wish.

In terms of the order of submissions, these will be made as follows. Firstly, the Scottish Police Federation, then Messrs Good, Smith and Tomlinson, then Mr Paton, then the Solicitor General, then the Coalition for Racial Equality and Rights, then the families of Mr Bayoh and then finally me.

In terms of bundles, you have a significant quantity of material before you. It's been divided into four classes or categories of material. Volume 1 consists of the written submissions and the letter that I have mentioned, along with notes from each of your Assessors, Michael Fuller and Raju Bhatt, and a note from you, as you've just said. That

is 197 pages long and is contained in the blue file before you.

Vol 2 consists of documents previously disclosed by the Inquiry to core participants so that they might fairly make submissions about the application made by the Scottish Police Federation, and the documents mentioned by core participants and me, by you and by the Assessors in our various documents. That's 393 pages long contained in the single lever arch file which is green in colour.

Volume 3 is an authorities bundle and therefore consists of the reports of the cases relied upon by everyone in their submissions. That's 2,051 pages long and is contained in four volumes, 3A, B, C and D, red in colour, and volume 4 is a collection of miscellaneous materials, essentially other documents supplied alongside the submissions, and is 357 pages long, contained in a single lever arch file which is purple in colour.

I think advocates should know that you're working, in the main, I think, from the hard copies of these materials and so should probably give the colour of the bundle and the volume letter, A, B, C or D, if they're referring to the red volumes, and then the page number.

In addition to these materials, four core participants have filed further materials and authorities in the last few days. Those materials have been collected up together for

you in a grey folder and they are tabbed up so you can use the internal pagination within each tab, but there has been no additional pagination applied to them.

We have given the opportunity for core participants to ask for documents to be displayed in the hearing room. In fact, all core participants have said that they don't ask for documents to be displayed.

In terms of the issues and positions of the core participants, the Scottish Police Federation has applied for you to recuse yourself, as you have said, that is to cease all further involvement in the Inquiry, and has made the same application in relation to Mr Bhatt. They have not made that application in relation to Mr Fuller.

The following core participants support that application, Messrs Good, Smith and Tomlinson, Messrs Maxwell, Gibson and McDonough, Mr Paton, Mr Campbell and the Solicitor General. Mr Paton also seeks the recusal of Mr Fuller, but no other core participate has made such an application.

Mr McEwan and Mr Trickett reserve their position in their written submissions and have not indicated any different position, having reviewed materials from the other core participants and from the Inquiry.

The Chief Constable of Police Scotland also reserved her position, in her written submissions, as to your recusal. She wished to see in particular what you said in your note,

what the family said and what I said in my submissions. Since receiving that material, she wrote to the Inquiry on 6 June -- I don't ask for this document to be turned up but for your note, it's volume 4, tab 42, pages 353 to 356 -- and said the Chief Constable does not invite the Chair to recuse himself. The issues which the organisation has with the fairness of the conduct of the Inquiry to date will be dealt with fully in her closing submissions. That is a position the Chief Constable can take because she's committed to continuous improvement in policing. Her engagement with the Inquiry and Police Scotland's organisational learning are aligned completely with the aims of the terms of reference, which include the aim to maintain and restore confidence in policing.

However, members of Police Scotland, of which she is the leader, have brought before the Chair issues of concern, upon which the Chair will need to reflect and consider fairly. Her decision not to seek recusal should not be interpreted as an indication she is against the application of the SPF. It will now be for their representatives to submit if and why the note by the Chair and the submissions on his behalf by Counsel to the Inquiry do not allay those concerns. So that's the Chief Constable of Police Scotland's position.

So with those brief introductory remarks, it is over to the Dean.

Submissions by MR DUNLOP

MR DUNLOP: Just by way of preliminary, two matters. Firstly, Mr Beer introduces me as acting for the Federation and former PCs, Walker and Short. As your Lordship knows, Ms Short is a former PC. Mr Walker is not; he remains a police constable.

Secondly, my Lord, I fear I may stray beyond the 40 minutes, but it will not imperil anything today because, for example, Mr Stewart, who is here today in place of Mr McConnachie will only be five minutes, so if I might, I will borrow some of his time.

LORD BRACADALE: Clearly I want to make progress, Dean, so if you can not stray over the time unduly, I would be grateful.

MR DUNLOP: Indeed. My Lord, this application has been described publicly as beneath contempt. I hope that your Lordship does not agree. Your Lordship will again, I hope, be in no doubt as to the esteem in which I and those instructing me hold him. I would rather be somewhere else; I would rather be doing almost anything else than bringing this application. I trust your Lordship understands I would not be making this submission if I did not consider it, on my professional responsibility, as being both proper and entirely necessary.

I do so consider.

I am reassured in my own views as to the propriety and necessity that this application is supported or adopted by

five of my colleagues, representing a total of 12 of the core participants to this Inquiry. Far from being, as has again been said publicly, a desperate and pathetic attempt to derail this Inquiry, this application is brought with deep regret but because it is considered to be warranted, necessary and appropriate in the circumstances as now known.

Your Lordship has the various submissions, and I'm not going to go through them. There is not time. Rather, I'm going to focus on what is the test for recusal and whether the known circumstances mean that the test is met. In doing so, I will largely be responding to the submission advanced by Mr Beer KC as the latest addition to the Inquiry team.

There is much on which Mr Beer and I agree. In particular, it is agreed that the hearing, this hearing, is entirely appropriate, indeed necessary. Your Lordship is entitled to have those asking him to recuse to say that to his face and to hear in person why they do so.

It is agreed that the test is that of apparent bias. As Mr Beer puts it at paragraph 8:

"If the test for apparent bias is satisfied, that is the end of the matter, recusal is mandatory."

It is also agreed that the question of apparent bias is intensely fact-sensitive, and I would not suggest otherwise.

Finally, my Lord, whilst this is not said expressly,

I rather imagine that it is agreed that if what has happened here, in the form of meetings with Mr Bayoh's family, had happened in an adversarial setting, then there would be no debate. Apparent bias would be demonstrated.

Those opposing the present application have not said so but if any of them has any basis for saying private meetings of the sort now demonstrated would not have indicated apparent bias in inter partes litigation, then I should be very surprised indeed.

So that rather narrows things down. Would the fair-minded and informed observer conclude that there was a real possibility of bias on the part of the Chair, and indeed of Mr Bhatt, and by bias, my Lord, I include unconscious bias. It is, I would suggest, remarkable that in the context of an Inquiry in which so much time has been devoted to the possibility of unconscious bias on the part of others, that no party opposing this application is prepared to grapple with the fact that the possibility of bias must include the possibility of unconscious bias.

Before I turn to the matters that I contend are intensely problematic in this case, it is perhaps worth pausing to consider what is meant by the fair-minded and informed observer. Here, again, I agree with Mr Beer, the answer is found in the case of Helow. The notional observer is fair, she is not unduly suspicious, she is not unduly complacent,

she will not shrink from the conclusion, if it can be justified objectively, that things decision-makers have said or done or associations they have formed may make it difficult for them to judge the case before them impartially. That observer is also informed and will take account of all known information. But here, we instantly have a problem.

The notional informed observer is not someone who was actually in the room at the time of the meetings with the family, because the record of those meetings is incomplete. It is not possible now to replicate in their entirety meetings which were either not minuted at all or minuted in an incomplete fashion. Multiple instances of this exist here.

For example, the first meeting was not minuted. We know the Chair wrote to the family to say that he was humbled and honoured to hear what they had to say, but we have no record of what they actually said.

By way of further example, in his own note referable to the meetings, document PH00069, the Chair records, at two separate junctures, things that were said in the course of the meetings that were inappropriate: paragraphs 36 and 44.

In both instances, the Chair indicates that he swiftly closed the matter down. Whilst I have no doubt that is the recollection of the Chair, it is not vouchsafed by the actual minutes of the meeting.

If I start with the incidents addressed by the Chair at paragraph 36 of his note regarding the meeting of 21 November 2022, what he says is this:

"Ade Johnson said that Alan Paton had been given the opportunity to say he's not going to sit across the table from a black family but he's happy to jump out of a van."

The Chair follows on by saying:

"That was an inappropriate remark. I brought the meeting to an end almost immediately."

When we turn to the minute of that meeting, what we see is this. It's in the preliminary hearing bundle at page 47. Ms Graham introduces the day that Zahid Saeed gave evidence and then Mr Johnson is noted as saying:

"Alan Paton been given the opportunity to say not going to sit across a table from a black family but happy to jump out of a van."

Mr Anwar is then noted as saying something, which is redacted, losing his best friends, war of words, climate of fear, smearing him repeatedly, again a redaction, it might be the statement read in. Mr Johnson is then noted as saying, "I like the questioning Ms Graham put to witnesses." Like them, give more examples, work with or come into contact, white/black and comparison in approaches.

That's the end of the minute. The minute does not record the Chair saying anything, let alone closing matters down.

Rather, a lot more seems to have been said, and we're not even entitled to know all of what it was.

The second instance of the Chair recording an inappropriate remark is at paragraph 44 of his note, this time in the context of the meeting of January 2024. The Chair there notes:

"Mr Anwar made a comment that representatives of PIRC and the Crown had lied repeatedly to the family. He made this remark in the course of a 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 change of hearing days."

Again, with respect, that does not entirely square with the minute, this time the PH bundle at page 58. What is there noted is Mr Anwar saying, what is coming from the PIRC Crown, redacted, lied repeatedly to the family, redacted, particularly difficult for the family to hear and see disclosure what's being said. Ms Mitchell is then noted as saying, "The issue for the Inquiry is it isn't a case of Mr Johnson reading a disclosure. He needs to leave the table because of what he feels." Mr Johnson then says, "It's particularly difficult because we met with these people," and then your Lordship says, change of Inquiry days.

There are, with respect, two difficulties with this. First, in the context of an admittedly inappropriate remark

from the family's solicitor, we have redactions, so the informed observer is not truly informed.

Secondly, that same observer is left with a contradiction between the Chair, who says he quickly moved the meeting on to a discussion about change of hearing days, and the minute, which records that, rather, what happened was that further commentary was added, first by counsel to the family and then by Mr Johnson himself.

My Lord, can I be clear, I do not make these points by way of forensic cross-examination of your Lordship. This hearing is not an evidential one. I make these points to underline a far more fundamental observation. Two of the many reasons why private meetings like this should not happen are these.

First, it is impossible to guard against the risk of inappropriate things being said, as plainly happened here. Second, other than in a situation where the entire meeting is recorded, it is impossible to recreate that meeting after the fact. The informed observer does not know the tone in which things were said, the body language, the pauses that give conversation life, the turn of an eyelid, as was memorably said to be potentially determinative of credibility, more than a century ago, in Clarke v Edinburgh and District Tramways.

That same observer does not know, and has no way of

ascertaining, whether the contemporaneous minute is correct or whether it should yield to the recollection of the Chair, who was compiling his note years after the fact, must have been under some pressure and subject to his own unconscious bias and desire to self-preserve when compiling that note.

So I do not make these points to challenge your Lordship's account, I make them to underline that this is exactly why meetings like this should not happen at all. And if they happen, and I'm coming to Mr Beer's suggestion that they're commonplace, they need safeguards, which were here entirely absent.

Before passing from this, I have focused on the two instances where the Chair himself accepts that inappropriate things were said at the meetings. In doing so, I do not mean to suggest that the applicants accept that there were only two inappropriate things said. That is absolutely not the case. For the reasons I'm coming on to, these meetings were, in almost their entirety, completely inappropriate. They were doubtless well meaning, they were doubtless arranged out of the best of intentions but, and with the greatest of respect, they were spectacularly ill-advised, and they have torpedoed the independence of the Chair.

Returning for the moment to the legal test, I have already explained that Mr Beer and I appear to be agreed that the question is whether apparent bias is made out on the

particular facts of this case. But before looking at those facts, it's necessary to address the basis upon which he suggests that private meetings, which would ineluctably mean an end to the question for an adversarial judge, do not have the same impact here. In that regard, I make various observations.

As a starting point, Mr Beer, paragraph 32, in attempting to discount the relevance of the case of Kanda, relies on the travaux préparatoires to the 2005 Act, including the Select Committee memorandum. We have produced that memorandum. When one considers it, two things are apparent. First, unsurprisingly, it mentions no case law at all. So the absence of mention of Kanda is of no moment. Second, at pages 22 and 24, one finds these observations. At 22:

"The qualities required of a chairman of a public inquiry are likely to be many. They include independence and impartiality. Above all, the chairman must be independent and impartial and seen to be so. If the conclusions of an inquiry are to attract confidence, the public require assurance that the person holding it is not going to be swayed by career prospects, pressure, etc."

And at 24, the memorandum says:

"The following features are likely to be universal and the first of those is any inquiry must not only be independent and impartial but seen to be so."

Accordingly, there is nothing there to suggest that Parliament had in mind anything other than well-understood notions of impartiality per the common law. There is certainly no suggestion of any different test.

Parliament is deemed to know the law, and when it passed the 2005 Act, it required not just fairness, which Mr Beer has dealt with at length in his submission, but also impartiality. The latter, impartiality, is addressed in terms of section 9, and in particular section 9(4) of the Act, a provision which warrants not a single mention in the 50 pages penned by Mr Beer.

That subsection, it will be recalled, enjoins the Chair not, during the course of the Inquiry, to undertake any activity that could reasonably be regarded as affecting his suitability to serve at such. That is the clearest possible importation of the common law rules of apparent bias.

The leading case, at the time of the 2005 Act, on the twin requirements of fairness and impartiality was Kanda. The statute expressly imported those twin requirements of fairness, section 17, and impartiality, section 9, into the Inquiry procedure. Where, one asks rhetorically, does one divine from the statute itself, or the travaux, any intention that the test should mean anything different? In truth, there is nothing.

So let me turn to the reasons why Mr Beer contends that

the test under the Act is different.

First, starting at paragraph 80, he stresses the inquisitorial nature of the Inquiry. I agree, of course, that this is relevant. But only in understanding that the procedure adopted in an inquiry will be different from adversarial litigation. It does not mean all bets are off, it does not mean that the inquiry is free to proceed as it wants without concerns as to apparent bias. No case cited by Mr Beer says that, and, indeed, it is interesting to see his comparison with the fatal accident Inquiry at paragraph 85. If he is trying to say that this inquiry is closer to an inquest than a fatal accident inquiry then, with respect, he is in error. Part of the very function of this Inquiry is to fulfil the requirements of what would otherwise be a mandatory FAI.

Much of the reasoning found in Mr Beer's submission is perilled on the fact that enquiries do not determine civil or criminal liability and, of course, that is right. But that does not mean that rights are not impacted. Article 8 and the right to reputation is at the fore in any inquiry. That is why the warning procedures are in place. This was recognised long before the 2005 Act came into force. In the leading case on natural justice applying to public inquiries, the decision of the Privy Council, or the advice of the Privy Council, in Mahon v Air New Zealand, as applied by Lady Wise

recently in the judicial review of the Hospital Inquiry. In the Appeal Cases report at page 816, Lord Diplock noted:

"So whatever is written about anyone to his discredit in the report of a commission so constituted is the subject of absolute privilege under the law of defamation. Devoid though the allegation may be of any factual foundation and notwithstanding, though this is not suggested here, that it also be inspired by malice, so he who has been traduced is deprived of any remedy by way of civil action to vindicate his reputation."

My Lord, precisely the same applies here. Critical comments of police officers or PIRC officers or Crown counsel would be career-ending. Section 37 of the 2005 Act means that there would be no remedy because absolute privilege applies.

So whilst it's plainly true that neither civil nor criminal liability will be determined here, the suggestion that there's no question of determination of rights is baseless. A critical finding in an inquiry would be no less damaging than a critical finding in litigation. The attempt to draw a bright-line between the adversarial and the inquisitorial is thus unfounded.

Mr Beer then, at 98, poses a question: is it unthinkable? If I may, I will give my answer to that at the end of this submission.

Next, at paragraph 100, he takes four of the cases we cite as showing that private meetings create apparent bias and he discounts them all as they did not involve public inquiries. By that, he must mean public inquiries under the 2005 Act. Assuming he means that, he's obviously right. Errington, for example, was decided in 1935 and plainly didn't involve an inquiry under an Act passed 70 years later, but it did involve a public inquiry. A minute spent reading the decision tells you that, and the same can be said of the other cases we cite. In every case involving a public inquiry, of whatever sort, whether planning or local or ministerial, prior to the introduction of the 2005 Act, private meetings with one of the parties has been held fatal to the impartiality of the chair. Every single one.

Mr Beer, who literally wrote the book on the subject, cannot give your Lordship a single judicial decision in which there was a private meeting with a party and where the impartiality of the chair survived challenge.

The next point, paragraph 102 onwards, relates to what has happened in other inquiries under the 2005 Act. There are multiple difficulties with this approach. First, none of the instances involved any sort of challenge to the impartiality of the chair or a judicial ruling thereon. Second, the fact that Mr Beer is able to give all of these examples speaks volumes. He can do so because the meetings

were not held in secret. They were announced, they took place in plain sight and they were tolerated by others. That cannot be said here. The core participants in this inquiry had no idea as to the nature and extent of what had been going on until the revelations earlier this year.

Third, if there has developed a practice of private meetings, that does not confer a stamp of legitimacy. If the sheriff in Docherty had said: well, I always meet with the complainers after trial and before sentence and everyone knows that, the decision in Docherty would not have been any different.

Fourth, with respect, Mr Beer fails or declines to note the difference between the inquiries he cites and the present one. In every single case he cites, at paragraphs 104 through 121, the families were incontestably the victims of the subject matter of the inquiry. In none of those cases was the deceased potentially at fault. Here, by contrast, there is an acute dispute as to was the villain of the piece.

The family contend Mr Bayoh is Scotland's George Floyd. The arresting officers, on the other hand, argue this was a man bent on violence, heavily intoxicated and armed with a knife, creating a clear and present danger. The attempt to equiparate this inquiry with, for example, the Covid inquiries or the Omagh Bombing Inquiry is entirely specious.

At paragraph 122 onwards, Mr Beer joins issue with the

question of what is meant by natural justice. Here, however, an omission I have already pointed to is patent. He spends his whole time looking at fairness, per section 17, without, at any time or in any way, recognising the requirement of impartiality under section 9.

Fairness and impartiality may well overlap but they are not the same. An apparently partial judge who treats everyone with scrupulous fairness is still disqualified.

At paragraph 130 onwards, Mr Beer proposes that we place undue reliance on Kanda. We do not. Our application is not perilled thereon. We do suggest it is highly relevant but so is every other case before your Lordship in which private meetings between chair and party has disqualified the former. I have already observed one searches in vain for any instance of private meetings with a party in any proceedings, whether inquisitorial or otherwise, being treated as anything other than fatal to the process. That is for multiple reasons.

Firstly, as observed in Kanda, 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.

Secondly, that is particularly so if the discussion involves evidential matters, as was plainly the case here, and thirdly, that applies a fortiori where the discussion involves expressions of sympathy towards, or association with, the party with whom the meeting has taken place.

If I proceed then to draw the threads together, as Mr Beer invites at paragraph 135, I stress the following. In doing so, I'm not recanting from the various points made in writing and rather simply, given time constraints, focusing on the major aspects.

The meeting in November '21 was unminuted. There is no clear record to tell the supposedly informed observer what happened. Plainly, the family were invited by the Chair to, "tell me something of the journey you've had from 3 May 2015." They were also asked for their thoughts on the question of race.

The attempt to dilute this into a discussion of race in general and not the impact of race in the particular circumstances of this case is hopeless for two reasons. First, in the absence of a minute, one cannot sensibly imagine that the family only mentioned race in the generality. Second, in any event, race in the generality is part of this Inquiry. Witness the Chief Constable's acceptance of institutional racism whilst disavowing any accusation of actual racism on the part of any officer.

What happens next is the letters to the family. To say that these are alarming is a significant understatement. In those letters, the Chair refers to the meeting of 2 November 2021, records the fact that, at the meeting, the family had discussed, and I'm quoting, "The subsequent

actions of the police and those investigating your brother's death," and indicated that he felt "humbled and honoured that you shared the story of your loss and the frustration you feel at the subsequent actions of the police and those investigating your brother's death."

If one wanted a paradigm of apparent bias, there it is in black and white. How can anyone look at that letter and discount the possibility of, at the very least, unconscious bias? How is the Chair meant to give a clean bill of health to "The subsequent actions of the police and those investigating your brother's death," when he's heard the private views of the family in that regard and indicated that he was "humbled and honoured" to have done so?

He also said he had, "heard your concerns about race." that's at the core of this Inquiry. It permeates everything, in the particular and in the general. Again, the possibility of unconscious bias is patent.

There's been some dispute as to the minutes regarding the Chair being profoundly moved by the evidence. Well, let's leave that to one side and look to the incontestable.

At the next meeting, April '22, the Chair is recorded as having said that, at the previous meeting in November, each family member had given, "a powerful account of the way in which you were treated on 3 May 2015." This would have been worrying if it had been said in the course of the hearings;

that it was said in private is remarkable.

21 November '22, a further meeting took place. Ade Johnson is noted as having said, "What happened on 3 May 2015 should never have happened," and linked the arrest of Mr Bayoh to the colour of his skin.

It is notable that in the 27-page note prepared by the Chair regarding the meetings, this is not addressed at all, despite it being front and centre of the motion to recuse. Reverting to the notional informed observer, what is she to make of this? There is a private meeting, which is instantly problematic. At that meeting, a family member says the very incident that led to this inquiry, the arrest of Mr Bayoh, should never have happened at all. No one challenges him on that, despite the incontestable fact that Mr Bayoh was high on drugs, wielding a knife and terrifying the citizens of Kirkcaldy.

He then goes on to link it to the colour of Mr Bayoh's skin, a hugely emotive and controversial accusation. Again, according to the minutes, no one challenges him on that and then, when we turn to the Chair's note of these meetings, this exchange is entirely ignored. What is the informed observer to make of that?

At the same meeting, there was discussion of the post-mortem report. That is plainly a matter of controversy in the Inquiry. When one looks to the Chair's report, this

is now paragraph 30, one finds the following:

"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 these were issues to be explored in preparation for the cause of death hearing."

Picking up on earlier comments, that simply does not fit with what is minuted. It's now the PH bundle at pages 45 to 46. We see there that it's your Lordship who says:

"Can I move on to specific matters raised regarding the post-mortem report."

Mr Johnson says:

"I want to know a bit more about how they came about putting that report together. Other witness statements, doctor brought in for Nicole Short, Mr Anderson, Rudy Crawford, misquoting the medical records."

There is then a discussion, involving your Lordship saying a lot of preparation had been done, and then Ms Graham has noted:

"Aamer Anwar had asked if we could set out some thoughts on the post-mortem."

Ms Thomson then talks about pulling together a reading list. Mr Anwar then says:

"Within 48 hours of Mr Bayoh dying, asked for the post-mortem to be held back so Mrs Bayoh could see her son."

The Lord Advocate agreed to that. The PIRC went ahead. Ms Graham then says:

"There's an important point Mr Anwar raised with us previously."

And Mr Johnson is then noted as saying:

"You can imagine why we're suspicious it went ahead, tried to send the body away where ebola and mass burial."

So there was a lengthy discussion of the post-mortem aspect, introduced by the Chair myself. The minute simply does not marry up with the Chair's description. Counsel to the Inquiry's intervention was not an interruption, it was an invitation to discuss.

The discussion then turns to further aspects of the evidence that had already been heard, in particular Kadi Johnson is noted as having stressed to the Chair that the family are the victims, criticising the approach of the Inquiry regarding Mr Saeed, who she considered had been treated a bit firm, when contrasted with that applied to PC Paton, who had been, according to her, given such privileges.

Ade Johnson is then noted as having, again without contradiction, made further criticism of PC Paton, plainly implying racism on his part, and made suggestions as to how the questioning of counsel might proceed thereafter.

None of that, none of it is addressed in the Chair's note. Again, the informed observer has nothing to allay the

plain and obvious concerns that leap from the page.

18 January '24, a further meeting takes place. Ade Johnson is noted as having said that witnesses to the events of 3 May 2015 were lying. This point has also been put front and centre of the application to recuse, yet when one turns to the 27-page note by the Chair, it's not addressed at all.

I've already addressed what was said by Mr Anwar at that meeting, but we then move to the question of the extension of the Terms of Reference, with the Chair's language mirroring that of Mr Anwar, with increasingly strident calls to extend the Terms of Reference. It seemed remarkable at the time; read in light of the minutes of these private meetings, it becomes alarming.

We also have the meeting of December 2024, in which the family is given the opportunity to suggest the format in which submissions should be made. With great respect, I don't recall your Lordship asking me what I thought about that, nor would I expect him to have done so.

Then the meetings became known and were queried. Again I'm sorry, but what happens next is very difficult to understand. By letter of 6 February 2025, the existence of the meetings and content of the meetings was questioned, with a request for sight of the minutes. No reply would be received until a month later when, on 5 March of 2025, the solicitor to the Inquiry responded to the letter of

6 February.

No minutes were provided or mentioned. Rather, what was said was that the purpose of the annual meetings with the family was to address issues relating to the welfare of family members as the Inquiry progressed and the impact on family members of the processes and procedures of the Inquiry. The Chair made it clear that anything of an evidential nature would require to be examined in evidence in the Inquiry.

That explanation was plainly designed to allay concerns as to the meetings that had taken place. It is, with respect, neither accurate nor complete. The meetings, very clearly, and for the reasons I have discussed, involved substantial discussion of evidential matters. They went far beyond pastoral or welfare meetings. They discussed matters of substance, as opposed to mere procedure.

The second sentence in the explanation seems designed to provide assurance that evidential matters were not discussed at such meetings and rather would require to be examined in evidence to the Inquiry. None of the meeting minutes record any indication by the Chair that evidential matters could not be discussed and, on the contrary, they clearly were.

The Chair himself acknowledges this in his note at paragraph 43, where he says:

"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 those issues."

Indeed. And there, in a nutshell, we have the reason why these meetings were illicit: inappropriate things were always going to be said and they were said repeatedly.

The Chair has thus heard repeated and firmly expressed concerns as to the actions and conduct of other key players in this Inquiry, which he was humbled and honoured to hear and which he found powerful. The letter of 5 March was neither a candid nor a complete response to the query posed. On the assumption it must have been approved by your Lordship, it adds to the concern.

As for Mr Bhatt, I make the same point discussed earlier, the informed observer was not actually at the meetings so can only go on the basis of what is recorded. The informed observer cannot peer into the mind of Mr Bhatt, does not know his intention in what was being said and can only assess what was said on an objective basis.

Mr Bhatt says all he meant, when he said, "We can try to help achieve what you want," was to get to the truth, but that would be obvious, that would be a truism, why would he need to say that.

This again simply underlines why these private meetings should not have happened. The informed observer is not a fact-finder, trying to work out what was said and why it was said at meetings that neither she nor anyone else were invited to attend.

Might I bring an end to my submission by answering the question posed by Mr Beer, to which I said I would return. It's at paragraph 98. Is it, he asks, unthinkable that the Chair 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 these meetings, the families express views on issues of substance, including evidence and procedure?

Yes. That is unthinkable. It has never happened in a scenario where there is, as here, an acute dispute as to who was in the wrong. It has never happened in a situation in which such meetings have been the subject of judicial challenge and left intact. It is unthinkable because it is wholly inimical to basic principles of fair play. It is unthinkable because the minutes read, with great respect, less like detached discussions of formalities and more like consultations with a client. It is unthinkable because in direct response to those arguing to the contrary, I invite them, more importantly I invite your Lordship, to imagine the counterfactual in which one reruns the present analysis,

inserting for the family of Mr Bayoh the arresting officers.

So test the case on the hypothesis that rather than having met privately with the family, the Chair had met privately with PC Walker and Ms Short. Test the case on the hypothesis that he met with PC Walker and Ms Short on five occasions, without telling anyone else, and been seen to describe himself as having been "humbled and honoured" to hear what PC Walker had told him; to have said that he found the testimony of former PC short powerful. What then? What then? The family would have been instantly able to point to apparent bias.

The present situation is no different to that hypothesis. Justice is, and must always be, even-handed. If I had approached your Lordship and said, "Nicole Short wants to tell you in private how devastating was the illegal assault perpetrated upon her by Mr Bayoh, which assault ended her career --

(Pause).

If I had approached your Lordship and said, "Nicole Short wants to tell you in private how devastating was the illegal assault perpetrated upon her by Mr Bayoh, which assault ended her career with the police," your Lordship would have instantly dismissed me and quite rightly. Indeed, he would have been entitled to raise a complaint as to my conduct. My hypothetical protestations, that if your Lordship didn't hear

her private cries, then she would have disengaged from the Inquiry, would have fallen on deaf ears, again quite rightly.

No matter what sympathy one might have to any participant, private access to the Chair on matters of substance will never be appropriate, and threats to withdraw from the process will never be an excuse for derogation.

That is particularly so where, as here, the family actually have no relevant evidence to give on the arrest itself. They were not there. Their evidence of their treatment in the aftermath is, of course, important, indeed crucial, on other aspects of the case. But the suggestion that one could not investigate the death of Sheku Bayoh without the evidence of the family, who did not witness that death, is baseless.

And even if I'm wrong about that, this simple point remains: the requirement of impartiality, which, under the statute, includes apparent impartiality, endures. It cannot yield to pressure from those who threaten not to participate.

Accordingly, and with great regret, and repeating the observation that I would rather be anywhere else and rather be doing pretty much anything else, I am duty-bound to submit to your Lordship that a line has been crossed. What has happened here should not have happened. It has led to 12 of the core participants to this Inquiry losing confidence in the Chair. Of the remainder, only two argue otherwise, with

the balance expressing concerns but otherwise sitting on the fence.

It's not a numbers game, but what confidence can there be in this Inquiry when the majority of core participants, including the Crown itself, have lost confidence?

As agreed with Mr Beer at his paragraph 8, if the test for apparent bias is satisfied, that is an end of the matter. Recusal is mandatory. No matter how much one tweaks the test for apparent bias to take account of the peculiarities of a public inquiry, the test for recusal is met. I wish it were otherwise but what has happened here is simply not acceptable.

I thus renew the motion for recusal.

LORD BRACADALE: Thank you. Mr Byrne, please.

Submissions by MR BYRNE

MR BYRNE: My Lord, on behalf of Officers Smith, Good and Tomlinson, we adopt the Federation motion. We adopt our note of argument and we invite the Chair to recuse himself for the reasons given in both of those documents.

The purpose of this submission on behalf of the officers today is to explain to the Chair why the officers make the motion and emphasise, as individuals, whose interests are acutely engaged by the Inquiry's role, why that places them in a distinct position, in contrast to an institution or a public body.

Their position as individuals, who stand accused of racism and criminality by the family, is the overarching context of this submission, the meetings the subject of the motion and their experience of this Inquiry.

I'll make that motion under reference to two issues, the first of which is the scope of the duty on this Inquiry arising from section 17(3); in other words, the statutory duty imposes an obligation to act fairly, which, in my submission, unquestionably captures the obligation to adhere to the principles of natural justice.

And then secondly, I will address whether there is anything exceptional within the Inquiry context which relieves the Inquiry from the application of the ordinary rules of natural justice and fairness ordinarily demanded in an administrative and quasi-judicial context.

In that connection, I will address why the interests of the officers as individuals are so grave that the context forbids private, secret meetings with the family running in parallel with the Inquiry.

On the first issue, what is the scope of the duty on this Inquiry under section 17(3), regardless of the obligation under section 9, the officers adopt the Federation's submission. It is criticised for straggling apparent bias and procedural unfairness, but we adopt the submission that private, repeated meetings give rise to apparent bias but, in

addition, are procedurally unfair to the officers and therefore the proceedings are vitiated. But we note that both are essentially labels or stickers placed upon the same underlying complaint, and that is of the repeated, private, secret meetings, with one party behind the back of the others.

Inquiry counsel's written submission at section D, paragraph 31, PH00068, explains the test arising under 17(3) as one strictly of fairness. He writes:

"There is no suggestion that there was any intention to incorporate an amorphous and unsettled list of the rules of natural justice, rather the duty is to act fairly."

In my submission, the Inquiry ought to reject that analysis under reference to three authorities contained in our supplementary bundle, which does not have a reference but will be in my Lord's grey folder. It is unnecessary, in my submission, to turn them up, but I can give the court the references.

The three cases, the first of which is the judgment of Lord Hope in the case of Errington v Wilson [1995] SC 550, pdf page 6. In that connection, his Lordship, the Lord President, reached two relevant conclusions at page 554 at H. Firstly, Lord Hope held that the obligation to act fairly and the rules of natural justice are inseparable.

Secondly, the administrative rather than quasi-judicial

context did not affect the applicability of the rules of natural justice and fairness. The principle applied regardless of the administrative, judicial or quasi-judicial context. The rule is universal and applies to anyone who has a duty to decide anything.

At page 555, pdf 7A to C:

"When a tribunal has not dealt fairly and equally with the parties, its conduct of the proceedings has been at variance with the principles of natural justice."

And so his Lordship equiparated fairness and natural justice. At B his Lordship said:

"The functions of a domestic body are not judicial or quasi-judicial but only administrative, but the body must still act fairly."

The expressions "acting unfairly" and "acting contrary to natural justice" are interchangeable and regarded them as different ways of expressing the same thing.

In the judgment of Lord Clyde at page 560, pdf 12, his Lordship dismissed the distinction as false and explained the challenge was alleged to be misconceived because the duty was only to act fairly and that duty was said to be somewhat different to the principles of natural justice. That is a fallacious approach. Natural justice is but fairness writ large and juridically.

He rejected a rigid distinction between judicial and

administrative decision-making as being determinative of whether in that case the right to cross-examination was required under the rules of procedural fairness.

At H to I, he emphasised that the obligation to treat parties equally was an overriding obligation applicable regardless of the context.

So there is no doubt, in my submission, that the obligation under section 17 imports both an obligation for fairness but also imposes what Mr Beer describes as the amorphous rules of natural justice.

But if there were doubt about that, the second authority we refer to presents the mirror image of section 17, because it is an example of the Court of Appeal last year explaining that a statutory test of natural justice can be described in shorthand as essentially a requirement to act fairly. The case is LA Albania [2024] 1 WLR 1673 and the statutory provision is contained at paragraph 20, where the test is natural justice, and at 54 and 56, Lord Justice Underhill's judgment explained that notwithstanding the statute required a breach of natural justice, as a shorthand in the application of the test, he termed it fundamental procedural unfairness.

So that presents as a mirror image of the test under section 17 and illustrates vividly the interchangeability of the concepts. There is no difference of note.

Thirdly, under reference to the case of Low v Independent Adjudicator [2009] EWHC 2253 (Admin), tab 3, this is a vivid example of procedural unfairness arising when a decision-maker met with a witness prior to the commencement of evidence.

It concerned a dispute over a prisoner's refusal to provide a urine sample, and the adjudicator, the prison adjudicator's position was vitiated because he had met with a doctor witness in advance, notwithstanding he immediately disclosed that to the parties, he was held to be instantly disqualified on grounds of procedural unfairness.

The High Court explained at paragraph 9 pdf 33 that:

"The dangers that flow from any judicial officer, including an independent adjudicator working in the Prison Service, albeit his sense within an "acquisitorial" role, speaking to the witness in advance of the hearing is obvious. It raises at least the risk that the adjudicator's mind will be affected on a relevant issue by what happened before the hearing."

At paragraph 9, at the bottom of that paragraph:

"Here, the obvious risks and appearance that the procedure has not been properly followed. As the phrase goes, justice has not been seen to be done."

At paragraph 11, the issue is described not as apparent bias but as one of grievous procedural irregularity.

Procedural irregularity was a serious one. It amounted to procedural unfairness. So, in my submission, it would be wrong to give section 17 the meaning contended for by the Inquiry counsel; rather, section 17, even ignoring the implication of section 9, imposes an obligation to act fairly, which captures procedural fairness and the rules of natural justice.

So whilst the apparent bias submission is adopted, it is also submitted that the procedure is unfair for essentially the same reason.

The second chapter of this submission is context. What does fairness require in respect of procedural unfairness, and what would a fair-minded observer consider the context or the relevant context to be under the test of apparent bias? In our submission, a careful analysis of the context of the Inquiry precludes private secret meetings running in parallel with the Inquiry. And it is beyond doubt, in my submission, that in any context, whether it be general administrative, Tribunal, quasi-judicial and judicial, parties meeting the decision-maker behind the back of the other parties is an instant ground for disqualification and recusal.

All of the authorities, whether it's the speech of Lord Mustill in R v Home Secretary ex parte Doody, Lord Hope in Helow, at paragraph 3, or perhaps to quote one of the only authorities that appears not to be before my Lord in the case

of R (Howard League) v Penal Reform [2017] 4 WLR 92 at paragraph 39, context is important. But under the umbrella of context, in my submission, as the Howard League case makes clear, the interests of the persons affected, the effect of the decision on their interests and the seriousness of the consequences are all critical aspects that make up the overarching context.

So we ask: what is it about this Inquiry context that disapplies the rule against the decision-maker meeting parties behind the other parties? As the dicta in Kanda goes, no one who has a lost a case will believe he has been treated fairly if the other side has access to the judge without his knowing. In my submission, that is a universal human experience that requires no formal judicial dicta.

But breaking down the context into three salient issues, in my submission, there are three such issues which drive the conclusion that apparent bias and procedural unfairness are made out in this context. First of which is the seriousness of the issues for the parties; secondly, whether there is an important dispute of fact between the parties; and thirdly, the character or nature of the meetings themselves.

Firstly, on the seriousness of the issue, the Terms of Reference are to establish the circumstances of Mr Bayoh's death and whether the actions of the officers involved were affected by race.

In my submission, the distinction between interests and rights in this context is a false one. The interests of the officers is as grave or more grave than many civil legal rights. This Inquiry will make a determination on whether the restraint and arrest was wrongful and/or motivated by race or racism. That is, in my submission, of a magnitude greater seriousness than the majority of cases proceeding before the ordinary courts and tribunals.

It is, for example, unquestionable that in an ordinary boundary dispute, the rules of natural justice would apply in their full vigour. But as I seek to outline, the issues of importance in this case are of a magnitude greater than that ordinary boundary dispute.

Thus, in my submission, it is a fallacy that the determination of a right per se requires greater protection from unfairness than a determination affecting interests. Some interests are more important than many rights. But what are the interests of the officers engaged by this Inquiry? The family contend, in short, that they are motivated by race or are racist. The treatment of Sheku Bayoh, they say, is a parallel of the murder of George Floyd by the convicted murderer, Derek Chauvin. That is clear from their campaign and their CrowdJustice page, cited in our note at paragraph 9.

The consequences of the family influencing or

successfully influencing the Chair to this effect are therefore truly catastrophic professionally, personally, and are seen or vocalised to be a pretext by the family and their solicitor as a basis for their prosecution.

In this respect, it is fanciful that the rules of natural justice ought to apply strictly to a sheriff or tribunal chair determining a boundary dispute in respect of an Edinburgh garden and not to this Inquiry's determination of disputed facts that relate to their conduct, the death of Mr Bayoh and whether they were influenced by race or racism.

Second, is there a dispute or serious dispute of fact? In this Inquiry, there is a grave dispute of fact. Two narratives typified in the family's meetings with the Chair, one of which contends they are the victims, and as the campaign suggests, victims of police racism.

Rather, the officers, in distinction, point to a reasonable and necessary restraint of a man, who had engaged in violence that morning, taken various drugs, selected a knife from his kitchen, displayed that large knife in a public place, disobeyed a lawful order, charged and then assaulted a female officer and then was restrained. There could not be a sharper, more distinct and more important dispute of fact.

The dispute goes to the heart of the parties' interests such that whilst the proceedings are not strictly

adversarial, the opposing parties are engaged in a serious contest, and in respect of that contest, the Chair is the umpire. In this sense, even-handedness between the opposing parties is as critical as in any contested litigation.

Thirdly, what a fair-minded and informed observer would make of the character of the meetings that ran in parallel to the Inquiry. An observer, or in the case of procedural irregularity, the court, would note that the family are an organised and funded campaign. That is the overarching context in which those meetings took place. They campaign in the media, they campaign in person. It is a campaign group whose objective is, as all campaign groups, influence. The objective of influence is set out by the family's solicitor, reported in the media, cited at paragraph 10 of our note, "This isn't the end because, as we said to the Chief Constable today, charges must follow in Scotland. Those officers have broken the law to have engaged in criminality."

So the purpose of influence is the prosecution of the officers. And through those meetings, advocacy was implicit and explicit. Without repeating the submissions my Lord has already heard from the Dean, allegations of lying were levelled in camera, comments on evidence and witnesses were casually made, discussions of the way the evidence ought, in their view, be taken took place. The meetings therefore

serve the campaign interests, to obtain -- either to or by effect, obtain an unfair advantage and obtain personal private access to the decision-maker.

The officers do not have a campaign, they don't have access to the media, they do not have access to senior judges, the Lord Advocate or Government ministers. The opportunity to plead to the Chair that they are victims of police criminality is given only to the family.

An opportunity to develop a personal rapport and relationship was given only to the family. An opportunity which was taken to advocate and persuade was given only to the family. As the officers explained to me yesterday, "The Chair has no idea who we are. We are just white officers."

Further, the fair-minded bystander would have regard to the quantity of the meetings running in parallel to the evidence and, in my submission, those meetings were secret. They were not transparent and there was no disclosure.

To the extent that it is said that there was a report in an online BBC article, that is not an adequate, effective or fair intimation of the procedure that's been adopted. One comes in November 2022 and another in December '24. They are unclear. They are a conspicuously unreliable basis for intimating a procedure such as this.

The nature of the meetings afforded an opportunity for the parties to challenge the credibility and truthfulness of

witnesses in camera, a platform to generate sympathy and trust. A fair-minded, independent bystander would know instinctively that personal meetings create an opportunity for influence. They would understand the dicta in Kanda as a matter of instinct.

They would also note that the threat to disengage was without any stated, rational or reasonable foundation. Nevertheless, it led to action. The fair-minded observer might therefore wonder what further deference the Inquiry would give to the family.

And lastly, they are wholly unequal. The officers simply have not had these chances. There is good reason to think that their welfare is in considerable jeopardy by the campaign against them, and the Inquiry.

Finally, it is the regrettable impression of the officers that the Inquiry and family are acting in concert, that there is inequality, that on the central dispute, the family are now at a considerable advantage. The Chair knows them personally, but knows nothing of the officers, knows nothing of their family worries, or values. They have a great deal to lose. They are confident that, if assessed impartially and fairly, their actions will be judged to be fair and reasonable. But the fair-minded, informed bystander would have regard to all of that and would ask whether their concerns are well founded and whether there was, quote

unquote, "a real possibility" of bias.

In my submission, they would so conclude, and furthermore, on an objective assessment, the court would regard those successive, private, secret meetings as procedurally unfair to the officers.

LORD BRACADALE: Thank you. I require to give the stenographer a break, so we'll take a 15-minute break.

(11.24 am)

(Short break)

(11.45 am)

LORD BRACADALE: [Hearing room muted - no audio feed] [LORD BRACADALE issued a reminder to the public gallery to remain silent during the oral submissions.]

Submissions by MR STEWART

MR STEWART: [Hearing room muted - no audio feed] [Missing text provided by Mr Stewart from his notes] [I appear on behalf of Retired Officer Alan Paton and adopt the submissions of the Dean of the Faculty of Advocates and maintain the motion that the Chair recuse himself from] the further conduct of these proceedings.

I say that, my Lord, whilst it is understood that the purpose of the meetings which have been under discussion took place between the Chair and the family of Mr Bayoh, and their purpose was to keep the family informed, and the intention was that they be of a pastoral nature.

It does appear, however, that on numerous occasions, both members of the family and, on occasion, legal representatives addressed the Chair on matters which had to do with race and to express opinions on matters that the Inquiry had yet to determine.

It is said that these comments, and I think it is accepted that some of these comments were inappropriate. It also appears, however, that the Chair allowed these comments to be made and these things to happen during the meetings.

It seems clear, from what has been disclosed, that the family and their representatives considered that they had a right to address these issues at these private meetings. And it appears that they were not disabused nor stopped in doing that.

It also appears that, during these meetings, the Chair had occasion to seek to justify decisions that had been made, and it seems that the approach to the Inquiry and to these meetings have been overshadowed and in some way influenced by what appears to have been a constant threat by the family and their representatives that they might disengage with this process.

I am instructed, my Lord, to make reference to the fact that Mr Paton himself has suffered greatly in respect of these proceedings. In the opening statement made on his behalf, it was stated that he had been subjected to

unjustified vilification on social media, in both written and by broadcast media. He had been made the focus of attention by individuals and has been singled out and, in his view falsely, been represented as being been motivated by race.

Despite this, when the racial comment regarding Mr Paton was made during the meeting by a member of the family, they were not told to refrain from such comments or to introduce matters of such an inappropriate nature.

In contrast to comments made at a previous meeting, where allegations involving racist comments were made by the legal representatives of Mr Bayoh, the Chair dealt with that matter by raising the issue publicly the following morning.

Mr Paton has had to retire through ill-health, and the Inquiry has had a catastrophic effect upon his mental health, yet he nor any other core participant has been given the opportunity to have the same individual discussions with the Chair and access to private meetings.

For these reasons, I would move the motion for the Chair to recuse himself from further participation. Thank you.

LORD BRACADALE: Thank you. Mr Duncan, please.

Submissions by MR DUNCAN

MR DUNCAN: Thank you, Sir. I propose to take this opportunity to make a few additional oral submissions on behalf of the Solicitor General to supplement the written submission that your Lordship already has.

I want to begin with the Solicitor General's position on the issues that are before you today, Sir. It is not correct, as Mr Beer says in his submission, and has been alluded to also in submissions this morning, it is not correct to say that the Solicitor General is among those who has expressed a loss of confidence in your Lordship. She has said no such thing. It is also not correct that the Solicitor General joins in the motion for you to recuse yourself. She takes no position on that matter. Rather, the Solicitor General has addressed the question that was put to core participants on 29 April, which was to consider the conduct and procedure adopted by the Chair in meeting with the families, and the letter explained that the Chair specifically sought submissions on apparent bias.

The Solicitor General has addressed the questions asked. They are objective questions about appearances. They are not about subjective opinions or intentions. In answering the questions raised, the Solicitor General has come to the view that there is force in the concerns that have been raised about apparent bias and about unfairness and that the test for these things are met. And it would be a matter now for your Lordship, no doubt under consultation with Mr Beer, to consider the submissions that are made on these matters and to consider what further steps may be required.

The next thing I want to touch on, my Lord, is the

question of why the Solicitor General has taken a position at all on the question asked. In answering that question, I begin by making this observation: the Solicitor General has no particular position on the substantive issues for ultimate determination in this Inquiry. She seeks no particular outcome. She was not involved in the original investigation. She acts in the public interest.

In particular, the Solicitor General's role as a core participant in the present Inquiry is as the head of the systems of criminal prosecution and investigation of deaths in Scotland for the purposes of the issues under investigation in this Inquiry.

Critically, it would be for the Solicitor General to determine if there were circumstances disclosed in the Inquiry's investigation that required reassessment by the Crown of whether criminal prosecutions should be considered in connection with the death of Mr Bayoh. The Solicitor General has repeatedly said that if the circumstances mandated a reassessment, then that will happen.

Now, so that is relevant to the issues that arise today. In particular, were the Inquiry's report to lead to calls for the question of prosecution to be reconsidered, it is of the highest importance that the report itself is not undermined by the way in which the Inquiry has proceeded. In other words, the public interest demands a robust report that is

not open to legitimate criticism, and I would see that as being the prime directing principle here.

Your Lordship said as much in his speaking note of 4 November 2021 and his discussions with the family. The speaking note indicates your Lordship saying that he had to ensure that the report is credible and carried weight, and it appears that some emphasis was placed on the requirement that it was clear that the Inquiry had been conducted in a thorough and independent way.

There is also the question of the state's currently incomplete Article 2 investigation into Mr Bayoh's death, and the concerns raised by the Scottish Police Federation and others have the potential to undermine and to impede that task and to have done so already, and that is a further reason for why the Solicitor General came to the view that she had no alternative but to take a position on the issues raised.

Now, I want to make next some additional observations on the -- some of the legal issues that have been discussed in the written submissions, and indeed this morning, already.

The first one is this, and Mr Byrne has already addressed your Lordship to some extent on this and I'll keep this brief. Whatever the answer is to the issues that have been raised, it seems unlikely that that answer will lie in a search for some difference between the concept of fairness

and the concept of natural justice. But for completeness, Sir, I do say that the cases I have cited at paragraph 9 of the written submission support the proposition that the principles of natural justice are capable of applying here.

The concept may not be expressly mentioned in the Saville Inquiry case, Sir, but the court there relied upon the Pergamon Press case and also the case of Lloyd v McMahon, which were very much about natural justice.

Mr Byrne has referred your Lordship to Errington v Wilson, which was a case I also provided to the Inquiry this week. I would, in addition to the passages that Mr Byrne referred to, suggest that your Lordship might want to look at what Lord Clyde said in that report at page 560.

Continuing on this point, Sir, I don't accept the suggestion apparently made by Mr Beer that in the Leveson Inquiry case, the court, on being presented with a case that was partly based on natural justice, instead decided it based on fairness. That, in my submission, is not a fair reading of what Lord Justice Toulson said at paragraphs 33 and 34. To the contrary, his discussion confirms there is no practical difference between the concepts for present purposes.

The second matter on legal issues, my Lord, the possible -- and I don't -- it may just be a possible suggestion that the Porter test for apparent bias is engaged

only where there is adjudication of rights. I have not identified any authority or principled basis why the test would only apply where there is adjudication of rights or to support the suggestion that its application here would be controversial or problematic. And indeed, I rather took Mr Beer to accept that in his book at paragraph 1132, which regrettably, I think, Sir, is not in any of the bundles.

I have, however, and this should be in your Lordship's grey folder, provided an extract from De Smith. I'm not suggesting we need to turn it up but the paragraph 12-27 vouches the point I've just made.

The short point is this, Sir: the public interest clearly demands the availability of the test where the circumstances merit that.

The third point I would make is one I have made already in my written submission but it bears repeating, and the Dean of Faculty has also referred to this. It is important to keep in mind, on the question of whether there is a real possibility of bias, that often we are concerned with the possibility of subconscious bias, and again in the grey folder, my Lord, I have provided an extract from De Smith again. I'm not suggesting we turn it up but it's paragraph 1202, and it's also worth mentioning that the Chief Constable, in her submissions, draws attention to the case of Lawal v Northern Spirit, in which Lord Bingham,

I think it is, makes a similar observation.

The fourth and I think final point on legal matters, Sir, Mr Beer and I are in, I think, possible agreement that there may well be a balance to be struck overall in the question of fairness. The point at which that balance is to be struck will be governed by the requirement that the Inquiry be, in the words of Lord Justice Toulson, as thorough and balanced as practically possible.

Sir, I move on to the question of the meetings themselves, and I want to just touch on certain issues in relation to the content and circumstances of those meetings, and I emphasise those words. It is the content and the circumstances of the meetings that I would see as problematic.

Very much like the Dean of Faculty, I intend to address myself to the rhetorical question raised by Mr Beer, were the circumstances of the meetings unthinkable. Well, that's not the test, but it may be a useful way of approaching matters. But in answering the question, it's critical that the full circumstances are taken into account, and I would see eight points as being the important points as encapsulating the point of departure in asking whether it was unthinkable.

The first is that it is accepted by your Lordship that inappropriate things were said from time to time, and comments at two meetings are highlighted. The second is

that, beyond these incidents, the available record indicates discussions about substantive matters, including evidence and, to an extent at least, its impact on your Lordship.

The third matter to mention is that some of these meetings and discussions took place after the evidence gathering, and indeed hearing, phases of the Inquiry had started.

The fourth thing, Sir, is that the available record records no warning in advance or afterwards as regards inappropriate discussions.

The fifth thing is that no formal steps were taken to advise other core participants about these meetings taking place or about their content.

The sixth is that the available record is incomplete and not comprehensive. The totality of what was discussed is undisclosed and it's not clear what the provenance of the minutes themselves actually is.

The seventh, already touched upon in submissions this morning: there are differences, which have the potential to be material, between the minutes, your Lordship's note and also the account provided in the written submission on behalf of Mr Bayoh's families.

And the eighth and final point is that when the Inquiry was asked for an explanation of the meetings, it provided an explanation in March of this year that is very difficult

to square with the minutes subsequently disclosed.

It's against that background, I would suggest, that Mr Beer's question, was it unthinkable, should be addressed. There's a number of ways of answering the question. One might be to consider precedents. Something that was without precedent might at least get some way down the road towards meeting the threshold of unthinkable. So let's think of precedents, case law would be the first.

No case has been identified that approves of inappropriate and other private discussions of the sort that took place here. The case law would indicate the opposite as being the correct approach. An argument that the reported cases were concerned with adversarial or adjudicative processes is not convincing, as I have already indicated.

Secondly, what about other public inquiries? All of the other public inquiries identified in parties' submissions are distinguishable from the present circumstances on a variety of fronts, the nature of the inquiry, the time of the discussion, the nature of the discussion, the disclosure of the discussion. None exhibits the eight features that I have mentioned.

The third one, what about this Inquiry? Is there a precedent in this Inquiry? There is a single example of a discussion with another core participant identified as having taken place. On 24 September 2021, I think at your

request, Sir, you had a teams call with the Solicitor General to discuss what you described to the family as a procedural impasse, and there was a follow-up call in October.

That discussion too is readily distinguishable. The fact and the nature of it was disclosed to the core participants who had greatest interest in knowing about that, namely the family, and the content could hardly be described as inappropriate. It was concerned with issues of disclosure, long before evidence commenced.

A fourth comparator, Sir, other similar processes, FAIs. As has already been said this morning, the Terms of Reference would indicate that this is a valid comparison. The steps taken in the Fenty FAI indicate what I think all practitioners would say, that it is unthinkable that meetings with the eight features I have mentioned would take place in any FAI.

Now, Sir, just some points of detail in relation to FAIs and just to add to what Mr Beer has said and to complete the picture. Again, I have provided some materials that are in the grey folder. Again, I'm not proposing that we turn them up. The first is that FAIs are inquisitorial, and that's rule 2.2 of the 2017 Rules; second, that the Inquiry is conducted by the sheriff, and that's section 1(2) of the 2016 Act, and the sheriff -- the last is that the sheriff can call for parties to lead evidence on particular matters, and

that's section 20(2).

Interestingly, Sir, the policy memorandum to the 2016 Act -- and I apologise that in the flurry of paper this week that's not one that I have added, but I can provide it if it would be of assistance. In the policy memorandum to the 2016 Act, it was noticed that there was a suggestion in some quarters that bereaved families should be "at the heart" of the process, but the discussion went on to emphasise that the FAI acts in the public interest to determine the core facts and that it is not there "specifically for the benefit of families".

So that takes me then to the next matter I wanted to just touch on and that is this question of the family being at the heart of the Inquiry. I agree with you, Sir, that it is useful, and indeed appropriate, that in construing the Terms of Reference, your Lordship should consider the Ministerial Statement of 12 November 2019, which is item 66 in the bundle. Again, I'm not suggesting we turn it up.

I absolutely accept that the confidence of the family was an important consideration for the Inquiry, and that the language of the family being "at the heart" may have been a good way of seeking to capture that idea. But I make two points.

First, it would, in my submission, be a misdirection to see that consideration as being the guiding principle, and

the Ministerial Statement itself emphasises the importance of ensuring the Chair commanded the confidence of all those who were involved and the public. And secondly the family being at the heart of the matter did not require, and does not explain, the eight elements that I have mentioned above.

Finally, Sir, just on meetings and for completeness, it doesn't appear that -- looking at what's been said by Mr Beer, that Article 2 is now relied upon as the justification for the conversations that took place. I would say that is correct, for the reasons I've already set out in my written submission, and indeed Ms McCall has also made written submissions about that. But also I think it's maybe useful to add that a number of the problematic conversations are not concerned with the Inquiry's Article 2 investigation but rather its investigation of what other agencies did. So Article 2 wouldn't provide an answer.

So, Sir, in relation to the meetings, along with the written submission, that is all I intend to say on behalf of the Solicitor General.

Very briefly, Sir, I want to touch on the contextual matters that I have also raised in the written submission. That is beyond those that I have already alluded to. I simply adopt, subject to what I'm about to say, what I've said in relation to the Terms of Reference, Mr Grave and the approach to taking witness evidence.

I want to proceed with extreme caution. I don't imagine that any core participant would see today as being a forum to discuss issues of evidence, and I would be particularly anxious about the Crown being seen to attempt that. Your Lordship has made some observations about the evidence, and I think all I would think it appropriate to say on those, Sir, is that it would be my hope that I could assist the Inquiry on these points in due course in closing submissions.

I would just like to make, I think, two further broad points on that matter, and just really coming back on things that have been said. Your Lordship has raised the question of why these -- or the fact that some of them these issues were not raised previously.

As I've just indicated, Sir, I would see the forum for doing that as being closing submissions. That said, a few of the points were raised with the Inquiry and, again, and I make -- I have no issue with this -- again, however, I would see the discussion of those as being for closing submissions.

On the particular matter of the Solicitor General raising these matters during the Terms of Reference process, I think it's clear she would not consider that appropriate.

And the only other thing I wanted to say is that in relation to the second Salmon principle, just to come back on something that Mr Beer has said, I do not say in the written

submission that there required to be warning letters in terms of rule 12 of the 2007 Rules. I thought the citation of Lord Scott's sceptical discussion of the utility of the Salmon principles, especially the second one, might have indicated that I had in mind the underlying principle. I would accept I could have made that clearer.

The point is this: that as Lord Scott puts it, the general rule that witness be given adequate notice of the matters in respect of which they will be asked is the point. Ultimately, all of this comes back, however, to Lord Justice Toulson's question, the process being seen to be as balanced as practically possible.

Sir, together with what has been set out in writing, those are the submissions on behalf of the Solicitor General.

LORD BRACADALE: Thank you. Now, Mr Moir, please.

Submissions by MR MOIR

MR MOIR: Sir, the Coalition for Racial Equality and Rights have the greatest respect for the Chair and both of his Assessors.

CRER consider that the Chair and his Assessors have conducted themselves with the utmost propriety and impartiality throughout the course of the Inquiry proceedings.

CRER have confidence in the Chair and his Assessors and their ability to continue in their roles. The Chair is invited to refuse the invitation to recuse himself and to

refuse the invitation to remove his Assessors from their roles.

CRER have provided the Inquiry with written submissions and had the benefit of considering the written submissions of other core participants and Counsel to the Inquiry. CRER adopt the terms of the written submissions and align themselves to the written submissions made by counsel to the inquiry.

It is for the Chair to determine application -- the application that he should recuse himself. It is for the Chair to determine the applications that his Assessors should be removed from their roles.

The test to be applied is as set out in Porter v Magill, whether the fair-minded and informed observer, having considered the facts, would consider that there is a real possibility that the Chair and his Assessors were biased.

The fair-minded and informed observer is not unduly sensitive or suspicious and will take a balanced approach to the information given. They will reserve judgment until they have seen and fully understood both sides of the argument. There is an element of detachment in their decision-making process, but they are not complacent. The observer knows the context in which the decision falls to be made is critical.

CRER considers that the SPF and the various officers, in their submissions, have failed to properly apply the test as

set out in Porter v Magill and have failed to properly consider the facts which the fair-minded and informed observer would take into account. Crucially, they and the Solicitor General fail to take into account the nature of a public inquiry and the fundamental differences which exist between civil and criminal litigation where matters of civil and criminal liability fall to be determined and an inquiry held under the 2005 Act. While the SPF and the officers place great reliance on the decision in Kanda v Government of Malaya, that is not a case which was decided on the basis of apparent bias. That is a case which talks of no one who has lost a case believing he has been fairly treated if the other side had access to the judge without his knowing. Kanda is not a case, it is submitted, on which much reliance can be placed by the Chair.

CRER, notwithstanding the oral submissions of the Dean of Faculty and others, maintain a public inquiry is different from adversarial proceedings. There will be no winners or losers in this Inquiry.

CRER have set out their submissions -- in their submissions the factors which the fair-minded and informed observer would take into account. These include the approach of other public inquiries where the Chair has met with the victims and their families.

It is submitted that the SPF, the officers, and the

Solicitor General, in their written submissions, have failed to appreciate that meetings between the Chair of a public inquiry and the victims or relatives of victims is a relatively common feature of a public inquiry and that is wherever, in the words of the applicants, the victim is incontestably the innocent victim or not.

The Dean has sought to distinguish victims in other inquiries as being innocent and contrast Mr Bayoh as not being innocent. Now, I refer to CRER's written submissions at paragraph 23. I don't intend to repeat them here.

It is respectfully submitted that the Dean is wrong to suggest and contrast victims in this way. The meetings had a proper purpose, keeping the wholly innocent family at the heart of the Inquiry, the family's status at the heart of the Inquiry has been repeatedly publicly stated.

It is submitted that nothing disclosed from the meetings would cause the fair-minded and informed observer to conclude that there was a real possibility that the Chair was biased, whether consciously or unconsciously, and, again, I make cross-reference to Porter v Magill, paragraph 103.

There is one further factor, not referred to in CRER's written submissions, which the fair-minded and informed observer would take into account when considering whether there exists apparent bias. At the time those submissions were drafted, CRER were unaware that the Solicitor General

had herself had a private meeting and a private telephone conversation with the Chair. While the Solicitor General failed to mention those conversations in her written submissions on her behalf, CRER submit it is an important factor that the observer would take into account.

It is not clear to CRER why the Chair's meetings with a black family, who have lost a son and a brother, should be treated differently to his meetings with the Solicitor General for Scotland. It is for the Solicitor General and others to explain why these meetings are so unproblematic that they do not warrant mention in submissions, other than the passing submission made just a moment ago, but the meetings with the Bayoh family are fatal to the continued involvement of the Chair and Mr Bhatt. None of the submissions so far advanced suggest that the Solicitor General's meetings show bias.

CRER submit that the Chair, when reaching his decision, should consider the law relating to the apparent bias and apply the test as set out in Porter v Magill. In doing so, he should have particular regard to the nature and features of an inquiry held under the 2005 Act and how that differs from other proceedings which determine civil or criminal liability. The Chair is invited to pay particular regard to the approach of other public inquiries and whether the chairs of those inquiries meeting with victims or family, rather

than simply looking at authorities which deal with different types of proceedings.

CRER submit that the fair-minded observer, having taken into account all relevant matters, would consider that there was no real possibility that the Chair and his Assessors were biased. CRER accordingly submit that the Chair should decline the invitation to recuse himself and should refuse the invitations to remove the Assessors from their roles. Thank you, Sir.

LORD BRACADALE: Thank you. Ms Mitchell, please.

Submissions by MS MITCHELL

MS MITCHELL: The families of Sheku Bayoh endorse the view of CRER. The families of Sheku Bayoh have the utmost confidence in the Chair and the Assessors. I invite the Chair to refuse the invitation to recuse himself and for the panel to do so as well, on the basis that (1) the Chair and the panel members have acted appropriately and no bias, apparent or otherwise, has been shown.

(2) The legal test for removing a Chair in the event of a lack of impartiality, the statutory test has not been met.

(3) That the common law in relation to the apparent bias test is not apt to apply directly in the present circumstances because core participants are not parties to an action where the court decides in favour of one or the other of them, ie we are not in an adversarial process.

(4) If the Inquiry does not find favour with the submissions in relation to the inapplicability of the common law, or at least not able to simply transpose it, and considers that the test is as per Porter v Magill, then the family adopt the analysis of the meetings set out by counsel to the inquiry and invites the Chair and the panel not to accede to the motion to recuse themselves as there has been no bias, apparent or actual, on that basis.

There is a preliminary issue which I want to raise and it is the idea that the meetings that the Chair and others had with the family were secret. They were nothing of the sort. The Chair mentioned in open hearing that he had met with the family. Matters were stated publicly, and indeed it was even recorded in the national press.

But perhaps rather than being surprised that the family met with the Chair, a question might be asked, why did other core participants not expect it? Because meetings with families is commonplace in public inquiries.

The Chair will have the benefit of a note by Mr Imran Khan to confirm that he -- that the families that he represented met in almost every Inquiry that he had been involved in. And I would posit that when considering the list that I'm going to read out, one can see that, in some of these, there was, as has been described, an acute dispute as to who was in the wrong. And I say that not because I think

that that is important for the Chair but to meet the argument that he shouldn't have met because there was some sort of dispute.

Examples include (1) the Stephen Lawrence Inquiry, chaired by Sir William Macpherson; (2) Zahid Mubarek Inquiry, chaired by Mr Justice Keith; (3) Victoria Climbié Inquiry, chaired by Lord Laming; (4) the Undercover Policing Inquiry, chaired by Mr Justice Mitting.

It also appears that Sir Martin Moore-Bick met many victims of the Grenfell Tower fire, and that is referred to in the CRER documents.

Also, Lord Turnbull, as part of his work as Chair in the public inquiry in the Omagh bombing, had contact with those who were directly affected by the bombing. He made it plain to the Inquiry that the trauma caused has been enduring and continues to have a powerful impact on those people. Further, the Chairs of both the United Kingdom and Scottish COVID-19 public inquiries have also met with bereaved families.

Perhaps further, they should know that when the Inquiries Act was reviewed, not once but twice, that it was the recommendation that the Chair meet with families. In fact, the words of not just one but two former Lord Justice Generals reflect this, and I refer to the documents lodged yesterday on behalf of the family.

I think it's worthwhile reading these out. The heading from the Inquiries Act 2005, post-legislative scrutiny, Select Committee on the Inquiries Act, assistance to core participants and witnesses.

238:

"Most inquiries include as witnesses, and in certain circumstances as core participants, people who have been directly affected by the matter under investigation. These people, especially victims and victims' families, will usually have no experience of any previous form of inquiry. We heard that for them participating in an inquiry can be a daunting task. Julie Bailey suggested that some people were reluctant to give evidence 'because it was going to be in public and adversarial.' Sir Robert Jay agreed that some witnesses are frightened to give evidence, although he explained that this could be for a variety of reasons."

The next paragraph is about witnesses who had been core participants and make some comments there, but importantly paragraph 240:

"Some inquiry chairmen met witnesses in advance. Lord Cullen of Whitekirk explained the value of this: 'Certainly I find it helpful to have meetings with the bereaved and possibly the injured - mostly the bereaved - before the inquiry gets going, so they have a chance to see what I am like and they can put questions to me and we can discuss how

the inquiry is going to be carried out.' Lord Gill agreed: 'You have to make it clear to them at the outset that everything is coming out in the open, that nothing is being held back and that everything that they want to know, to the extent that it can be known, will be brought out. I think it also helps if you speak to them directly, person to person, just to let them know that all you are there to do is to help to get to the truth.' Sir Brian Leveson told us that he was keen that counsel to the inquiry met informally with witnesses beforehand. We can see the value of doing so."

And that led to a recommendation, which was followed through in the later review in 2024, that inquiry chairman and counsel to the inquiry should, as a matter of course, meet victims and families as early as possible in the inquiry process. There should be a dedicated team or named members of staff responsible for liaising with witnesses.

So there we find, as a matter of fact, that having looked at meetings that took place between inquiry chairs and families, particularly bereaved families, it is thought that that is a good part of the process. There is no comment to be found anywhere in these documents about the need for procedural safeguards, about the need for there to be any warnings or guarantees given in relation to that matter. It is simply silent on those things.

The other report in 2024/2025 states at paragraph 47:

"Many, though not all, public inquiries concern a disaster that has a direct and devastating effect on a group of people and their families. The terms 'victims and survivors' describes those people who have been directly affected by the major event of public concern which triggered the inquiry, as well as their families."

I just want to make that clear, that that is the proper phraseology used in respect of these matters, and, of course, no criticism could have been made of the Chair in that regard.

So esto any observer, informed or otherwise, comes to this inquiry, they should be aware of the fact that chairs meet with family members on a regular basis and that is something which has been endorsed.

Now I move on to the law as contained in the statute. This hearing is governed by the statute as a statutory-based inquiry. The laws contained in the statute is to regulate questions that answers need to be given to. What happened, why did it happen and what can be done to prevent it happening again?

At this point, I would like to say, before we turn to the terminology in the statute, the Dean of Faculty has identified issues of who is potentially at fault, and uses terminology such as, "Who is the villain of the piece." With respect, the purpose of the public inquiry is to make

investigations, examine matters of public concern about a particular event or set of events, not to identify who may or may not be the villain of the piece, and we agree with CRER that the Dean is entirely wrong to contrast and categorise individuals in this way.

When we look at the statute, we can see that submission made by the Dean in relation to adversarial settings and the bright-line, which is said not to be so bright, because the Dean set out his submissions saying, if this happened in an adversarial setting, this would be apparent bias.

Well, of course, the real problem with anything that follows thereafter is this is not an adversarial setting, and simply because parties themselves do not agree on what may be the facts of the matter does not make this an adversarial process.

There is a bright-line and that bright-line is set down in the statute at section 2, where it says:

"An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability."

That is the bright-line that differentiates this public inquiry from every court or tribunal. And in order that this inquiry not be inhibited in that regard in any way where it thinks it might so do, subsection (2) is there. But subsection (1) is absolute and makes it clear that this is not an adversarial process.

Further, just because rights are engaged do not make it a quasi-adversarial process. Buying a house engages rights, buying a coffee engages rights. It does not bring those processes closer to an adversarial process.

A second point to be made, which follows on from the fact that the Inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability, is that core participants are not party to the proceedings. Article 6 does not apply, nor do the procedural safeguards, including, for example, the right to an independent impartial tribunal, the right to cross-examine. These do not apply to this Inquiry.

These proceedings cannot be seen as adversarial, even if there are critically important matters which are not agreed on by parties, precisely because of section 2. The error can be seen at the opening of the written submissions on behalf of the SPF, where it is stated:

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

This is not a matter of a hearing; this is an Inquiry. Core participants do have special rights in inquiry process, we're obviously aware of receiving disclosure documentation, being represented, being able to make legal submissions and

being able to make rule 9s. We can suggest questions and receive advanced notice of inquiry but that does not change the fact that this is an inquiry.

It is important to note that not all core participants have the same rights and duties in respect of an inquiry. The current matter is the case in point, that the families of Sheku Bayoh have an Article 2 right, which this inquiry, as a public body itself in terms of section 6 of the Human Rights Act, must not breach. That duty is not held to any other core participant and it places this family in a unique position. And that unique position is the same position that is reflected in the comments of the two former Lord Justice Generals, Cullen and Gill.

It follows from that that any and all suggestions that core participants should be treated equally is wrong. It falls into the same error of those who say that they don't see colour and therefore they treat all people the same can't have issues of race.

It's submitted that paragraph 15 of the written submissions on behalf of the SPF and others in respect of the motion is wrong when it proceeds on the basis that all core participants require to be treated equally. The Inquiry owes duties to the family of Sheku Bayoh that it does not have in respect of others. And the Chair has made that clear repeatedly from the outset of this Inquiry.

It follows on from this that complaints made at paragraph 22 and following of the SPF and others' submissions are to be viewed in the following way. The question is asked why Ms Short might not ask why she is at the heart of the Inquiry and the answer to that is that no other core participant has lost their loved one, who was in police custody and whose death occurred there at that time. It is being suggested that because the Inquiry is tempering(?) the Article 2 rights of the family that there is bias, and this is wholly wrong.

Secondly, the next issue that was raised after whether or not Nicole Short and Mr Walker could consider themselves at the heart of the Inquiry, a comment is made about someone being the incontestable innocent victim. I've already addressed this before and said that this is inappropriate.

But a question is raised there as to whether or not it would seem Mr Bayoh was deserving of a pen portrait. The situation is that Mr Bayoh lost his life in this interaction, and the question of his Article 2 rights are at the very centre of this Inquiry. It cannot be said that the pen portrait that was shown at the start of this Inquiry is somehow indicative of bias; rather, it is the entirely appropriate recognition of the fact that the Article 2 rights of this family and Mr Bayoh must be central to the questions that it asks.

Finally, the comments in relation to the questioning of Mr Zahid Saeed are simply not understood. It is suggesting that that is indicative of bias? How? I can't go any further than that because I'm not clear what the argument was.

So I started off with talking about the statute and I mentioned paragraph -- section 2. I go on to talk about what's been described as the twin pillars of impartiality and fairness, and the Dean of Faculty has already touched on the requirement in section -- in section 9. But I would ask the Chair to look more carefully in detail in relation to section 9 of the Act, because section 4, which was referred to by my learned friend, saying a member of the Inquiry panel must not, during the course of the Inquiry, undertake any activity that could reasonably be regarded as affecting his suitability to serve as such, does not free-float. It is subsection (4) of paragraph 9 of which the foregoing sections identify what the test for impartiality is. That's why the heading of the section is "requirement of impartiality".

And the test for impartiality is that the minister must appoint, not appoint or allow to continue to appoint, as is said in paragraphs 2 and 3, (a) a person has a direct interest in the matters to which the inquiry relates or (b) a close association with an interested party unless, despite the person's interest or association, his appointment could

not reasonably be regarded as affecting the impartiality of the inquiry panel.

Now, that is the test for impartiality as set out in the statute. You cannot pick and choose parts of the statute and look at section 4 alone and not look at the rest of it.

It is correct to say, and has been said earlier this morning, that Parliament is deemed to know the law, and it's deemed to know the law when it enacted this section. But instead of enacting any Porter v Magill test, this is the test that it identified. In relation to the requirement of fairness, section 17 deals with this. And the question has to be asked: if the common law is expected to have ruled on these matters and Parliament was intended to deem it as such, why include both of these sections in the Act? There's not a section for it in -- I was going to say the Criminal Procedure (Scotland) Act. I don't want to fall into the same trap of considering adversarial processes. But it's got to mean something that the Act set out these things and stated them, and I would respectfully submit that it points to the fact that this is the test.

Why, if the statute was to make sense, should a chair accede to a motion to recuse himself when the minister who appointed him couldn't have removed him unless they'd actually proved in terms of section 9 he was not impartial? What this is all apt to suggest is the transposing of common

law onto statutory non-court bodies is a difficult one, and one which I would respectfully submit cannot simply be done, and, if it is to be done, it's to be done with the greatest care, and only when it's been made out that the law that applies to it has been fulfilled, and I would respectfully submit it has not.

I move to the tests for apparent bias. The first I don't need the Chair to be taken to, but it's Kanda and the infamous dicta no one has lost a case will think he's been treated fairly if the other side has access to the judge. This is absolutely square in the submission of the Dean in relation to adversarial proceedings. That is absolutely so. And that is why it is so important to recognise (1) these are not adversarial proceedings and (2) it is actually not only encouraged but a recommendation that the Chair should meet with the bereaved families.

Had those recommendations thought that the test was that in Kanda, it couldn't have possibly suggested that be the case, nor indeed Porter v Magill, nor indeed Stubbs, as I will come on to. But it is apt to show how inappropriate it is simply to take a test that applies to an adversarial process and say this is the test that needs to be applied, and I hope to do that by identifying, if I may, Porter v Magill.

In relation to the paginated submissions in

Porter v Magill, I would like to draw the Inquiry's attention to paragraphs 99 to 103, and that sets out the test. That's to be found at page 375, 376 of the authorities, I hope. Is that correct? (Pause). Does the Chair have that?

LORD BRACADALE: Yes, I do.

MS MITCHELL: Yes. At paragraphs 99 to 103, the question of the test for apparent bias is discussed, and it's tweaked slightly by the end of paragraph 103 but not very much. But I would like to ask the Chair to focus on not just the opening words of the test but the whole test.

Paragraphs 100 to 103 are focusing on the reasonable likelihood or real danger tests in respect of whether or not there was apparent bias. But if about three-quarters of the way down paragraph 99, between F and G, the court states:

"This approach ..."

Meaning the approach of whether or not there is a reasonable likelihood or a real danger:

"... which has been described as 'the reasonable apprehension of bias' test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified."

And:

"... the court also observed that, in considering whether

there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive:

"'What is decisive is whether this fear can be held objectively justified.'"

Now, I want to come to the actual question in this case, which is whether or not it is appropriate to transpose what is said to be the test from an adversarial process into a process which is non-adversarial. The reason that I say that it cannot be done is that the question of whether or not one looks at a test in these circumstances is the bias must relate to one of the parties. And in these hearings, we do not have parties. We have core participants who may have their own interest, but they are not parties. And I go right back to section 2: this isn't a determination of liabilities of parties.

At paragraph 99, it is said that the test should be -- and I appreciate this is tweaked, but nothing to do of relevance arises from that for my purposes:

"Accordingly, 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 ..."

So when we look at the Porter v Magill test, we have to look at the whole test and what it says. A question of bias does not float free in the air; it has to apply to a party, and that party is a person involved in the case to the issue under consideration by him in an adversarial process, and that is what is made clear there.

The same issue can be made of the case of Stubbs, and that can be found further up the document at paragraph 250 -- 230, sorry. (Pause).

Paragraph 230, does my Lord have that? That's the test in Stubbs.

LORD BRACADALE: Are you referring to a paragraph in Porter v Magill or Stubbs?

MS MITCHELL: No, I've moved up to Stubbs at page 230.

LORD BRACADALE: Page 230.

MS MITCHELL: Yes. Paginated page 230, the bottom paragraph, paragraph 15, "The appearance of bias". Again, this is -- this takes place in the context of an adversarial process:

"The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind."

And then it goes on to reference -- it goes on to reference a quote:

"The concept of bias ... extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

And then it goes on:

"A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute."

Now, what's made clear in each of these authorities is that they all relate to the test of apparent bias between the parties in an adversarial process. Therefore we cannot simply transpose the dicta onto a completely different type of process and say that is how it applies. I am not suggesting that the Chair and the panel members should not be -- should not be impartial; I am suggesting that what they should not do is simply apply a test that is not apt to apply and place it onto this process.

If, of course, I am wrong in that regard, I adopt what has been said in relation to these meetings in respect of my learned friend, Mr Beer, who has gone through in careful detail each of these meetings and set out a proper context

for that.

If we do apply -- if I go to my esto position, ie esto I am incorrect and that the Porter v Magill test can simply be lifted wholesale despite the fact it regulates apparent bias between the parties in a different setting, if we can simply transpose that, the simple fact of the matter is that anyone who was looking at these would know the chair of the inquiry should meet with the families, would know that they are victims in the sense that they have lost their loved one and Article 2 applies; they would know that they should be at the heart of the inquiry, as several other families have been at the heart of the inquiry and met with the chair; and they would know, as has been stated here repeatedly, that you as Chair are not in any way being impugned by what was said to have happened.

The real difficulty is that this is being -- this whole process is being treated like a civil process. The parties are looking out to their own interests rather than attempting to assist the Chair by getting all the information out that they possibly can about what was happening. And I say "parties" in the loosest sense: the core participants.

And because we are looking through the prism of these like civil proceedings, we're forgetting that essentially this is an inquiry that has been brought into being because there were great concern about an issue that happened, and

the Chair has to investigate that matter and bring back recommendations.

The person looking at this would know that the way that the family are being treated, in the sense that they are being placed at the heart of the Inquiry, is a recognition of their Article 2 rights, and they would read the comments in any of these discussions that were taking place against that background, not against the background, for example, where the gravest concerns is being imputed to every comment, Mr Bhatt being one particular example: simply taking the words that he says and not looking at the context in which he has said them.

The fact is that this Inquiry has behaviour impeccably, it has got an important job to do and must continue to do that job. It must do so without fear and it must refuse this motion for the Chair to recuse itself and for those members to recuse themselves as well.

I think that's my time up, and I think those are my submissions.

LORD BRACADALE: Thank you. We'll stop for lunch now and sit again at 2 o'clock.

(12.55 pm)

(The luncheon adjournment)

(2.01 pm)

LORD BRACADALE: Mr Beer.

Submissions by MR BEER

MR BEER: Thank you very much, Sir. Can I start with some general submissions, and I respectfully suggest you should determine these motions on the basis of the following seven principles.

Firstly, that it is for you to determine the motion insofar as it relates to you. It now seems to be accepted that that is the case, ie you should determine the motion insofar as it relates to you, rather than the approach previously taken, namely of going straight to the Court of Session, bypassing you and asking that court to determine whether you were apparently biased.

That was wrongheaded for the reasons set out in my written submissions.

Now, this of course does not prevent any core participant from challenging the decision that you make by way of judicial review.

I am so sorry, I have been asked to pause for a second. Problems with the audio apparently.

LORD BRACADALE: I see that the transcript is not functioning.

(Pause).

I think that's now operating.

MR BEER: Thank you very much, Sir, I was saying that this does not, of course, prevent any of the core participants from challenging, by way of judicial review, your ruling on the

motions. Indeed, in a number of the written submissions you have received, the lawyers seem to have that in mind, the claim for judicial review already, despite not knowing the outcome of your ruling on the motions, or the reasons that you will give in your ruling.

Secondly, you should also determine the motions made in relation to the Assessors, rather than the Assessors themselves determining the motions, that is the motion in relation to Mr Bhatt made by the Scottish Police Federation and that made by Mr Paton in relation to Mr Fuller.

I have set out in detailed submissions, it's paragraphs 11 to 19, no need to turn them up, of my written document why that should be so, ie you determine the motions in relation to the two Assessors. I've not detected any dissent from what I said in writing in any of the oral submissions today.

The third general principle is that you should determine -- you should judge the motions by determining what fairness required in terms of the conduct of the meetings themselves and what fairness now requires in terms of a broad, overarching, determining principle in relation to the motions insofar as they allege apparent bias and also insofar as they allege procedural impropriety.

Fourthly, you should have regard to the law on apparent bias as it has been developed in the context of proceedings

in courts and tribunals when determining what fairness requires.

Fifth, you 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 a very different context.

Sixth, you should have regard to the special nature and features of inquiry proceedings, which I have suggested, for detailed reasons, in the written submissions, are sui generis.

Seventh, you should pay close regard to the approach taken in comparable inquisitorial and public inquiry proceedings, particularly the approach taken in relation to meetings with those who are bereaved or in a similar position to the bereaved as a result of the event or events being examined, in determining how a fair-minded and informed observer would regard the conduct in issue here.

I have set out detailed submissions, over the course of some 50 pages, supporting each of those propositions, and nothing's going to be served by me now repeating them. So instead, I propose to concentrate on a small number -- I think there's about half a dozen of them -- of issues where core participants have made submissions today or have lodged further materials in the last couple of days that affect the points that I have made.

So the first of them is the Federation's reliance on section 9 of the Inquiries Act 2005.

Mr Dunlop made a range of submissions founded on section 9 of the Inquiries Act 2005 this morning, and he observed, in the course of those submissions, that it was remarkable -- I think he used the word remarkable, remarkable or a similar word -- that section 9 of the Act was not mentioned from start to finish by me in my 50 pages of submissions.

Can we turn up the blue folder, please. Tab 13.

Page 127. You should have a cross-heading, halfway down the page, Scottish Police Federation submissions, section 9 and section 17 of the 2005 Act imposed the same requirements as were "laid down in Kanda". You'll see that over the course of paragraphs 27, 28, 29, 30, 31, 32 and 33 I not only mention but address in detail the reliance on section 9 of the 2005 Act.

So far from not mentioning section 9 from start to finish in 50 pages, I gave seven paragraphs over to it.

But that's just fencing, we're all guilty of moments of forensic flourishes which overlook the facts. Let's look at the substance of the point made rather than the side issue of whether or not I devoted any attention to section 9 or not.

You should have section 9 in your bundles, it's in the grey bundle and it's right at the back -- thank you very

much -- with a cross heading of "Requirement of impartiality".

Now, sections 9(1), 9(2) and 9(3) don't affect the issue, really, because they are concerned with the steps that a minister must take when determining whether to appoint a member of an inquiry panel. It's really section 9(4) that's in issue:

"A member of the inquiry panel must not, during the course of the inquiry, undertake any activity that could reasonably be regarded as affecting his suitability to serve as such."

There's nothing in the words used there, ie following a close textual analysis of the words used by Parliament, which indicates that that subsection incorporates all of the rules of natural justice, whatever they are. Nor will you find anything in the pre-legislative history to section 9 or the Act more generally which establishes that, by the use of those words, 9(4), Parliament intended to incorporate all of the rules or tenets of natural justice.

And in relation to that point, the suggestion that the Act, either here in section 9 or in section 17 -- this was the way that Mr Byrne put his submissions rather than founding on section 9. The suggestion that the Act incorporates all of the principles or tenets of natural justice.

The problem with that submission is that the difficulties associated with it have not been grappled with. And one way to try and grapple with the issue is to look at one of the other principles of natural justice, not the one that we're said to be concerned with, the rule against bias. Let's look at one of the other principles.

One of the other principles of natural justice, quite well established, is that every person has a right to a hearing and must be allowed to present his or her own case. That's one of the well-recognised rules of natural justice. Well, is there a right to have a hearing, is there a right to be allowed to present his or her own case in a public inquiry? No, there is not. The 2007 Rules, the 2006 Rules in England and Wales, do not give any person such a right. They restrict the rights of all people, in a number of ways, so as to extinguish the right, as the principle of natural justice would have it, through restricting who can be core participants, by preventing anyone from presenting a case and by not allowing, as of right, any core participant to ask questions.

So that principle of natural justice, the right to have a hearing to present one's own case, does not apply in public inquiries and yet, as those who support the motion would have it, these provisions of the Inquiries Act 2005 have incorporated all of the rules of natural justice.

They must logically say that that rule was also incorporated by Parliament in the enactment of section 17(3) and the requirement of fairness that it contains. But the other legislative provisions make it quite clear that that rule of natural justice is not only restricted, it's extinguished in inquiry proceedings. And that's why I made the general point in my submissions that the search for the tenets of natural justice, as they arose in conventional litigation, and then the attempt to cross-apply them to these proceedings was folly.

Can I turn then to the second point, the related point raised by Mr Byrne and Mr Duncan on -- founded on Errington v Wilson. This is also in the grey folder and it's in the Solicitor General's supplemental bundle of authorities, and I think it's the second tab into her -- the first tab into her authorities, Errington v Wilson. Thank you.

Now, two points were really made on the back of Errington v Wilson. The first of them was that the principles of natural justice and the duty to act fairly were inseparable because, it was said, the principles of natural justice were designed to achieve fairness. And then secondly, reliance on -- in reliance on part of Lord Clyde's judgment, it was said that I'd fallen into the trap essentially of suggesting that the only duty upon you was to

act fairly and that that duty was in some way different to a duty to observe the principles of natural justice.

As to the first point, I would respectfully suggest that it doesn't advance your understanding or assist you in your task in any way to state the high principle that the principles of natural justice and the duty to act fairly are inseparable. And that's because the issue for you is what approach should be taken in the context of a public inquiry being conducted under the 2005 Act to the issue of the Chair of the Inquiry and its Assessors meeting privately with one of the core participants.

It would only be the case that this high principle would be of assistance if it could be shown that, in the context of a public inquiry under the 2005 Act, it had been established that the principles of justice applied and that they included a principle that prohibited such a meeting.

In any event, it's important to note that despite his statement of high principle, Lord Hope, when he came to determining its application in the circumstances before him, was very careful to stress that it was in the circumstances of that case and the nature of those proceedings that meant that the justice in question was under a duty to have regard to the principles of natural justice.

We can see that at the foot of page 554. That's the internal pagination. Letter H, which is right at the foot of

the page, the paragraph beginning "In view of the nature of proceedings". So Lord Hope, Lord President said:

"in view of the nature of these proceedings, I consider that the justice was under a duty to have regard to the principles of natural justice and that, in the circumstances of this case, this is simply another way of expressing the broad proposition that she was under a duty to act fairly."

So two limitations in the way that Lord Hope expresses himself there. The nature of these proceedings and in the circumstances of this case.

Even when Lord Hope came to express the high principle, he then expressed it in the context of the case before him. We can see that at -- over the page at 555B onwards.

And if you just read B until the end of the paragraph. (Pause).

In particular, the sentence:

"In my opinion, it is sufficient for the purposes of the present case to say that the duty to act fairly, which the second and third respondents admit, and the duty to act in accordance with the principle of natural justice, which the petitioner avers, are different ways of expressing the same thing."

So again a limitation, carefully expressed by Lord Hope.

So putting all of this another way, the logic is, well, look, we can show by reference to Errington that there's no

difference between fairness and natural justice. We've got Lord Hope saying that the principles are inseparable. Counsel to the inquiry accepts that the Chair is under a duty to act fairly. We can point to some cases which say that natural justice includes a requirement that the decision-maker should not receive evidence or submissions in private. It must follow that that principle applies to a public inquiry too. That, with respect, is fallacious reasoning.

You'll recall that the second point that it was sought to make on the back of this was that, in reliance on Lord Clyde's judgment, I'd fallen into a trap of suggesting that the only duty on you was to act fairly and that was in some way different to the duty to observe the principles of natural justice.

I would cross-refer you to paragraph 30 of my submissions, no need to turn them up, volume 1, blue, page 127, where I begin to mention authorities which set out the principle that what fairness requires is always fact-specific and context-specific as a rich seam of authorities that establish that proposition.

Can I turn to my third point and that is the point made about the difference between these proceedings and adjudicative proceedings. And the Solicitor General makes a different point founding on a passage in De Smith on

judicial review.

That's also grey folder, Solicitor General, second tab in and then it's three pages from the back of that tab. And it should have, halfway down the page, "Scope of the test".

Mr Duncan has highlighted, helpfully, the passage at the foot of the page. It's paragraph 12-026 and 12-027. After extracting a paragraph from a decision of the Court of Appeal in England and Wales, the authors say:

"These comments were obiter as the court went on to find that if the common law principles of bias did apply, they had not been breached. Future courts should be cautious about adopting the suggestion that the Porter test only applies to decision-makers concerning adjudicative or quasi-judicial proceedings. First, the distinction between adjudicative and non-adjudicative or quasi-judicial and non-judicial functions is unclear. Second, it is difficult to see a principled case for permitting apparent bias in cases clearly concerning non-adjudicative functions. It is not clear for instance why the Porter test should not apply where a decision-maker tasked with formulating general policy gives the appearance of being biased."

To be clear, I've not submitted that you should not apply the Porter v Magill test in relation to the motions as it's founded -- insofar as it's founded on apparent bias, whether that's on the basis that the Porter v Magill test only

applies to adjudicative proceedings, which these are not, or on some other basis.

Instead, my submission drew attention to the decision in Porter v Magill, in circumstances where it hadn't been mentioned by the Scottish Police Federation in their submissions. The distinction I was drawing between adjudicative and non-adjudicative proceedings was not in the context of the test for apparent bias and the approach set out by the House of Lords in Porter v Magill.

Instead, I was drawing the distinction, when considering the different nature of the proceedings that we are engaged in here, an inquiry under the 2005 Act, and the cases relied on by the Federation and the Solicitor General, namely proceedings in a court, where parties litigate the issues before a judge, about the propriety of meeting an individual engaged in the proceedings.

That was the distinction I was drawing between the two different species of proceedings, not in relation to whether or not the Porter v Magill test for bias applies.

You can see that if we go back to the blue file, tab 13, page 127. In fact, I'm just going to list these paragraphs out for your note, Sir, rather than taking you to them. The distinctions I was drawing between adjudicative and non-adjudicative proceedings are in paragraphs 29, 93, 99, 133, 135 of my submissions. That's the distinction I was

drawing, about the propriety of meeting people or communicating unilaterally with people, but not about Porter v Magill.

Fourthly, some reliance has been placed upon the decision of the Sheriff Principal in the case of Warren Fenty. This means I think we're going to have to delve into the red files, and that's tab 18 of volume 3A. Which should be right at the back.

You haven't, I think, looked at this so far. But what seems to be said is that the Sheriff Principal did not accede to a motion to recuse himself but that was only because of two features of his meeting with the deceased, Mr Fenty's, mother. Firstly, the Sheriff Principal said that he couldn't discuss the merits with her in the course of the meeting that he had with her, and secondly, a minute of the meeting was disclosed to all parties. Those features are absent here. Therefore, it is said, in this case the test for apparent bias and recusal is or must be met.

Can we look at paragraph 3, please -- the whole decision is given over to the Sheriff Principal's determination, apart from a few passages which deal with recusal. So paragraph 3 on page 2, he says:

"In any fatal accident inquiry there are many interests involved, including public or private bodies and their employees and the general public interest. In this case, my

view is the primary interest is that of Mr Fenty's family, not least his mother. Everyone is affected by the delay but the family more than anyone. At a recent meeting I had with Mrs Fenty ..."

And you'll see footnote 2 says -- sorry, footnote 1 says:

"The holding of the meeting was the subject of criticism by some of the parties. I deal with that at the end of the determination."

Going back to the text:

"... it was obvious to me that the decade of delay had added a considerable burden to the grief caused by the loss of her son. It was also obvious to me that she struggled, and continues to struggle, to understand the circumstances which had led her son to overdose on methadone, to be admitted to hospital and to end up dying in police custody."

Then for the balance of his determination, he deals with the facts. You need to go to right to the end, it's page 435 in the red print. Picking up at paragraph 72, under the heading "Meeting with Mrs Fenty":

"Some parties' representatives were critical of my decision to meet Mrs Fenty without the other parties being present, such that a motion to recuse myself from the inquiry was made. I refused it. I of course readily accept that a judicial officer should not meet parties in private without the attendance of all. That's a basic rule of natural

justice. I also of course readily accept that justice must be seen to be done, in other words the perception of a reasonable bystander must be taken into account. However, the situation here was unprecedented. All parties were affected by the unconscionable delay. But as I have already said, I considered that Mrs Fenty had been hit the hardest.

"For that reason, I considered not only in the interests of justice, but also out of common humanity, she was entitled to an explanation for it directly from me. The sheriff clerk was present throughout, and I was careful to advise Mrs Fenty, which I had to repeat on several occasions during the meeting, understandably so given her rightful concerns, that I couldn't discuss the merits. A full minute of the meeting was provided to all parties. For these reasons, the meeting was appropriate, and justice was served and was seen to be served."

So the suggestion seems to be that those two features, him saying to her, "I can't discuss the merits," and the minute of the meeting was disclosed to the parties, are absent here and so, the submission has gone, how much stronger this case must be for recusal.

That involves a logical fallacy in reasoning. To be specific, it's the fallacy of a false analogy. A and B were present in this other case, they are absent here and therefore the outcome must be different.

You will wish to consider the usefulness of the value of relying on the first instance decision of a sheriff, albeit he was a Sheriff Principal, in reaching your conclusions here.

More than that, you may wish to consider the points that I've already made, that distinguish this case still further from a sheriff conducting an FAI. The giving of powers to the sheriff conducting the FAI of all of those powers that he or she would have for the purposes of the discharge of the sheriff's jurisdiction and competence in civil proceedings -- that's section 19(1) of the 2016 Act -- and the application within an FAI of the rules of evidence which apply in the sheriff's court when normally conducting civil proceedings. That's section 20(3) of the 2016 Act.

It doesn't assist to say that, in this Inquiry, one of the reasons or the purposes for the conduct of the Inquiry is to replicate or to encompass that which would have been undertaken in a fatal accident inquiry. That doesn't make these proceedings like a fatal accident inquiry. When judging what the proceedings are like, what is their type, what is their species, one must look to the instruments that govern them; in that case the 2016 Act, in our case the 2005 Act and the 2007 Rules.

The Solicitor General drew your attention to rule 2(2) of the Fatal Accident Rules 2017, which state that an inquiry,

an FAI is inquisitorial and not adversarial. But you may consider that that does not assist much in the present debate given that it remains the case that an FAI has many of the powers which mean that it looks and feels like court proceedings. I've mentioned them already.

And the simple statement that an inquiry is inquisitorial and not adversarial says nothing about the powers that it has which make it look and feel like a court, which are absent in these proceedings, and as I pointed out, are absent in coroners' inquests.

Can I turn, fifthly, then to the George Low decision, which was relied upon by Mr Byrne. Again supplemental authorities, grey bundle, please. Which I think is the fourth tab from the back. Just some things to note before we get into the decision itself. Firstly, this was a rolled-up hearing decision. You can see that from paragraph 1 on the second page. This is a rolled-up hearing for both permission to apply for judicial review and a substantive judicial review.

You can see from the very front page, the frontispiece, that it was an ex tempore judgment, ie the argument was heard and the judgment was given on Thursday, 20 August 2009. You'll see, thirdly, that it's the decision of a deputy High Court judge, Mr Randall QC, as he then was.

You might note, fourthly, that no authorities are cited

in the case from start to finish. It was an authority-light decision, absent from the discussion is any authority.

And so you might conclude that, in the spectrum of precedential value, an ex tempore judgment by a deputy High Court judge in England and Wales, where no authorities were mentioned, might sit at the lower end of the spectrum of persuasiveness. But anyway, let's look at the substance of it.

You can pick that up at paragraph 2. The subject matter of the application is a determination by an independent adjudicator, who was in fact a district judge, in relation to a charge brought against Mr Low under the notice of report that he refused to obey a lawful order to provide a specimen of urine required of him under a mandatory drug testing programme. So it's an IA decision, determining a charge against a prisoner in prison for failing to supply a specimen, and we can see from paragraph 3 as well that essentially the prisoner said he was on medication, which offered him a reasonable excuse for not providing a specimen, and relied on a letter from a locum doctor that he said supported that claim.

If we go to paragraph 7 over the page, there the deputy judge quotes directly from Ms Condruns(?). She was the solicitor that was acting for the prisoner in the prison. Uncontradicted note of events on 23 July, that's the day of

the hearing before the IA:

"Prior to entering the hearing and on my initial attendance at the prison, the IA called me into the hearing room to provide me with some information. The IA stated that on his arrival at the prison on that day, he had spoken to the prison doctor, Dr Duncalf, and Dr Turner, who had provided information to him about Mr Low's medication."

And then this:

"Judge Morgan [that's the IA] informed me that the letter that had been provided by the healthcare department was inaccurate and that the locum doctor should not have provided this information. I stated I would require the doctor's attendance, either Duncalf or Turner, to provide these details within the hearing and explain why this inaccurate information was provided."

Then if we look at paragraph 9 of the judgment, about eight to ten lines in, beginning with the word "Secondly", here the prisoner was arguing in the Administrative Court that the -- what had occurred gave rise to the suggestion of bias. If you have got the word "Secondly", the deputy judge continued:

"Secondly and very importantly, it deprives the claimant of the opportunity for him or his representative to take part in the process of testing the evidence."

What the judge is saying is that the judge having

a meeting with the witnesses beforehand had that effect. And then this:

"That is indeed what happened here because the passage from the note I have already quoted twice uses the word 'inaccurate' to describe the short form of letter provided by Dr Turner."

And so what the court was concerned with, what the deputy judge found, was that the adjudicator had actually formed a view on the critical issue in the case, whether the medication that the -- that had been provided to the prisoner gave him a reasonable excuse for not providing a specimen.

He, the IA, had said that that information was inaccurate and ought not to have been given. So that was the IA expressing a view on the substance of the matters. It's not a record of him saying, "This is what the doctors told me," ie this was a case not of risk of bias; as the deputy judge said, the risk had actually come to pass.

This being a case of actual bias, it's in that context that one must consider the other observations of the district judge.

Continuing in paragraph 9:

"Ms Bush ..."

She was counsel for the interested party, that's the Ministry of Justice, who present the case against the prisoner:

"... was driven to submit that I should be cautious before treating the note made by Ms Condruns(?) and verified by a colleague as accurate."

And the judge rejects that. Then if we go back to paragraph 8, halfway through, the deputy judge says:

"Faced with that difficulty, her submission [that's Ms Bush's position] is that nevertheless the problem was rectified. She puts that on two bases. First, the adjudicator told the claimant's solicitor that he had done this and, secondly, that the hearing did proceed with what the claimant's solicitor then expressed herself as wanting to happen, namely one of the doctors would give evidence and be cross-examined."

And the district judge, sorry, the deputy judge goes on to reject those two points as being points which saved what had happened because this was a case of actual bias, the judge had met witnesses outside of the hearing and had expressed a conclusion to one of the parties, setting out exactly what his view was of the position. The healthcare department information was inaccurate. The locum doctor shouldn't have provided it before the hearing had commenced.

The approach taken by Mr Byrne of contrasting that case with our own suffers from the -- again from the same logical fallacy problem as with reliance on the Warren Fenty case.

A court here held that two things didn't save or salvage

the position, disclosure of the facts and content of the conversation and then the subsequent calling of evidence. Accordingly, if those features didn't save the case with George Low, how can they be said to salvage or save the case here?

But the context, as I've said, is radically different. The decision-maker was not speaking to family members for the purpose of ensuring that they were at the heart of the inquiry. Here, it was a judge speaking to witnesses in order to obtain information about the evidential matters which he was then about to determine, in a context where he expressed a clear view on the basis of that information.

Can I turn then to the next point, which is other examples of core participants communicating directly with the Inquiry about matters of substance, I'm going to call them, without the core participants knowing about the matters of substance that were discussed.

You'll see, Sir, in my submissions, I have made a series of points about what distinguishes these proceedings from court or tribunal, ie litigation proceedings, and have submitted that it will be right for you to take these distinguishing features into account in both assessing whether it was a procedural irregularity or procedurally unfair to meet with the families in the way that you did and when determining how the fair-minded and informed observer

would view those meetings for the purposes of determining whether the test for apparent bias is met. I am going to recap those points because they are very important. They make these proceedings very different from the cases upon which those who support the motions rely.

Firstly, in these proceedings, there are no pleadings, there are no statements of case, there is no indictment, there is no other written instrument by which the parties to the proceedings determine themselves the issues to be tried. Instead, you determine which issues you wish to investigate, you control the process and you gather the evidence. It would, I respectfully suggest, be unthinkable for a court to act in the way that you do in this inquiry and other chairs in other inquiries act in this regard. Unthinkable.

Secondly, a public inquiry is prohibited by section 2 of the 2005 Act from making findings of civil or criminal liability. This is a fact-finding exercise in this building, not a method of apportioning guilt.

Mr Byrne has placed before you some extracts of the 2014 House of Lords committee on the Inquiries Act about how the findings of an inquiry may affect or even ruin reputations. Two points of that -- about that and the reliance on Article 8 earlier. Firstly, that does not change the legal character and status of these proceedings. And secondly, the passage upon which reliance was placed was about the

importance of allowing legal representation, and no one can accuse the police officers engaged in this inquiry of being underrepresented.

I would suggest that it would be unthinkable for a court to decline to make findings of criminal or civil liability, unlike in these proceedings, unthinkable.

Thirdly, this inquiry, like all inquiries under the 2005 Act, is not bound by the rules of evidence that apply in legal proceedings. It makes the whole character of the proceedings very different. Their formality and the extent to which the norms which have grown up in legal proceedings in which the strict rules of evidence apply cannot be read across to these very different proceedings.

Again, I would suggest, respectfully, that it would be unthinkable for a court to act in the way that you do in this inquiry, and in all other inquiries up and down the land, in the way that chairs conduct their inquiries in relation to the treatment of evidence not bound by the strict rules of evidence. Unthinkable.

Fourthly, this inquiry, like all inquiries under the 2005 Act, is not required to adopt a standard of proof. Imagine that, a court saying no, we're not going to adopt a standard of proof in this criminal court, we're not going to adopt a standard of proof, balance of probabilities in this civil context. It would be unthinkable for a court to decline to

adopt a standard of proof. Unthinkable.

Fifthly, in this Inquiry, we receive documents from the core participants and decide which of them to disclose to the core participants. Putting it a different way, the Inquiry controls the process of disclosure, not the parties. Again, I would respectfully suggest that it would be unthinkable for a court to act in this way. Please, parties, you send your documents into me, the judge, and then I will decide which documents to give to this party or to that party or whether to give any disclosure back at all. Unthinkable. But that's how inquiries operate.

Sixthly, and this may be a particularly important point in relation to the issue that you have to decide because it's about the extent to which the inquiry, and the Chair in particular, communicates with core participants, a public inquiry does not follow the norms that operate in conventional litigation concerning communication between the parties and the court, the inquiry and the core participants.

I'm going to return to this because of its importance in more detail in a moment. But I think it would be, again, respectfully, unthinkable for a court unilaterally to communicate with one of the parties to the proceedings before it.

And lastly, seventhly, the way in which the inquiry adduces its oral evidence is quite unlike -- is very

different from the approach taken in conventional litigation. The inquiry has its own counsel. Those counsel presumptively ask all of the questions. The rights of core participants to ask any questions is severely circumscribed. It would again, I suggest, be unthinkable for a court to act in that way, to have the parties in front of it tell their lawyers to sit down and ask no questions and instead have its own lawyer asking all of the questions. Unthinkable.

And so it's in that context, how unthinkable it would be for courts or tribunals to act in the same way as public authorities do in these multiple and varying ways, that I ask the rhetorical question: is it unthinkable that the chair of an inquiry should meet with those most directly affected by the events under scrutiny, the family and relatives of the man who died?

I'm going to point to some factual material now, that exists in the context of this Inquiry, to illustrate that sixth point, the one that I said might be important, and the sixth point was that the strict rules that regulate the extent to which parties in adversarial proceedings may properly communicate unilaterally with the court or tribunal do not apply here.

I gave the example in paragraph 93 of my submissions that, in England and Wales, the position has been codified in the context of court proceedings by part 39.8 of the

CPR 1998. It says that you mustn't do it, you mustn't communicate unilaterally with the court, and there are sanctions for doing so and people regularly get hauled up before judges of the High Court for doing it.

By contrast, in this context, there is no such prohibition. It happens all the time that the core participants, and others, communicate with the Inquiry -- and by the Inquiry, I mean both the Inquiry legal team and the Chair -- on a unilateral basis without copying any of the other parties into their correspondence or indeed informing the other parties in the proceedings, the other core participants, that they were intending to communicate unilaterally with the Inquiry or had done so, or even summarising their communications.

We can see some examples of this in the material before you. I stress these are only examples. Can I start, please, with communications from the Chief Constable of Police Scotland to the inquiry, in which he -- I think it was then. May have been she depending on the date of the communication -- seek to influence you in the conduct of your Inquiry. Can we turn up volume 4, that's purple. Tab 8. And it's page 18. You should have, I hope, a letter of 15 September 2021, and you'll see that it's a letter from the solicitor for Police Scotland, the head of legal services, to the Solicitor to the Inquiry. And just to introduce the

letter, the context here is all about the procedural issue of disclosure of material to the Inquiry, and in particular, the disclosure of material that Police Scotland claimed was sensitive material.

You'll see in the bold heading on page 18, at the top, in capital letters, Police Scotland say that this letter is "For the urgent attention of the Chair, The Rt Hon Lord Bracadale", and you'll see underneath it says:

"Inquiry into the death ... disclosure of sensitive material."

And then the first paragraph of the letter:

"I shall be obliged if you will place this letter before the Chair and confirm when this has taken place."

So the bold heading at the top is Police Scotland requiring this letter to be placed directly to you. This isn't to the legal team, this is for you. This is the Chief Constable's solicitor writing just to you. And that's emphasised in the first paragraph.

And then you'll see -- you can read this in your own time, Sir -- Police Scotland make representations about an issue of substance. This isn't run-of-the-mill correspondence between lawyers, Police Scotland lawyers and the Inquiry's lawyers; they make representations to you, submissions to you, on an important issue, as to the way that the Inquiry should be run. So it's addressing issues of

substance, the disclosure of evidence that they say is sensitive. And you'll see from the last paragraph of the letter too, on page 22, the solicitor says:

"I shall be pleased to clarify or develop any part of this submission as be thought fit. The letter has been drafted with the assistance and advice of senior counsel instructed to assist the Chief Constable at the Inquiry. Otherwise, I respectfully submit same for consideration and determination by the Chair. I await from hearing from you at your convenience once the Chair has had an opportunity to consider matters."

And so it's clear that Police Scotland thought that it was permissible to have a unilateral, private communication to you that's not copied to any other core participant. You can see that -- from the header and the footer of the letter and elsewhere that it's not copied to any other core participant, and thought it appropriate for you to act on their unilateral, private, to use their pejorative word, "secret" communications to you.

So you may wish to take into account what the fair-minded and informed observer would make of this correspondence when assessing the point made about the alleged unfairness or effect on impartiality of meeting with the families of Mr Bayoh.

Can we look at a second letter, please. It's back a tab,

I think, page 13. It's part of the same course of correspondence. So tab 7, page 13. Letter 13 -- sorry, 1 October, again solicitor for Police Scotland to Solicitor to the Inquiry. Can I suggest, I'm not -- I should stress, rather, I'm not picking this letter or the one before for any particular reason, I could have picked any one of a large number of letters of unilateral communications. It certainly cannot be alleged against the Chief Constable that he or she has been slow to write to you privately to try and influence the Inquiry on what it does.

The context of this is again the disclosure of material to the Inquiry. You'll see under the first substantive paragraph under preface:

"I am obliged to the Chair for the careful consideration which has been given to the matters set out in my letter."

And last paragraph on page 17:

"I respectfully submit same for consideration and determination by the Chair. I await hearing from you at your convenience once the Chair, as advised by Senior Counsel to the Inquiry, has had an opportunity to consider matters."

So it's clear from these paragraphs, again, that Police Scotland expected the letter, or at least its contents, to be drawn to your attention, and for those contents to influence your mind, to influence your decision. Again, note letter not copied to other core participants,

they weren't told that it had been written or -- nor was it summarised.

And so what's the difference between the Chief Constable making these private suggestions directly to you, and members of the family making suggestions to you orally in a meeting or a series of meetings, again about issues of substance? That's the kind of thing that a fair-minded and informed observer might bring into account.

The same thing might be said of the Solicitor General. Can we note down but no need to go to it, it's your note in volume 1, the blue volume, tab 16, page 173, your paragraph 8. You refer to two meetings with the Solicitor General, the latter of which was at the Solicitor General's request. We've disclosed the documents relating to these two meetings, just for your note volume 2, tab 25, page 91, volume 2, tab 26, page 92 is the first meeting and then tab 27, page 99 and tab 28, page 101 for the second meeting.

So then meetings in September and October 2021. The second of which was called, as I say, at the Solicitor General's request. You will know from -- because you wrote your note and because you have seen the records of your speaking note, that what was discussed were issues of substance. They were about the running of the Inquiry. How is that relevant? How might that be important? You may think it has a threefold relevance: firstly, it might go to

the point I've sought to stress in my written submissions, namely that none of this is unusual in the context of a public inquiry, ie communications directly with the Inquiry and with the Chair. Police Scotland have been doing it, the Solicitor General has been doing it.

It might go to the issue of those who seek to apply their experience of courts and tribunals, forums in which issues are litigated and determined upon, make a mistake in drawing that experience across to this different context.

Secondly, it might go, in the mind of the informed observer, to the issue or the suggestion that meetings only occurred with the families of Sheku Bayoh and that that points towards apparent bias because, so it was said, these were the only meetings that happened and so the question was asked, how come they got differential treatment?

And thirdly, it may go more broadly to the information that the fair-minded and informed observer would bring into account in assessing whether or not the test for apparent bias is met.

Mr Duncan sought to draw a distinction between the two meetings with his client, the Solicitor General, and you on two bases: firstly, they happened before the evidence had begun, and secondly, they were discussing issues of procedure and not evidence. But those are distinctions which are illusory and not real. Issues of substance were discussed,

the topic was restricting the disclosure of material which the police and the Crown said might be sensitive.

Can I turn lastly, then -- I'm going to just go over 3 o'clock, and I'll continue, if I may, rather than taking the break.

Can I turn lastly then to the comparison of the approach in other inquiries that they have taken to the issue of meeting with families. And I've submitted that you should pay close regard to the approach taken in comparable inquisitorial and public inquiry proceedings and in determining how the fair-minded and informed observer would regard the conduct in issue here.

I've given some examples, if we turn up the blue file at tab 13. Page 154. At paragraph 103, onwards I say:

"Although doubtless other examples could be identified, the following inquiries are of note."

And then I explain what has happened in some other inquiries concerning meeting with families. The Nottingham Inquiry, the Omagh Bombing Inquiry, the Scottish COVID-19 Inquiry, the Southport Inquiry, the Lampard Inquiry.

Ms Mitchell has additionally placed before you some material that you might regard as important and which supplements the examples that I have given. If we turn that up, it's in her supplemental materials in the grey file, I think it's three tabs from the back. Do you have a --

essentially a Word document, which begins, on the second page, "The Inquiries Act 2005 post-legislative scrutiny"? Thank you.

You may consider that this material is relevant in two respects. Firstly, in assessing whether it was a procedural irregularity or procedurally unfair to meet with the families in the way that you did, and secondly, when determining how the fair-minded and informed observer would view those meetings for the purposes of assessing whether the test for apparent bias was met.

So just so that you know, although she's kindly produced this in a very economical form as a Word document, you should know a bit of context about it. So it was a Select Committee of the House of Lords, it was reviewing the operation of the Inquiries Act 2005 just under ten years in. You can see all of this, I think you've turned over to the next page, you get all of that from the next tab. That's in fact the front page of the document that Ms Mitchell has put before you. Do you have that, the one with the House of Lords portcullis symbol on it? And so that gives you all of the background material to date and authoritatively identify what you're being provided with. It's a House of Lords paper, HL paper 143. It's a report of the session 2013 to 2014 and it's published on 11 March 2014. So that's the context.

If we go back to Ms Mitchell's document, she has read to

you paragraph 240, and I would highlight the following, and again, I realise the irony perhaps me of all people in this room telling the people in this room that the first witness that's cited was Lord Cullen, later the Lord President. Have you got 240? So Ms Mitchell's document, the Word document, and paragraph 240 is at the bottom of the page, it's three tabs from the back. It's the one that's behind the Aamer Anwar frontispiece that looks like that. (Pause). Brilliant.

So we're looking at paragraph 240 at the foot of the page. And the committee said:

"Some inquiry chairmen met witnesses in advance. Lord Cullen explained as follows."

LORD BRACADALE: I suspect we perhaps don't have that, although I have seen it before today, so you can just read it and I can pick it up.

MR BEER: So the committee said:

"Some inquiry chairmen met witnesses in advance. Lord Cullen of Whitekirk explained the value of this. 'Certainly I find it helpful to have meetings with the bereaved, and possibly the injured, mostly the bereaved, before the inquiry gets going so they have a chance to see what I'm like and they can put questions to me and we can discuss how the Inquiry is going to be carried out.'"

I was ironically telling you who Lord Cullen was, later

Lord President of the Court of Session, who chaired three public inquiries, the inquiry into the Piper Alpha disaster, that was a statutory inquiry under the Tribunals of Inquiry (Evidence) Act 1921; the inquiry into the Dunblane massacre, that was a non-statutory inquiry, and the inquiry into the Ladbroke Grove rail crash, that was also a statutory inquiry under the terms of section 14 of the Health and Safety at Work Act 1974, so that's the first witness that this committee relies on.

The committee carries on:

"Lord Gill agreed."

Again with irony, I remind you that Lord Gill, at the time the Lord Justice Clerk, conducted the ICL Inquiry, which was an inquiry under the Inquiries Act 2005, ie the very same instrument that you're conducting your inquiry under. He delivered his report to the House of Commons and to the Scottish Parliament under section 26 of the 2005 Act. He said:

"You have to make it clear to them at the outset that everything is coming out in the open, that nothing is being held back and that everything they want to know, to the extent that it can be known, will be brought out. I also think it helps if you speak to them directly, person to person, just to let them know that all you are there to do is help to help get to the truth."

And then the committee recommended, in bold, at the bottom -- this is a recommendation of a committee of Parliament about the Act that you're operating under:

"Inquiry chairmen and counsel to the inquiry should as a matter of course meet victims and families as early as possible in the inquiry process."

So you will have noted, as will the fair-minded observer, the clear evidence of these two senior and distinguished members of the judiciary here and the resulting recommendation made by the committee, which evidence and which recommendation pre-dated your Inquiry and therefore the meetings that you held with the family.

You will wish to consider whether it was a procedural irregularity, unfair, or meant that you were apparently biased for you to do what these two senior and distinguished members of the judiciary had recommended and which a committee of our Parliament suggested should be done as a matter of course.

The Federation, this is my last point, criticise reliance as what has happened -- reliance on what has happened in other inquiries. Mr Dunlop referred to paragraph 102 and following of my submissions, setting out what had happened in these other inquiries, and suggested that there were multiple different problems or difficulties with this approach. He listed the four of them and then said that what I had done

was specious.

Firstly, he said that none of the cases relied on, the other inquiries that I listed, involved a challenge or a ruling, so it never formed up into a ruling on the issue of apparent bias. But that's not a difficulty at all. These clear, consistent and repeated examples of chairs meeting privately with the families of those most affected by the events the inquiry is examining are not placed before you, as I'm sure you'll appreciate, because they have some precedential effect, it's the conduct in question and the effect that it would have on the fair-minded and informed observer that this clear and consistent practice would have that is relevant. Not because there's been rulings which affect or should bind you.

Secondly, he said that it follows from the fact that I'm able to give all of these examples that the meetings were not or couldn't have been held in secret because I'm able to mention them, and were thereby tolerated by others, whereas here he said that the core participants had no idea what had been going on; the meetings were secret.

You will have read the underlying materials that I have placed before you which are cross-referenced by footnotes to each of paragraphs 102 to 121, and you will see what little was revealed by each of those inquiries in each case about what had happened at the meetings. We don't have the

equivalent of the minutes of the meetings which you have disclosed, but what we can see is that, for the most part in each case, it was revealed after the relevant meetings had occurred that the meetings had occurred, not beforehand. There was no question of the meetings being tolerated. As much has been revealed about what was discussed in those inquiries as it had in this Inquiry before the present hearing and the disclosure for the purpose of it.

Thirdly, it was said that if it's suggested that a stamp of legitimacy has been placed on this practice, ie what you have done had been done by many other chairs in other inquiries, that doesn't affect the substance of the issue; it just means that many other inquiries have been doing the wrong thing as well. But that doesn't begin to engage with the issues that these other inquiries raise, the clear and consistent practice that has been undertaken. Still less does it engage with the recommendation of the House of Lords Subcommittee in its 2014 report on the Inquiries Act 2005 on best practice.

Fourthly, lastly, he said that the comparison fails to acknowledge the difference between the other inquiries where families were incontestably the victims or the relatives of a victim and where in no case was the deceased even potentially at fault. That is, with respect, to draw a distinction which is illusory rather than real.

There were many other core participants affected by events in those other inquiries. The Health Service, including individual clinicians, the Police Service and individual police officers in the Nottingham Inquiry, they didn't get to know what had gone on in the private meetings; the Police Service, individual police officers, the Security Service, Government officials in the Omagh Bombing Inquiry, they didn't get to know what was going on in the private meetings; the Police Service, individual police officers, the Education Service and individual members of it in the Southport Inquiry, they didn't get to know what was going on.

So it's wrong to view this issue through the lens of whether the person who died and their relatives who met the chair may or may not be blameworthy. That's an open issue in this Inquiry. In all other inquiries, too, there are disputes between the families who adopt one view on the issues and the institutional and core participants who may adopt a different view. One group of people are being seen by the chair, the rest of them are not.

Those are my submissions, Sir.

LORD BRACADALE: Thank you. Well, I shall take time to consider the submissions and give a written decision in due course.

The Inquiry will now adjourn.

(3.15 pm)

(The hearing adjourned)

I N D E X

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