Sheku Bayoh Public Inquiry

Conduct and Procedure Hearing - 12 and 13 June 2025

Volume 1 [of 4]
Submissions and Notes

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[1] Where applicable, the Indexes use the terms defined at page 1 of Submissions of CTI (PH-00068).

IN THE SHEKU BAYOH INQUIRY

APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG WALKER; and (3) Ms. NICOLE SHORT (together, "the Applicants") re the Hearing Fixed for 12 and 13 June 2025

Introduction and motion

1. At the outset, the Applicants all wish to stress that they have the greatest respect for the Chair, whose integrity they do not seek to impugn. They have no doubt that the matters discussed herein were the result of a well-intentioned desire to assist the family of Mr Bayoh in navigating the Inquiry.

2. However, 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.

3. Accordingly, and with regret, they invite the Chair to recuse himself from further involvement in the Inquiry. They require to make the same application regarding one of the assessors, Mr Bhatt.

The law on apparent bias as referable to public inquiries

4. It is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein: *Errington v Minister of Health* [1935] 1 KB 239; *Kanda v Malaya* [1962] AC 322; *Hibernian Property Company Limited v Secretary of State for the Environment* [1974] 27 P & CR 197; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105; *Furmston v Secretary of State for the Environment* [1982] JPL 49; *Bradford v McLeod* 1986 SLT 244; *Simmons v Secretary of State for the Environment* [1985] JPL 253; *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205; *Doherty v McGlennan* 1997 SLT 444; *Georgiou v Enfield London Borough Council* [2004] LGR 497; *The Queen on the Application of Tait v Secretary of State for Communities and Local Government* [2012] EWHC 643 (Admin).

5. The rigour of this principle is well illustrated by the case of *Doherty, cit.sup*. There, in summary criminal proceedings, after convicting the accused but before sentence and whilst an appeal was possible, the Sheriff invited the complainer to his chambers for a private meeting. In finding apparent bias made out, LJC Ross said:

> "As was stressed in the case of *Bradford v McLeod*, it is essential that judges should be very careful not to do anything which may give rise to [a suspicion of lack of impartiality] and although justice may well have been done in this case, we are persuaded that a reasonable bystander might well form the suspicion that the sheriff was not being impartial in acting as he did. The sheriff admittedly had convicted the complainer by the time he had this meeting with the witness, but for all the sheriff knew the complainer might have appealed against conviction in which event the sheriff would have had to prepare a stated case. ***It is stated in the statement of facts that the issue of credibility and reliability of witnesses was a crucial one in this case and if that is so, then in a stated case the sheriff would have had to express a view upon the credibility of, among other witnesses, the complainer who was the individual with whom he had this private meeting***."

6. What has been happening here goes far beyond that which gave rise to a reasonable suspicion in *Doherty*.

7. The basic position is summarised as follows in *Kanda v. Government of Malaya*, *cit.sup*:

> "The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness."

8. This principle is equally applicable to the Chair of a public inquiry, and to his assessors. The test of apparent bias has been applied in several cases involving

public inquiries: see e.g. the cases cited above of *Errington*; *Hibernian Property Company Limited*; *Furmston;* and *British Muslims Association.*

9. The Chair is subject to a statutory requirement to act with fairness (2005 Act, s.17(3)), and to the common law requirements of natural justice (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry* 2025 S.L.T. 205). This is underlined by the provisions of s.9 of the 2005 Act:

> "**s.9 Impartiality**…
>
> (4) 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."

10. It is clear that "Parliament is taken to have known what the law was prior to the enactment": *Lachaux v Independent Print Ltd* [2020] AC 612 at [13]. Accordingly, by expressly imposing the requirements of impartiality (s.9) and fairness (s.17) as laid down in *Kanda,* Parliament may be taken as having decided to impose the same requirements of natural justice on the Chair.

11. Once apparent bias is demonstrated, recusal is mandatory. It matters not that the decision-maker protests that he is not in fact biased or that he will obtemper his duties to act fairly and impartially: *Kanda, cit.sup*. As was confirmed in *Millar v Dickson* 2002 SC (P.C) 30 at [65]:

> "The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice... ***It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial.*** The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. ***If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is***

that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand."

The grounds for recusal here

12. The following events are now apparent. They are presented in chronological order, under explanation that many have only recently become known (as a result of disclosure by the Inquiry in advance of the hearing fixed for June 2025)[1].

November 2021

13. Before the oral hearings commenced, a meeting was arranged between the family of Mr Bayoh and the Chair. In advance thereof, (a) the family was invited to set the agenda, and (b) the family asked for sight of the s.21 notices which had at that point been served by the Inquiry[2].

14. This is instantly problematic. Private meetings should not occur at all, other than (perhaps) for the very limited purpose of introducing Core Participants to the Chair and providing reassurance as to the procedure that will be followed. *A fortiori,* a meeting whose agenda is set by one of the Core Participants and not by others (the content of that meeting not being disclosed until disclosure was forced by the concerns raised by the Applicants) is not one indicative of fairness or impartiality.

15. Moreover, the provision to the family of the s.21 notices does not involve treating the Core Participants equally. Other Core Participants had asked for sight of the s.21 notices. That request was, for a long time, refused. It was not known until now that the refusal applied only to the other Core Participants, and that the s.21 notices had been shared with the family. There is no good reason why those notices should

[1] Procedural Hearing Bundle, referred to hereafter as "PH Bundle"
[2] PH Bundle, p.11

have been shared with the family and yet denied to others. From the very outset, accordingly, the family was treated differently from other participants.

16. The meeting then seems to have taken place on Thursday 2 November 2021. No minutes were taken, and it is not clear precisely who was at the meeting: but it plainly involved the Chair, the family, and the family's legal representatives.

17. At the meeting, the family were invited by the Chair to "tell me something of the journey that you've had from 3 May 2015"[3]. That "journey" is something that would require to be explored in evidence before the Inquiry, and indeed has been so explored with some (but not all) of the family members who attended the meeting. There is no basis upon which such matters could, consistently with the requirements of fairness, be the subject of private discussion with the Chair, in the absence of other Core Participants.

18. Also at the meeting, the family were asked for their thoughts on the question of race[4]. From the very outset, the question of race has been something that the Chair has stressed is core to this Inquiry, and permeates every aspect thereof. There is no basis upon which that could, consistently with the requirements of fairness, be the subject of private discussion with the Chair, in the absence of other Core Participants.

19. The Chair followed up that meeting with letters to the family, which were not shared with other Participants and have only recently come to light. In one, to Mr and Mrs Johnson[5], the Chair referred to the meeting of 2 November 2021, and recorded the fact that at that meeting the family had discussed "the subsequent actions of the police and those investigating your brother's death". This can only relate to events at the police station after the arrest, and the involvement of PIRC, all of which involve contested matters of fact which will require to be decided as part of the Inquiry. Moreover, in that letter the Chair did not merely record that he

[3] PH Bundle, p.14
[4] PH Bundle, p.24
[5] PH Bundle, p.30

had listened to the family in this respect: he 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". That does not display a dispassionate or objective view regarding whatever was said (that being unclear in the absence of any minutes) in this regard. The Chair also went on to explain that he "heard your concerns about race". He thereby confirmed that this core aspect of the Inquiry was the subject of private discussion and representation, contrary to all requirements of fairness and impartiality. It cannot be maintained that none of this matters when evidence has been given on oath, or that the Chair would put such matters to one side and focus only on that evidence: one of the key participants at this meeting (and indeed in the others) was Ade Johnson, and Mr Johnson has not been asked to give evidence to the Inquiry (other than *via* the medium of these private meetings).

April 2022

20. Shortly before the evidential hearings began, a further meeting was arranged, attended by members of Mr Bayoh's family, Counsel to the Inquiry, and the Chair. A minute of that meeting was taken, and has been produced. At that meeting, the Chair is recorded[6] as having said that, at the previous meeting in November 2021, each family member had given a "powerful account of the way in which you were treated on 3 May 2015". Accordingly, it would indeed appear that at the unminuted meeting the previous November, not only was there discussion of factual matters that would be core to the Inquiry (vouchsafed by the fact that the Chair goes on to say that he wants them to give evidence about that in due course), but moreover that the Chair had found what the family had said to him "powerful". Given the fact that such meetings should not be happening at all, the fact that at the second such meeting the Chair described the representations he had heard at the first in such a manner is acutely disconcerting.

[6] PH Bundle, p.42

21. The Chair went on[7] to discuss the video that was to be shown on the first day of the Inquiry (discussed further below), indicating that this would "be a very strong start to the hearings".

May 2022

22. In opening the Inquiry, in comments which have been repeated on multiple occasions and publicly, the Chair stated that the family of Mr Bayoh would be at the heart of the Inquiry. He has said no such thing of any other Core Participant, despite the fact that some of them have clearly suffered as a result of the events of 3 May 2015. In particular, former PC Nicole Short (another Core Participant) was, on any view of the facts, assaulted by Mr Bayoh on 3 May 2015, and as a result was medically retired from service with Police Scotland. She is uncontestably entirely innocent of wrongdoing, and no one involved in the Inquiry has ever suggested otherwise. At no point has the Chair suggested that she might be "at the heart of the inquiry". She is entitled to ask why that is so.

23. The first day of the Inquiry then commenced with the showing of a professionally shot video, depicting the life of Mr Bayoh and involving drone footage over his home village in Sierra Leone. This was arranged, and paid for, by the Inquiry.

24. It is accepted that such a presentation is not unheard of in public inquiries. This has been done, for example, in the COVID inquiries. However, in other instances where it has taken place, the subject of such a "pen portrait" was incontestably the innocent victim. In the present case, as must have been apparent, there is an acute dispute as to who was the wrongdoer: Mr Bayoh, or the officers who arrested him. Arranging and paying for a video tribute to the life of one Core Participant when it was known that other Core Participants did not accept the description of Mr Bayoh as the "victim" is again problematic – all the more so when the Chair had indicated in advance (privately) that this would "be a very strong start to the hearings".

[7] PH Bundle, p.43

25. The second day of the inquiry heard the evidence of Zahid Saeed, who had become involved in a fight with Mr Bayoh shortly before his arrest. Mr Saeed was uncooperative. Rather than compelling that individual to obey his oath, the Chair adjourned the inquiry, and has since decided that the inquiry should proceed without his being recalled. This is in stark contradistinction to witnesses from Police Scotland and Crown Office, who have been subjected to robust questioning.

November 2022.

26. On 21 November 2022, a further meeting took place, involving the family of Mr Bayoh (but no other Core Participant), Counsel to the Inquiry, the Chair, and both assessors. At that meeting, there was plainly discussion of evidential matters. In particular, Ade Johnson is noted[8] as having said that "what happened on 3 May 2015 should never have happened", and linked the arrest of Mr Bayoh to the "colour of [his] skin". As already noted, such meetings should not happen at all. *A fortiori,* they should not involve discussion of matters of substance.

27. At the same meeting, Mr Bhatt is noted as having said to the family that he was sad to hear what the family had to say, and that we (namely, the Inquiry) "don't have the magic wand to change the world but what we can is try to help achieve what you want". That assertion appears to have gone uncontradicted by anyone else at the meeting. That statement is redolent of partiality and unfairness. No other Core Participant has been told that the Inquiry will "try to help achieve what you want".

28. Immediately after that, the Chair is noted as having said something. In the original disclosure of the PH Bundle, this was completely redacted. Following protestation of that redaction, there has been a further incomplete disclosure, so that it is now known that the Chair said (presumably prompted by Mr Bhatt's comment that the Inquiry will "try to help achieve what you want"), "Is there anything we can do [REDACTED]"). This is again concerning. It is entirely unclear why the question

[8] PH Bundle, p.44

that the Chair posed of the family ("Is there anything we can do…") should be left opaque in this manner. What was the Chair asking the family in this regard?

29. The meeting then went on to discuss the evidence that had, by then, already been heard by the Inquiry. Ade Johnson is noted[9] as having commended the way in which evidence was taken from the arresting officers, and as going on to assert that this evidence contradicted the statements of those officers (and was thus false), with a discussion then taking place of the consequences of giving false evidence. That is again entirely inappropriate. One party should not be allowed private access to a decision maker in order to discuss evidence that had been given or to provide commentary thereon.

30. In a similar vein, the Chair then is noted[10] as having invited the family to discuss matters arising from the *post mortem* report. That involved a further discussion of evidential matters, and resulted in Ade Johnson criticising the medical report obtained regarding Nicole Short. The family solicitor, Mr Anwar, is then noted[11] as having been critical of the way in which the *post mortem* was carried out. These are again matters of contention before the Inquiry, and should not have been the subject of private discussion or representations.

31. The discussion then turned to further aspects of the evidence already heard. In particular, Kadi Johnson is noted[12] as having stressed to the Chair that the family "are the victims", and 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 (another Core Participant), who had been "given such privilege". At that point, Senior Counsel to the Inquiry is noted[13] as having intervened to say that she had pushed Mr Saeed and "encouraged him to help" Mr Bayoh. Again, there was no intervention by anyone else present. It is not clear why

[9] PH Bundle, p.45
[10] Ibid.
[11] PH Bundle, p.46
[12] PH Bundle, p.47
[13] ibid

the Inquiry should be trying to "help" Mr Bayoh, as opposed to getting to the truth. This is again not consistent with requirements of fairness and impartiality.

32. Ade Johnson is then noted[14] 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. Why the family was allowed to tell counsel how to question witnesses is entirely unclear. It is, however, clear that the suggestion ("give more examples – worked with or come into contact [with members of the BAME community] – white/black and comparison in approaches") was thereafter taken up and adopted by Counsel to the Inquiry: several witnesses have been questioned in such a manner.

January 2024

33. On 18 January 2024, a further meeting took place, involving the family, their legal representatives, Counsel to the Inquiry, and the Chair. By then, some family members had given evidence. At that meeting, the Chair is noted[15] as having said to Kadi Johnson that he was "profoundly affected" by her evidence. That is suggestive of pre-determination. Had it been said publicly (in the course of the Inquiry hearings) it would have been the subject of challenge. As it was said privately, no challenge was possible.

34. Kadi Johnson is then noted[16] as having made further representations as to how the family had been treated, and having commended the Inquiry as to how matters had been handled to that point. No other Core Participant has been invited to discuss evidential matters privately, or to offer their views as to how the Inquiry has been handled.

35. Ade Johnson is then noted[17] as having said that witnesses to the events of 3 May 2015 were lying. What happened on 3 May 2015 is plainly central to the Inquiry.

[14] ibid
[15] PH Bundle, p.57
[16] PH Bundle, p.57
[17] PH Bundle, p.58

To allow the family to make private representations that witnesses have lied about that is wholly inimical to basic principles of natural justice.

36. Mr Anwar, is then noted[18] as having said "What is coming from the PIRC/Crown [REDACTED] – lied repeatedly to the family. [REDACTED] particularly difficult for the family to hear an [*sic*] see in disclosure what is being said". This is problematic, for two reasons.

37. First, it again involves allowing the family (*via* their lawyer) to make private allegations of mendacity on the part of public officers (from Crown and PIRC), without any visibility thereof or ability to contradict same.

38. Second, the reason for the redactions is entirely unclear. Said redactions have been queried, but all that has been said by the Inquiry is that the redacted passages do not refer to a person. The context is a serious allegation (of repeated dishonesty on the part of public officers) made in private representations to the Chair. The full context of what was said is important, and the insistence on leaving this redacted is a matter of further concern. This is a matter that will be returned to at the end of this application.

September 2024 onwards

39. On 4 September 2024, Mr Anwar wrote to the Deputy First Minister seeking an extension to the Terms of Reference, and saying inter alia:

> "Last Friday the Bayoh family met with the Chair of the Inquiry, Lord Bracadale and his legal team, at which a number of concerns as outlined below were raised, we now understand he is due to meet with you this week…
>
> This … decision that is sought to be examined [viz: the decision by Crown Office not to bring criminal proceedings against any police officer involved in the arrest of Mr Bayoh] was taken on an incomplete and erroneous

[18] ibid

understanding of the evidence and failed to consider important issues such as race."

40. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

41. By letter of 6 September 2024, the Chair indicated that he had met with the Deputy First Minister, and said:

> "While he is yet to hear closing submissions and analyse the totality of the Crown evidence, the evidence raises certain questions about the Crown investigation in relation to
>
> the understanding of the factual evidence;
>
> the instructions given to expert witnesses; and
>
> the absence of an examination of the issue of race."

42. On 16 September 2024, Mr Anwar wrote to the Deputy First Minister repeating the request for said extension to the Terms of Reference, and saying inter alia

> "However, [the Chair] does have a concern. While he is yet to hear closing submissions and analyse the totality of the Crown evidence, the evidence raises certain questions about the Crown investigation in relation to:
>
> - the understanding of the factual evidence;
> - the instructions given to expert witnesses; and
> - the absence of an examination of the issue of race."

43. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

44. On 3 October 2024, Mr Anwar wrote again to the Deputy First Minister seeking the said extension to the Terms of Reference, and saying inter alia

"The Chair raised significant concerns with you that the evidence raises certain questions about the Crown investigation in relation to:

the understanding of the factual evidence;

the instructions given to expert witnesses; and

the absence of an examination of the issue of race."

45. This letter was not shared with the other Core Participants, and only became known to the Applicants when it was disclosed in January 2025.

46. On 25 October 2024, the Chair wrote to the Deputy First Minister, saying inter alia:

"My current thinking is as follows. Evidence heard by the Inquiry raised certain questions about the Crown investigation in relation to: the understanding of the factual evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race."

47. The Chair then wrote a further letter to the Deputy First Minister on 18 November 2024, saying:

"As I have not heard submissions on behalf of the Crown and have not yet conducted a full analysis of the evidence, I have not formed a concluded view in relation to the investigation by the Crown. That said, some of the evidence raised concerns about the Crown investigation in relation to: the understanding of the factual evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race. Since my meeting with you in September the Inquiry has heard further evidence from an expert instructed by the Crown which only reinforces these concerns. It is, I think, a reasonable inference that the matters giving rise to concern would have been integral to the decision not to prosecute. That raises a question as to whether the October 2018 decision was flawed on the basis of that it proceeded on a misunderstanding of the factual evidence; the instructions given to expert

witnesses were misconceived; and there was a failure properly to examine the issue of race."

48. On 5 December 2024, a further meeting took place, attended by the family and their legal representatives, Counsel to the Inquiry and the Chair. The purpose of the meeting was noted[19] as being for the Chair "to hear from the family on any issues they would like to discuss". By this point in time, the evidence stage of the Inquiry had concluded, although there remained the possibility of further evidence being necessary if the request to extend the TORs was granted. Submissions were anticipated as being required in early course. There is no proper basis for convening a private meeting, involving one Core Participant only, to hear from them "on any issues they would like to discuss". Doing so is wholly inimical to basic requirements of fairness and impartiality.

49. The Chair is then noted[20] as having discussed the family's application to extend the TORs, and his support thereof. Immediately thereafter, he asked the family "to discuss how they have been coping" (presumably, in connection with the application to extend and the delays caused thereby). That led to a discussion of how the delays were affecting the family and an expression of desire that the application be decided quickly.

50. There then followed[21] various expressions of gratitude to the Chair, underlining the impression of a situation in which the necessary distance between Chair and Core Participants had been elided.

51. Thereafter, the meeting is noted[22] as having involved a discussion as to the format of submissions; whether or not Ade Johnson would be able to make a statement (despite not having been led as a witness); an indication that this was likely to be allowed; and the structure of the report (which was indicated to have already been drafted, albeit in "very early stages"). No other Core Participant has been invited

[19] PH Bundle, p.65
[20] ibid
[21] PH Bundle, pp.65-6
[22] PH Bundle, p.66

to make representations as to the format of submissions. No other participant has been invited to make a personal statement on the impact of the events of 3 May 2015 (despite the fact that, as is obvious, many people have been impacted). No other participant has been advised that the report is already partly drafted, or invited to make representations as to how the report might be structured All of this is again indicative of a relationship between Chair and family which is far removed from that which would ordinarily be expected or required by the tenets of natural justice.

52. On 28 January 2025, in the course of the Judicial Review by the Chief Constable, some of the correspondence referred to above was disclosed to the other Core Participants.

53. On 29 January 2025, the inquiry emailed Core Participants as follows:

> "The Inquiry would also like at this early stage to clarify a specific point from a letter shared by Mr Anwar yesterday. The letter dated 4 September 2024 from Mr Anwar to the Deputy First Minister in the first paragraph states "Last Friday the Bayoh family met with the Chair of the Inquiry, Lord Bracadale and his legal team, at which a number of concerns as outlined below were raised, we now understand he is due to meet with you this week".
>
> This is erroneous. The Bayoh family and their legal team did meet with members of the Inquiry team (including Inquiry Counsel and the Solicitor) on 30 August 2024 but Lord Bracadale did not attend."

54. On 4 February 2025, following the conclusion of said Petition for Judicial Review, the Chair wrote a letter to the Chief Constable of Police Scotland, and copied this into other Core Participants. Therein, for the first time, the Chair disclosed *inter alia*:

> "Since the setting up of the inquiry I have from time to time met with members of the families as part of my commitment to keep them at the heart of the Inquiry."

55. It is now understood that there were five such meetings. These have been addressed above. The Chair had not previously disclosed such meetings. Such meetings happened in private, without notification (before or after) to other Core Participants or any discussion thereof at any of the evidential hearings. No other Core Participant was invited thereto. No other Core Participant has had the benefit of private meetings with the Chair. No disclosure of such minutes as were taken of such meetings was made until complaint of said meetings was made by the Applicants.

56. In the same letter, the Chair referred to the meeting of 5 December 2024, and said:

> "As to my meeting with members of the families of Mr Bayoh on 5 December 2024, this was not a meeting to discuss the proposed extension to the terms of reference… The only reference at this meeting to the application before the Deputy First Minister was an acknowledgement by me that the families had made the application and confirmation by them that they had seen my letter to the Deputy First Minister dated 18 November 2024; there was no further discussion of the matter."

57. That description is, with respect, not entirely accurate or complete. As is now clear from the Minute of the meeting of 5 December 2024, and as discussed above, the Chair, immediately after his acknowledgement that the families had made the application and confirmation that they had seen his letter to the Deputy First Minister dated 18 November 2024, asked the family "to discuss how they have been coping". That led to a discussion of how the delays in deciding the application for extension were affecting the family and an expression of desire that the application be decided quickly. There was, accordingly, "further discussion of the matter", which is hardly surprising as the avowed purpose of the meeting, as set out above, was "to hear from the family on any issues they would like to discuss".

58. On 6 February 2025[23], agents for the Applicants queried the revelation that the Chair had been meeting with the family of Mr Bayoh, and raised certain questions

[23] PB Bundle, p.70

as a result thereof. No reply would be received to this letter until 5 March 2025 (discussed further below).

59. On 25 February 2025, at a point in time when the Deputy First Minister had not yet decided whether or not to extend the Terms of Reference, the Chair wrote to the legal representatives of all Core Participants, recording that he had met with the Deputy First Minister and saying inter alia:

> "The Chair went on to refer to his letter of 18 November 2024 which identified certain aspects of the public interest which were immediately relevant to the Inquiry.
>
> The first was the public interest in the examination of a potentially flawed prosecutorial decision. The Chair explained that he remained of the view that there are ***strong indications that the prosecutorial decision was flawed*** on the basis that:
>
> • it proceeded on a misunderstanding of the factual evidence;
>
> • the instructions given to expert witnesses were misconceived; and
>
> • there was a failure properly to examine the issue of race."

60. On 5 March 2025, the Solicitor to the Inquiry responded to the said letter of 6 February 2025. Therein, the following assertion was made[24]:

> "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."

61. 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

[24] PH Bundle, p.73

very clearly, and for the reasons given above, involved substantial discussions of evidential matters. They went far beyond pastoral or welfare meetings, and discussed matters of substance as opposed to mere procedure. The second sentence in the explanation quoted above seems designed to provide assurance that evidential matters were not discussed at such meetings (and rather "would require to be examined in evidence in 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 has thus heard repeated and firmly expressed concerns at to the actions and conduct of other key players in this Inquiry, which he was "humbled and honoured" to hear, and which he found "profoundly moving".

Application of the test of apparent bias to the foregoing

62. It is, presumably, accepted by the Chair that he is subject to the requirements of natural justice and that he therefor requires to avoid the appearance of bias (thus explaining why he protested such a suggestion when he considered it as having been made in the Petition for the Chief Constable).

63. The foregoing creates such an appearance. It is reiterated that the motion to recuse is brought purely on the basis of loss of confidence in the Chair, and in Mr Bhatt, on the basis of apparent (and not actual) bias. The *bona fides* of both the Chair and Mr Bhatt in complying with the requests of the family for such meetings is not questioned. However, such meetings are hugely problematic, from the point of view of the requirements for an appearance of fairness and impartiality.

64. Many of the comments discussed above suggest (or create the appearance) that the Chair and Mr Bhatt have pre-judged, or evinced a closed mind to, material issues in this inquiry: *Stubbs v The Queen* [2019] AC 868. Mr Bhatt indicated that the Inquiry would try to give the family what it wanted to achieve (which, as has been clear from the outset, involves criticism, and the eventual prosecution, of the arresting officers). The Chair has adopted the language of the family of Mr Bayoh and advocated their cause, as referred to in the correspondence set out above.

What started out as "certain questions" relating to the decision not to prosecute then moved to "concerns", and had by February 2025 become (without any further evidence being led) "strong indications that the prosecutorial decision was flawed". The Chair was plainly urging the Deputy First Minister to extend the Terms of Reference, and to include therein the prosecutorial decisions and also the Victims Right Review. He did so against a backdrop of having said (privately) that he was "humbled and honoured" to have heard Ade Johnson's descriptions of his concerns at the actions of police officers and others; that he was "profoundly moved" by the testimony of Kadi Johnson; that he had listened (privately) to the concerns of the family as to how they were treated on 3 May 2015; and that he had heard (privately) the concerns of the family on the central question for the Inquiry, being that of race. All of that points towards pre-determination.

65. Moreover, as already noted it is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein. The meetings described above are not indicative of meetings devoted to procedure or to the welfare of the family. They involve matters of substance and of evidence. They involve allowing the family and their lawyer to make representations and suggestions in private. The minutes read, with great respect, less like detached discussions of formalities, and more like consultations with a client.

66. One might test the complaints made herein by imagining that, rather than having met privately with the family, the Chair had met privately with the Applicants. If he had done so, and been seen to have been "humbled and honoured" to hear what PC Walker had told him, and that he had found the testimony of former PC Short "profoundly moving", the family would have been instantly able to point to apparent bias. The present situation is no different to that hypothesis. Justice requires to be even handed, and what would have been inappropriate for the Applicants is equally inappropriate for the family.

67. The case thus falls precisely within the four corners of *Kanda*, *cit.sup* in which the Privy Council confirmed (at pp.337-8), as is surely obvious, that "no one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing".

68. For these reasons, a fair-minded and informed observer, looking at the foregoing and understanding that the Chair had, following various private meetings with the family of Mr Bayoh, supported their attempt to extend the Terms of Reference on the basis that he considered that there were "strong indications that the prosecutorial decision [sc. the decision by Crown Office not to prosecute any of the officers involved in the arrest of Mr Bayoh] was flawed", would conclude that there was a real possibility that the Chair was biased: *Porter v Magill* [2002] 2 AC 357 at [103]. No cure is found in the fact that the Chair might ordinarily be expected to obey his judicial oath: "the interests of justice required not merely that he should not display bias but that the circumstances should not be such as to create in the mind of a reasonable man a suspicion of [his] impartiality" (*Bradford v McLeod*, *cit.sup* at p.247; : *Millar v Dickson, cit.sup* at [65]; *Porter, cit.sup* at [104]).

69. In closing, four final points are made.

70. In the first place, it is perhaps helpful to remind oneself that part of the function of the present Inquiry is to fulfil the requirements of a fatal accident inquiry. There would be no prospect of a Sheriff presiding over an FAI behaving in the manner discussed above. To the knowledge of counsel for the Applicants there is only one prior instance of a decision addressing the question of Sheriff in an FAI meeting privately with the family of a deceased. This was the FAI into the death of Warren Fenty (Case ABE-B204-20, Report dated 10 May 2024). There, the presiding Sheriff had become unwell, leading to substantial delays. The Sheriff Principal (Pyle) accordingly required to take over conduct of the FAI. He held a meeting with the mother of the deceased. The approach of the Sheriff Principal in so doing is in stark contrast to what is now known to have happened here.

71. Firstly, there was only one such meeting,

72. Second, the meeting was immediately announced to all other parties, allowing them to object thereto.

73. Thirdly, multiple protections were put in place. These are described in the Sheriff Principal's report (at [72]) as follows:

> "**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 office holder should not meet parties in private without the attendance of all. That is 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 that 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 Mrs Fenty's rightful concerns), that I could not discuss the merits. A full minute of the meeting was provided to all parties.*** I consider that for these reasons the meeting was appropriate and that justice was served – and was seen to be served."

74. Thus there are many and varied differences between that case and the present. In *Fenty*, the reason for the meeting was for the Sheriff Principal to explain the delays, the "fault" for which lay with the Court itself. The meeting was entirely transparent and open. It was fully minuted. There were no redactions to the minutes. There was no discussion of matters of substance. None of those factors are here apparent.

75. In the second place, there is the question of the redactions in the PH Bundle. The whole point (*per* said decision of Sheriff Principal Pyle) is that "a judicial office holder should not meet parties in private without the attendance of all": rather, all participants should be able to see what happened. Albeit there has been disclosure of the minutes of those meetings that were actually minuted, the lack of any minutes for the first meeting and the redactions undertaken to those minutes which were taken mean that such disclosure is incomplete. If the aim of disclosure of the PH Bundle was to place participants in the same position as if they had been at the meetings, that aim has failed. If the other participants had been at such meetings, the Chair would not have been able to ask them or their representatives to place their fingers in their ears for some of the meeting; but that is the ultimate effect of the redactions that have been made, and adhered to despite protest. As already noted, it is entirely unclear why it is thought appropriate to refuse to allow the other participants fully to understand (for example) what Mr Anwar was saying when he accused officers of the Crown and PIRC of having repeatedly lied to the family[25]. It is equally unclear why the other participants are not entitled to know what the Chair meant when he asked the family[26] "Is there anything we can do [REDACTED]?"

76. Thirdly, there is the particular position regarding PC Paton. There is a redaction in the minutes[27] regarding what seems to have been a discussion of his mental state. That redaction has presumably been effected in order to prevent disclosure of something that should not be disclosed: namely, the private information regarding PC Paton's mental state. It is accepted that the redaction was correctly applied: such private information should not be disclosed, to anyone. However, the meeting minute (as redacted) does indicate that this private information ***has*** been disclosed, albeit only to the Bayoh family. That is quite improper. There is no

[25] PH Bundle, p.58
[26] Ph Bundle, p.44
[27] PH Bundle, p.47

sensible basis upon which such disclosure has been allowed to the family, and not to anyone else.

77. For the avoidance of doubt, the Applicants are not asking for disclosure of that private information. They quite accept that it should not have been disclosed. Rather, the point is that it ***has*** been disclosed, but only to one party. That is again the antonym of a fair and impartial process.

78. Finally, a question arises as to the procedure that has been adopted to determine the issues raised herein. The Chair cannot be the ultimate arbiter of whether the Chair himself has acted fairly and impartially. The Applicants have seen the letter from the Chief Constable protesting the proposed procedure. Whilst they do not go as far to say that the hearing set for 12-13 June 2025 should not proceed (they accept that the Chair would be entitled to query a motion to recuse, and to require that these complaints be raised in a public *forum*), they do agree that if the Chair is tainted by apparent bias, as they contend, then this is something that should be clear to him (with the benefit of advice from his Counsel), and moreover that this is not something that he might avoid by deciding to the contrary and giving himself, as it were, a clean bill of health.

79. In these circumstances, and with the renewed expression of regret, the motion is made that the Chair and Mr Bhatt should recuse themselves from any further involvement in the Inquiry.

Roddy Dunlop KC

Counsel for the Applicants

7 May 2025

In the Sheku Bayoh Inquiry

Submissions on behalf of Retired Officer Alan Paton on the application for recusal on behalf of (1) The Scottish Police Federation; (2) PC Craig Walker and (3) Ms Nicole Short

Alan Paton has lost confidence in the Chair to this inquiry. He is concerned that he can no longer be seen to be receiving a fair hearing, and that apparent bias has now arisen. He invites the Chair to recuse himself from further involvement in the Inquiry. He makes the same application regarding both assessors, Mr Bhatt and Mr Fuller.

The full and thorough submissions made by the Dean of Faculty on behalf of The Scottish Police Federation; PC Craig Walker and Ms Nicole Short are adopted by Mr Paton.

In addition to those submissions, Mr Paton will comment upon particular aspects of the application that relate to him. In particular, the discussion of his mental health and certain comments made during meetings.

At the outset the Chair made it clear the family were to be placed at the heart of the Inquiry. A meeting was held on 13 April 2022. At that meeting the Minutes record the Chair as stating ' When I spoke to you before when we met each of you gave me a very powerful account of the way in which you were treated on 3 May 2015 and subsequently". This was before any evidence was heard and these were matters in dispute. Such a description by the Chair would suggest to any impartial observer that the Chair had already formed a view

about a matter in dispute. The Chair did not hear prior to any evidence being led about the way in which Alan Paton had been treated in the media by the representative of the family and the catastrophic effect it had upon his health.

At the same meeting the Chair described a video which the family were putting together as " a very strong start to the hearings".

A further meeting was held on 21 November 2022. At this meeting both Mr. Bhatt and Mr. Fuller were present as well as the Chair and others. These were supposed to be meetings to keep the family informed and in effect to be pastoral in nature. However, both a member of the family and their solicitor saw fit to address the Chair on matters of race and indeed to express opinions on the very matters the Inquiry was yet to determine. The Chair allowed this to take place. The tenor of this meeting is indicative of the fact that the family and their representatives saw these meetings as an opportunity to comment on the evidence and at no time were they told that such matters ought not to be discussed. Indeed Mr. Bhatt addressing the family and their representative stated, "but what we can (do) is try to help you achieve what you want". It could not be clearer that what the family want is for police officers, including Alan Paton, to be prosecuted.

Neither the Chair, nor Mr. Fuller sought to disassociate themselves from that remark. At the same meeting a member of the family expressed their view in regard to how satisfied they were with the approach of Senior Counsel to the Inquiry in certain aspects and how there were contradictions in the evidence of police officers and querying about what would happen if someone lied under oath. At no point did anyone at the meeting suggest such

comments were inappropriate and that the assessment of evidence would be for the Chair in due course. Further matters of evidence were discussed at this private meeting about the post mortem process.

A member of the family queried the decision to allow Mr. Paton to give his evidence in the manner which he did. They contrasted it with their view of the way the witness Zaheer Zahid was treated. This was a matter which ought to have been immediately closed down by the Chair. He had by this time issued his decision. Not only did he allow this matter to be raised but he considered it appropriate to justify his decision. There are no circumstances in which it would be appropriate to have a discussion involving one core participant's medical records with another core participant in private. At this point Senior Counsel commented on the approach to Mr. Zahid's evidence commented "Maybe I did push him- encouraged him to help SB". It is at best unclear why she should be seeking to help Mr. Bayoh as Counsel to the Inquiry. The actual position regards the treatment of the witness Mr. Zahid is set out fully in the submissions on behalf of the SPF.

At the same meeting another member of the family stated "Alan Paton being given the opportunity to say not going to sit across the table from a black family-but happy to jump out of a van". This was a racial slur against Mr. Paton in circumstances where for years the solicitor for the family had been making claims of racism against him all of which were and are denied. In opening statements to the inquiry Mr McConnachie Senior Counsel for Mr. Paton stated that 'He (Alan Paton) has been subjected to unjustified vilification on social media and in both written and broadcast media. He has been made the focus of attention from the representatives of Mr Bayoh's family and has been singled out falsely as being

motivated by race. There has been extensive media coverage naming him as being involved in the incident and alleging racism and violence on his part. Mr. Paton denies all of these various accusations' This was a very blatant example of the relationship between the Inquiry team, the Chair and the family having strayed far beyond any pastoral one into one where an impartial observer would have serious concerns. The Chair, Mr. Bhatt and Mr. Fuller appear to have allowed this racial slur, these comments about the evidence to go unchecked. It is apparent that the family and their representative considered they had right to address these issues at these private meetings and were never disabused of this.

At a further meeting on 18 January 2024 inter alia the Chair commented on how he was profoundly moved by the evidence of one family member. No other core participant has been given the opportunity to have such discussions with the Chair. Mr. Paton has not met in private with the Chair or the Inquiry team to hear how they view his journey since 3 May 2015. The fact that he was required to retire from the force through ill health and the catastrophic effect upon his mental health. In that meeting the family representative was permitted, without rebuke, to comment upon the veracity of the testimony of witnesses from PIRC and Crown.

The final meeting of which we are aware was on 5 December 2024. By this time the Chair had supported the family request for an extension of the terms of reference. As outlined in the submissions of the SPF there is a clear coincidence of language used by the family and the Chair to the Deputy First Minister. At this meeting the Chair considered it would be possible for the family to make a personal statement rather than just a legal one. This has

been viewed by the Chair as feasible. No one else has been afforded the opportunity to make a personal statement.

These submissions have been made following the disclosure of minutes of the various meetings. As early as February 2022 during the course of submissions, the legal representatives for the family referred to a personal letter written by the Chair to the inquiry to the family. A copy was requested by the legal representatives for Alan Paton. The inquiry team replied to that request on 4 February 2022 confirming that a letter was issued following a meeting with the family and that they would not share the letter with other core participants.

Given the unknown content of either the meetings or the letter our concern was raised during a meeting between Mr McConnachie KC and Senior Counsel to the inquiry on 7 February 2022, when she indicted at that time she would raise this with the Chair. No follow up was ever received. At this early point in proceedings, the Chair and Counsel for the inquiry were aware of our concern about the lack of transparency surrounding these meetings and correspondence.

It is evident from the minutes that the inquiry team, the family of Sheku Bayoh and those representing the family have been actively discussing the types of questions that should be asked and the treatment of witnesses. This goes well beyond them being at the heart of the inquiry. It is suggestive of them working collaboratively.

In her opening, Counsel to the inquiry stated that 'public trust in the inquiry is vital, and we hope to enhance this through increased openness' this approach does not seem to have

been followed. The inquiry has been conducted in close connection with the family and in a manner which suggests the aims of the Inquiry are inextricably linked to those of the family.

Apparent bias has been demonstrated by the comments and actions of the Chair and by Mr Bhatt. Their recusal is mandatory.

While it is accepted that Michael Fuller may not have actively participated in the meetings his role is one of assisting the decision maker.
He has been present during the meetings and heard those comments being made by family, Chair and Mr Bhatt and made no intervention or attempts to close down the conversations

The risk is that he would be influenced by what he has seen and heard and if apparent bias is shown, he may too be tainted therefore it follows that he too should recuse himself.

Brian McConnachie K.C

Laura Anne Radcliffe

Advocate

20 May 2025

IN THE SHEKU BAYOH PUBLIC INQUIRY

Submissions for the Coalition for Racial Equality and Rights

Re

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

1. The Coalition for Racial Equality and Rights (CRER), like the Applicants, have the greatest respect for the Chair. CRER consider that the Chair, and his assessors, have conducted themselves with the utmost propriety and impartiality throughout the course of the Inquiry proceedings.

2. CRER retain their confidence in the Chair and all his assessors. There has been, CRER submit, no bias, whether apparent or otherwise. CRER are opposed to the Applicants' request and submit that the Chair and Mr Bhatt should refuse the invitation to recuse themselves from further involvement in the Inquiry.

Public Inquiries, Requirement of Impartiality and apparent bias

3. CRER note that, as a general rule, public inquiries are convened to address matters of public concern, as identified by the Terms of Reference. It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. A public inquiry does not determine issues between parties to either civil or criminal litigation but conducts a thorough investigation. An inquiry has to follow leads and is not bound by the rules of evidence (*R (Cabinet Office) v Chair of the UK Covid Inquiry* [2024] KB 319, at paragraph 52).

4. The Chair has a wide discretion bestowed upon him by the Inquiries Act 2005. The procedure under the 2005 Act is designed to be flexible and inquisitorial in nature (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry* 2025 SLT 205, at paragraph 30). Whilst remaining impartial, it is particularly important for an inquiry to build a good relationship with victims, survivors, and their families (*The Practical Guide to Public Inquiries,* Mitchell et al, page 110). In terms of Section 9(4) of the Inquiries Act 2005, the Chair and his

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

5. CRER do not dispute that the fundamental principles of natural justice apply to inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings (*Greater Glasgow Health Board v Chairman of the Scottish Hospitals Inquiry*, at paragraph 33). In determining where fairness lies in a public inquiry, there is always a balance to be struck (*R(Associated Newspapers Ltd) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para 55). It is of the greatest importance that an Inquiry should be, and seen by the public to be, as thorough and balanced as possible (*R (Associated Newspapers Ltd) v The Right Hon Lord Justice Leveson*, para 53).

6. The common law jurisprudence not only assists when considering the fundamental principles of natural justice but provides guidance on relevant factors to take into account in relation to Section 9(4) and act as a cross-check (*Congregation of the Poor Sisters of Nazareth v Scottish Ministers* 2015 SLT 445, at paragraph 28).

7. The applicable test is as set out by Lord Hope in *Porter v Magill* [2002] 2 AC 357, at paragraph 103: '*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased.*' The test is whether having regard to all the circumstances a fair minded observer would conclude that there was a real possibility that the Chair and his assessor were biased (*Porter v Magill*, at paragraph 104). This test of real possibility of bias is less rigorous than one of probability, it is a test which is founded on reality. The test is not one of any possibility of bias but of a real possibility of bias (*Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, at paragraph 36).

8. Before the question of whether a fair-minded and informed observer would conclude that there was a real possibility that the Chair was biased can be answered, it is necessary to know what qualities are possessed by this observer.

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

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

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

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

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

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

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

The instant case

12. The Applicants have set out, at paragraphs 12 to 61 of their submissions, the matters which it is submitted are indicative of apparent bias. The vast majority of these matters relate to meetings between the Chair, his assessors, and the inquiry staff, and correspondence arising from those meetings. CRER understand the Applicants' position to be that the meetings between the Chair and Bayoh family are, in and of themselves, indicative of apparent bias. The Applicants, at paragraph 67 of their submissions, state that the case falls precisely within the four corners of *Kanda*, in which the Privy Council confirmed (at pp.337-8) that '*no one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.*'

13. CRER submit that the Applicants' submissions in this regard fail to appreciate the fundamental distinction which takes the instant case outwith the four corners of *Kanda*: this Inquiry is an inquisitorial, not adversarial process. There will be no 'winners' or 'losers' from the Inquiry. There will be no findings of civil or criminal liability. Rather, the Inquiry is an attempt to establish the truth of the events at Hayfield Road on 3 May 2015, and the response to those

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

14. As is outlined above, the test to be applied is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Chair and his assessor were biased. While the Applicants have set out at length the grounds upon which they submit apparent bias has been demonstrated, CRER submit, adopting the language of Lord Woolman in *Congregation of the Poor Sisters of Nazareth v Scottish Ministers*, at paragraph 33, that the grounds are flawed and incomplete.

15. The fair-minded and informed observer would be aware that, in terms of Section 2 of the Inquiries Act 2005, the inquiry will not determine civil or criminal liability. The Applicants grounds are incomplete because they leave out of account a variety of matters which would be within the knowledge of the fair-minded and informed observer. That observer would have access to all the documents on the Inquiry and Scottish Government website. The observer would have regards to the Inquiry's Terms of Reference. He or she would be able to see from the 'FAQ' section on the Inquiry's website that the Inquiry was inquisitorial and the focus of an inquiry is to examine what happened and work out what can be done to prevent similar events taking place in the future. The observer would note from that same page that the Inquiry's Terms of Reference were announced following submissions from the legal representatives of, *inter alia*, the Bayoh family and the Scottish Police Federation. It would be further noted from the 'FAQ' page that the law does not allow public inquiries to make findings of criminal or civil liability.

16. The fair-minded and informed observer would be aware that there have been other public inquiries where meetings have been held with families of the deceased whose deaths formed the basis, or part of the basis, for the Inquiry. The observer would be aware that in the public inquiry into the death of Stephen Lawrence, Sir William Macpherson of Cluny noted:

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

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

17. The observer would be aware that in the ongoing inquiry into the deaths at Grenfell Tower, the Chair of that Inquiry, prior to the Terms of Reference being published, met with residents and survivors from Grenfell Tower[2]. He or she would also be aware that three public meetings, at which the Chair was in attendance, were held as part of the consultation on the Terms of Reference[3].

18. The observer would be aware that Lord Turnbull, as part of his work as Chair in the ongoing public inquiry into the Omagh bombing, has had contact with those who were directly affected by the bombing. The observer would be aware that Lord Turnbull considered that that contact made it plain to the inquiry that the trauma caused has been enduring and continues to have a most powerful impact[4].

19. The observer would also be aware that the Chairs of both the United Kingdom[5] and the Scottish[6] Covid-19 public inquiries have met with bereaved families.

20. The observer would also be aware of the need for the Inquiry to retain the confidence of the Bayoh family. He or she would further be aware of the family's rights under Article 2 of the European Convention on Human Rights. The Applicants' submissions have failed to have regard to the fact that the Bayoh family's Article 2 rights are engaged and that they must be

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[1] *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny*, Appendix 1, paragraph 7.
[2] https://www.bbc.co.uk/news/uk-40520596
[3] https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-19-July-2017.pdf https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-20-July-2017.pdf https://prodgti.s3.eu-west-2.amazonaws.com/documents/transcript/Public-meeting-25-July-2017.pdf

[4] Omagh Bombing Inquiry, Transcript of Preliminary Hearing 30 July 2024, page 3 lines 10-14 https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/42/2024/07/2024.07.30-Omagh-Bombing-Inquiry-Preliminary-Hearing-Transcript-1-1.pdf
[5] *UK Covid-19 Inquiry Opening Statement https://covid19.public-inquiry.uk/wp-content/uploads/2022/07/Baroness-Hallett-Opening-Statement.pdf*

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

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

21. While the Applicants have founded upon comments made by the Chair, that he was humbled and honoured to hear the family's account, and that he found them profoundly moving, CRER submit that these remarks are a basic human courtesy to a family who have lost a loved one and are would not be considered by the observer to be indicative of bias. The observer would, of course, note comments made by Chairs of other inquiries, such as those of Lord Turnbull referred to above, and those of the Chair of the Lampard Inquiry, who stated that the commemorative and impact accounts which were received by her were powerful, and were to be given by people describing with dignity, pride and courage to those who have died[7].

22. CRER submit that the fair-minded and informed observer, having considered all the facts and all the evidence available to him or her, would conclude that there was no real possibility that the Chair and his assessor were biased as a result of the meetings between the Chair, his assessor, and the Bayoh family, or any comments made at those meetings.

23. There are two other matters which CRER wish to comment upon. The Applicants, at paragraphs 22-25 of their submission, contrast the family of Mr Bayoh being at the heart of the Inquiry with the approach taken in relation to other Core Participants, particularly Ms Short, and the video presentation about Mr Bayoh. CRER submit that in this part of their submissions, the Applicants have lost sight of a fundamental issue: Mr Bayoh died on 3 May 2015. Neither Ms Short nor the other Applicants, or Core Participants, lost their lives that day. Unlike Ms Short or the other Applicants, the Bayoh family's Article 2 rights are engaged. The Inquiry's Terms of Reference are explicitly to establish the circumstances surrounding the death of Mr Bayoh and the extent, if any, to which the events leading up to and following his death were affected by his actual or perceived race. It is difficult for CRER to understand why the Applicants consider the video played at the beginning of the Inquiry to be problematic. The Applicants seek to distinguish Mr Bayoh from those who have lost their lives in other circumstances which are subject to Public Inquiries. The Applicants note that in those instances, the subjects of pen portraits were '*incontestably the innocent victim'*. It is incontestable that Mr Bayoh died on 3

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

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

24. At paragraph 64 of their submissions, the Applicants submit that correspondence from the Chair in relation to the application to extend the Terms of Reference to include prosecutorial decision making points towards pre-determination. CRER note that the correspondence from the Chair in relation to the extension of the Terms of Reference comes after he has heard a great deal of relevant evidence. As the Chair set out in his letter to the Deputy First Minister on 18 November 2024, he had not formed a concluded view in relation to the investigation of the crime but some of the evidence raised concerns about the Crown investigation. In his letter to Core Participants of 25 February 2025, the Chair stated that there were strong indications that the prosecutorial decision was flawed.

25. CRER submit that the fair-minded observer would be aware that the Chair is required to approach his task with an open mind, not an empty one. The Chair has heard a great deal of evidence in relation to prosecutorial decision making. It is not indicative of pre-determination for the Chair to have concerns about what that evidence shows, or to consider that there were strong indications as to what the evidence shows. The fair-minded and informed observer would not ignore the part of the Chair's letter of 18 November 2024 where he stated that he had not formed a concluded view and would not only take account of that part of the letter where he stated that some of the evidence raised concerns.

26. CRER submit that the fair-minded and informed observer, having taken into account all relevant matters, including all the Terms of Reference, all the material available on the Inquiry website, the inquisitorial nature of the inquiry, the lack of any findings of civil or criminal responsibility, and the practices and procedures adopted by other public inquiries, would consider that there was no real possibility that the Chair and his assessors were biased.

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

Mark Moir KC

Kevin Henry, Advocate

21 May 2025

Sheku Bayoh Public Inquiry

SUBMISSION BY SCOTT MAXWELL, DANIEL GIBSON and JAMES McDONOUGH

In relation to

APPLICATION FOR RECUSAL BY SPF, PC CRAIG WALKER AND NICOLE SHORT

[1] In their Opening Statement to the Inquiry, Sgt Maxwell and PCs Gibson and McDonough expressed their hope that the Inquiry would be a thorough and transparent process. They noted that "Everyone with an interest in this Inquiry now has to place their trust in the Chair." They demonstrated their willingness to do so by fulfilling their commitment to co-operate fully with the Inquiry.

[2] It has been ten years since the incident at Hayfield Road. The Inquiry held its first procedural hearing on 18 November 2021, some three and a half years ago. The passage of time continues to weigh heavily on these three officers (as of course it does on others, most of all the family of Mr Bayoh). They want the Inquiry to reach its conclusion. But they want that to be achieved through a process that is both fair and seen to be fair.

[3] The disclosure that, unbeknown to these Core Participants, the Chair has met on a number of occasions with the family of Sheku Bayoh has dealt a significant blow to their trust in the Chair and to the critical issue of whether the Inquiry can be seen to be fair.

[4] This is particularly acute following the commencement of the evidential hearings in May 2022.[1] But the content of the meetings in November 2021 and April 2022 also give rise to concern.[2] In November 2021 the Chair asked the family to

[1] Reference is made to the SPF application paras 24-38 in that regard

[2] Preliminary Hearing Bundle, Items 4 and 10

describe their journey since 3 May 2015 and for their views on race.[3] In April 2022, the Chair described his view of the family's account of their treatment on 3 May and after as 'powerful'.[4] This was all in the knowledge that these issues were central to the Inquiry, that they were contested, and that determination of issues of credibility and reliability would be critical.

[5] At no time during the currency of the Inquiry has the Chair met, or offered to meet, with Sgt Maxwell, PC Gibson or PC McDonough or their legal representatives. They understand that the Chair has not met privately with any Core Participant other than the Bayoh family.

[6] The explanation provided by the Inquiry for the meetings is set out in a letter dated 5 March 2025.[5] Principally it refers to maintaining the family's confidence and engagement with the Inquiry and to the obligation under Article 2 of ECHR to involve the next of kin in the Inquiry. There is no authority to support the proposition that fulfilment of the next of kin's rights in terms of Article 2 extends to private meetings with the ultimate decision maker. No explanation is provided as to why other Core Participants were not advised of the plan to hold such meetings and were not provided with minutes of the discussion that took place until the issue was forced, resulting in the recent disclosure.

[7] In these circumstances, and with considerable regret, Sgt Maxwell and PCs Gibson and McDonough concur with the application by SPF, Walker and Short. For the reasons set out in that application and as discussed above, they conjoin in the motion for the Chair and Mr Bhatt to recuse themselves from any further involvement with the Inquiry on grounds of apparent bias.

Shelagh M McCall KC

21 May 2025

[3] See SPF application paras 17-19

[4] See SPF application para 20

[5] Procedural Hearing Bundle, Item 19, page 72-73

AAMER ANWAR & CO
SOLICITORS & NOTARIES

IN THE SHEKU BAYOH INQUIRY

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

Introduction

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

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

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

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

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

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

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

Impartiality of the Panel

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

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

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

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

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

on the ground that the member has—

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

(ii) a close association with an interested party,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The grounds for recusal

November 2021

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

April 2022

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

May 2022

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

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

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

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

November 2022

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

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

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

January 2024

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

September 2024

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

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

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

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

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

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

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

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

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

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

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

In relation to the "four final points":

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

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

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

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

For the foregoing reasons it is submitted that :

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

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

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

4. The motion ought to be refused.

Dr Claire Mitchell KC

Counsel for the Bayoh Families

Aamer Anwar - Principal Solicitor

April Meechan - Senior Consultant

Aamer Anwar & Co., Solicitors for the Bayoh Families

22 May 2025

THE SHEKU BAYOH INQUIRY

SUBMISSION TO THE CHAIR 12 & 13th JUNE 2025

ON BEHALF OF THE CORE PARTICIPANTS (I) GOOD, (II) SMITH, and (III) TOMLINSON

("THE OFFICERS")

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1. The Officers adopt the SPF's submission, motion and their legal analysis. The Officers emphasise their association with paragraph 1 of that submission; that the events giving rise to this motion result from a well-intentioned wish to assist the family of Sheku Bayoh and share the greatest respect for the Chair.

2. We agree the Inquiry is subject to the rules of natural justice and fairness. It is an express and prescribed statutory obligation on this Inquiry (sections 9 and 17(3) of the Inquiries Act 2005), a common law obligation (*Kanda v Malaya* [1962] AC 322, page 337; *Greater Glasgow Health Board v The Chairman of the Scottish Hospitals Inquiry* 2025 SLT 205), and, regardless, the disapplication of the ordinary rules of fairness will only be effected by the clearest and most express statutory language and in the most exceptional circumstances (*Roberts v The Parole Board* [2005] AC 738, paragraph 30).

3. The Officers wish to explain, in ordinary language, why they support the motion.

4. The Officers are individuals who have been personally impacted by the events of 3rd May 2015. The effect of those events on them cannot be underestimated. They fundamentally disagree with the family's view of the events and of their conduct. They are acutely aware of the human desire to give a grieving and campaigning family what they want. Which is partly why they consider objectivity in the resolution of two deeply opposing narratives to be critical in this Inquiry.

5. The facts underpinning the death of Sheku Bayoh are so controversial that they call to resolved by an independent inquiry having begun as a political campaign[1] in July 2015. On the one hand the family view Sheku Bayoh's death as unlawful and pursue that cause through a campaign which seeks, *inter alia*, the conviction of Officers. The campaign draws a charged parallel with the murder of George Floyd, considers his restraint was

[1] https://www.bbc.co.uk/news/uk-scotland-33658656

unnecessary and that Sheku Bayoh's death is a result of racism. There could not be a more emotive or charged allegation against a police officer in Scotland.

6. On the other hand, the Officers view is that they are not racist, were in no way motivated by racism or unconscious bias but motivated by the need to protect the public. They responded to a call relating to a man behaving dangerously with a knife, presenting as a potentially very serious threat to the public. He had engaged in violence that day and was – *therefore* – dangerous, had consumed unlawful drugs, disobeyed a lawful order to bring him under control and charged and assaulted a police officer. He was lawfully restrained.

7. From the Officers' perspective they have had no chance to speak directly to the Chair in private to explain why they think the family's view of events is wrong or to sway the Chair and inquiry through sympathy. They have not been given the opportunity to establish a personal rapport with the Chair or impress him. Rather, the meetings have led to the Chair being impressed by the family (April 2022, the Chair commended a *"powerful account of the way in which you were treated"* whereby that account appears to have been delivered in private at an earlier meeting of the November 2021). If the Officers had been granted the same, they may too have impressed the Chair.

8. Each Officer has a compelling personal account to give the Chair were they afforded the opportunity of private meetings running in parallel to the inquiry. They could have spoken of their journey or calling to public office, their belief in equality, the need to protect the public from danger, their personal values, their integrity, the personal toll on them and their families, the stress officers face when encountering knives in public, address why men take knives onto the streets, their strength and integrity in remaining silent in the face of a misconceived and inaccurate public campaign falsely alleging racism, untruth and criminality.

9. As we have explained, the family's account is highly controversial and falls to be objectively and dispassionately resolved by the Chair. The family believe he death of Sheku Bayoh is a parallel of the murder of George Floyd who was murdered by a police officer, Derek Chauvin, in Minnesota. The crowd justice page[2] explains,

[2] https://www.crowdjustice.com/case/justiceforsheku/

"George Floyd was kneeled upon until he took his last breath. So was Sheku, only more weight and more officers kneeled upon him. George Floyd stated: "I can't breathe", so did Sheku."

10. The solicitor to the family, believed to be speaking on their behalf, is reported to have said of the arresting Officers,

"This isn't the end because, as we said to the chief constable today, charges must follow in Scotland" and that "those officers…have broken the law, to have engaged in criminality[3]".

11. The family's narrative, and political campaign, is not inert but highly controversial and disputed.

12. That campaign flies in the face of accepted principles of Scots Law in terms of which, the actions of Officers are generally strongly presumed to be no more than their duty and done honestly and bona fide (*Beaton v Ivory* (1887) 14 R 1057, page 1061; *Rae v Strathern* 1924 SC 147, First Division, page 152; *Whitehouse v Lord Advocate* 2020 C 133 paragraph 90(2)). The campaign of the family has put into the public domain claims that have no apparent evidential[4] or rational foundation.

13. The Officers are, therefore, distressed to learn of the private meetings with the family and what was said by the family and their legal team to the Chair in private. This is because they assume the family have used those meetings, and by which we mean no criticism of them, to influence the decision maker and his team. Either expressly or by implication. They cannot discount the impact this has had on the Chair and Inquiry team nor the influence it may have had on issues of central importance to them.

14. To take some examples that illustrate the character of the meetings overall, and which support this concern, we highlight the following. At the meeting of 21st November 2022 there is discussion of the impact of racism which is linked to the 3rd of May along with a personal account of how it is upsetting to the family. That is highly disputed.

[3] https://news.stv.tv/east-central/sheku-bayohs-family-hold-brutally-honest-meeting-with-police-scotland-chief-jo-farrell

[4] See crowdjustice page, George Floyd and the image of SB's body which fails to point out his actions before he was restrained (his assault on his friend, his damage to his kitchen and his assault of a police officer).

15. The family's lawyer has taken these opportunities to address the Chair on the credibility of evidence and thus to engage in private/secret advocacy directly to the Chair and team at that meeting, *cf.*,

> *"…I can't begin to think what this is like for a family. It is done to stop the family coming. Only so much the family can take. Incredibly important statement to make…".*
> *(Minutes 21st November 2022, p44 'procedural hearing bundle')*

16. More troubling is the allegation of lies discussed with the Chair, whereby the solicitor addressed the Chair on the credibility of evidence *in camera*;

> *"what is coming from the PIRC/Crown [redaction] – **lied repeatedly** to the family [redaction] particularly difficult for the family to hear a seeing the disclosure what is being said".*
> *(Minutes 18th January 2024, p58)*

17. Allegations of lying are serious and not challenged, contradicted or qualified.

18. On 18th January 2024 the personal impression of the family is expressed repeatedly, and further allegations of lying are made to the Chair *in camera*, as is a general suggestion that the witnesses are not acting in good faith,

> *"we are suffering twice. Every single day is a reminder of the 3 May….why are people saying things? **Why are they lying**?…Grateful for the team and the way questions asked and put forward…"*
> *(Minutes 18th January 2024, p58)*

19. The Officers are also concerned that questions were asked to, *"help SB"* (believed to refer to Sheku Bayoh, minutes, 21st November 2022, page 47). The Officers have not seen record of any questions designed to especially help them, rather, they expect even handedness, objectivity and to be treated fairly.

20. The tenor of the minutes gives rise to the general impression that the family ought to be at '*the centre'* or '*heart*' of the Inquiry and by implication the Officers held at the periphery,

> *"Ade also thanked the Chair and the Inquiry on behalf of the family for….keeping the family at the centre"*
> (Minutes 5th December 2024).

21. The family discussed the evidence generally with the Chair and expressed approval of questions,

> *"AJ...a lot of good things came out...other side of things liked.....presenting evidence that contradicts their statements...what happens if lie under oath?" (Minutes of 21st November 2022).*

22. The family took the opportunity of these meetings to directly persuade the Chair they are *'the victims'*,

> "KJ I want you to know that *we are the victims*"
> (Minutes 21st November 2022)

23. In respect of the private/secret advocacy of their solicitor it is, as discussed above, objectionable, unfair and unlawful. The point of advocacy is persuasion.

24. Except, perhaps, in the exceptional context of national security secret/private hearings, and ipso facto secret/private advocacy, to wit those witnesses '*are lying'*, is never permitted. See the judgment of Lord Neuberger. *Al Rawi v Security Service* [2012] 1 AC 531, paragraph 30,

> *"30 In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial."*

25. From the perspective of the Officers the exceptional meetings given to the family is taken very seriously. In their view, those meetings give rise to the very strong impression that the Inquiry has given repeated and important opportunities to the family to persuade and build sympathies amongst the Chair and Inquiry team. The opportunities to persuade bears on the evidence and of their cause during cotemporaneous meetings running in parallel, *in camera*, to the Inquiry and its evidence. It would be surprising if personal private meetings, with a family who have lost a loved one, did not have some effect in swaying the decision maker's mind when resolving facts and making findings. Rather, the Officers do not need to speculate; the minutes suggest that the Chair considered one

private account to be a “powerful” one (April 2022 meeting). He expressed to the family in private that he had been “profoundly affected” by their public evidence (January 2024).

26. The Officers have remained silent in the face of the campaign against them. They do not speak out or seek to persuade the public through the media or contradict the campaign. They do not have personal access to the Lord Advocate, the media, Government Ministers or Senior Judges. Rather, they look to, and trust in, this Inquiry alone to be the *Authority* to deliver the truth. They are ordinary people who do an exceptional job. They are required to fulfil an important public duty and should be granted the same protections as anyone else. That protection includes a hearing which has the appearance of impartiality in order to resolve facts objectively and independently. They ought to be granted the same rights and privilege as the family.

27. The Officers have been excluded from those private personal meetings. Their lives have been very significantly damaged by the actions of Sheku Bayoh and by the misconceived campaign of his family. They are held at the periphery of the inquiry and not afforded private meetings running alongside the Inquiry; this is strongly suggestive that an objective and dispassionate report into the death of Sheku Bayoh, and their conduct, cannot be achieved.

Dan Byrne, KC

Carla Fraser, Advocate

22nd May 2025.

SUBMISSIONS

on behalf of

The Chief Constable, Police Service of Scotland ('Police Scotland')

RE: APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG WALKER; and (3) Ms. NICOLE SHORT

INTRODUCTION

1. An application has been made on behalf of the Scottish Police Federation ('the SPF'), [redacted] PC Craig Walker and Ex PC Nicole Short ('the Applicants'), Core Participants in the Inquiry, inviting the Chair of the Inquiry and one of the assessors, Mr Bhatt, to recuse themselves from the Inquiry on the grounds of apparent bias. The broad basis for the application is the conduct of and lack of disclosure of details of discussions at meetings held by the Inquiry with the Families of Mr Bayoh and their legal representatives. Information about the contents of those meetings which have taken place over the period 2021-2024 have only been disclosed to Core Participants recently. The information and material will be referred to collectively as the 'Minutes' albeit they comprise documentation other than minutes, such as emails and correspondence, and do not appear to be a complete record.

2. Neither the Chief Constable, nor her predecessor has had a private meeting with the Chair in connection with this Public Inquiry. All matters have been dealt

with through the legal representatives of the office of Chief Constable and the Inquiry legal team.

3. The Chair has directed that a public hearing on the fairness of the conduct and procedure adopted by the Chair in meeting with the Families be set down on 12 and 13 June 2025.

4. The Chair has invited submissions from all Core Participants but his position on the application is unknown as at the date of these submissions and will not be disclosed until 2 June 2025.

THE FAMILIES AT THE HEART OF THE INQUIRY

5. The Chief Constable recognises that the Families of Mr Bayoh are in a different position from other Core Participants. It is crucial that the Inquiry fulfils its function to achieve its aims in respect of their Article 2 rights and that the Families remain at the heart of the Inquiry.

6. This was specifically addressed in the opening statement of the then Chief Constable, Sir Iain Livingstone, QPM. The following statement, with which the Chief Constable is in complete agreement, was addressed directly to the Families : [1]

> *The Chief Constable who is present here today has asked that I address my first remarks to you, his family. You are at the heart of this Inquiry. The Chief*

[1] Day 2, 11/05/2022, 32:9-32:18

Constable wishes to express his support for this Inquiry to you in person and publicly. Today he offers his condolences to you for the loss of your loved one. The Chief Constable was powerfully affected by Kadi's statement yesterday that she does not feel safe in Scotland, that she fears for her children and for her nieces and nephews. As Chief Constable, he leads a police service whose purpose is to improve safety and wellbeing of the people and communities of Scotland. That mission is and must be for the benefit of all citizens and, as Chief Constable, he is clear that Police Scotland has a major role in ensuring that Scotland is a safe, secure and welcoming place.

7. This was re-affirmed in the interim closing oral submission in a further direct address to the Families as follows:[2]

You are at the heart of this Inquiry and the Chief Constable wishes to acknowledge the courage, the strength and the dignity you have shown throughout.

The Chief Constable made a commitment to you in his opening statement. When he expressed his support for this Inquiry, he affirmed the mission of Police Scotland to improve the safety and wellbeing of the people and communities of Scotland, including your community, and to do so for the benefit of all citizens.

THE POTENTIAL CONSEQUENCES ARISING FROM THE SPF APPLICATION

8. The Chief Constable is acutely aware that, should the Chair recuse himself or in due course be deemed to be disqualified from continuing as Chair, the

[2] Day 61, 27/06/2023 , 33:19-34:22

consequences for the Inquiry will be further delay. The Inquiry was announced in November 2019 and the Terms of Reference ('ToR') were published on 21 May 2020. The Bayoh Families, who are undoubtedly at the heart of the Inquiry, and who campaigned long and hard to have this Inquiry, would be bitterly disappointed, and rightly so.

9. The Chief Constable is also aware of the consequences were the Chair to continue if the test of apparent bias were to be satisfied. Core Participants exposed to adverse findings would have cause for complaint. The ultimate findings would not attract the respect required to achieve the aims of the Inquiry and the Inquiry would fail to serve its purpose. The integrity of the process must be preserved in the interests of the Families and all communities.

10. It is entirely regrettable that these issues have arisen now, particularly given the extensive commitments by Police Scotland in support of the work of the Inquiry, their extensive engagement with the Bayoh Families as well as all the communities served by Police Scotland.

11. The Chief Constable has absolutely no wish to see the Inquiry halted or delayed further at this late stage. However, a serious matter such as this relating to procedural unfairness or questionable conduct on the part of the Chair, having been raised by a Core Participant, through responsible legal representation, calls for an answer.

12. Trust and confidence in policing is essential. One of the aims of this Inquiry is to maintain that confidence. Police Scotland has expended considerable resources in seeking to further all work necessary in light of the Terms of Reference ('ToR') set by the Scottish Government.

13. The Chief Constable is committed to absolute candour. This includes approaching the issue without agenda. The consideration of the issue is not an attack on the integrity of the decision maker. The Chair is a highly regarded retired Senator of the College of Justice.

14. The Chief Constable, as the leader of Police Scotland, a key organisation within the Scottish Justice system, is compelled by the principles of fairness and integrity and her public duty therefor to consider the points raised by the SPF.

15. It is of fundamental importance to public confidence in the public inquiry system in Scotland that justice is seen to be done as well as being done: *Dring v Cape Intermediate Holdings Limited.*[3]

16. The Chief Constable requires to address matters in line with the obligations of her office including those she has to all communities served by Police Scotland. Police Scotland has been open to rigorous and thorough examination by the Inquiry. The organisation has also examined and reflected on all the processes and procedures in 2015.

MEETINGS WITH THE FAMILIES IN PRINCIPLE

17. There is and should be no criticism of the Families of Mr Bayoh in attending the meetings. Chairs in other inquiries have met with victims and bereaved next of kin as part of the Article 2 investigative requirement for involvement of the next of kin *'to the extent necessary to safeguard his or her legitimate interests'*[4] and in order

[3] [2020] AC 629 at [1].

[4] *Jordan v United Kingdom* (2003) 37 EHRR 52 at [109]

to ensure that they are at the heart of the inquiry. The Chief Constable has no issue with the Chair meeting with the Families of Mr Bayoh before the commencement of the evidential hearings provided that the meetings did not stray beyond matters such as introductions, processes and procedures and welfare. However, on any view, transparency as to what was discussed is key and there is an expectation that there would be meticulous minutes kept of such meetings in order to avoid any misunderstanding or questions being raised as to the purpose and nature of such meetings.

18. When the issue of the meetings was raised by the SPF, the Solicitor to the Inquiry reassured Core Participants that the purpose of the meetings was to reassure the Families that they were at the heart of the Inquiry, to maintain their confidence in the Inquiry, and to encourage them to continue to participate fully in it. It was expressly stated that '*the purpose of the annual meetings 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*.'

19. It was only on 29 April 2025 and 2 May 2025 and after the draft petition was raised by the Applicants that the Minutes were disclosed. Therefore it has only recently come to light through disclosure of that material the full extent of the meetings and an indication of the matters discussed.

20. The issue taken by the SPF with these meetings is that those discussions encompassed evidential matters that were in issue or dispute as well as the means for the Families to obtain particular answers.

21. The question which arises is whether in doing so, the Chair, guided by or together with his team, appears to have confused putting the Bayoh Families at

the centre of the Inquiry in order to get to answers in pursuit of the truth and justice (a proper and appropriate aim) with conducting the Inquiry on behalf of the Families in trying to prove the case as advanced by the Families (an improper and impermissible aim for an independent Chair and inquisitorial public inquiry).

22. The Chief Constable also notes that other inquiries have employed other mechanisms such as human impact hearings, engagement sessions, focus groups, online questionnaires, or the publication or display of written contributions from victims or next of kin. Such mechanisms allow effective participation by victims and next of kin. They provide an opportunity for their account as to events and their impact without the formality or the emotional stress and trauma that can be associated with the process of giving oral evidence in public. They can be more effective than *ex parte* discussions with victims and next of kin and, more particularly, avoid the risk of any misunderstanding as to what was discussed or of any appearance of bias. Additionally, for those witnesses who do give oral evidence, there is also provision of a witness support service, which is understood to have been in place in this Inquiry.

THE APPLICATION AND THE NEED FOR AN ANSWER

23. It is imperative that the Inquiry and the Chair maintain credibility if the Inquiry is to fulfil its aims and its ToR. The fact that there were *ex parte* discussions between the Chair and one Core Participant on which no information was shared with the other Core Participants has given rise to concern on the part of the Applicants.

24. As the Inquiry and the Chair are aware, Police Scotland had raised concerns about the procedural fairness of the Inquiry on a number of occasions. In line with the procedure preferred by the Inquiry, these concerns were intended to be addressed through closing submissions urging/ reminding the Chair not to be misdirected by the approach taken to these matters by his Inquiry team.

25. An organisation is in a different position from an individual. The Chief Constable is in a position to take a view about such matters having regard to the impact on Police Scotland of any findings which the Chair makes in the context of transformative change already having been advanced in the interests of the public. The Chief Constable recognises that this is not the same for individuals who are exposed to an individual consequence of findings which may impact on their careers, personal lives and liberty. That is one of the reasons for the officers, as individuals, having legal representation separate from that of the organisation. Nevertheless, the Chief Constable cannot abrogate her welfare duties as regards the officers nor the clear interest in procedural fairness in the interests of justice. These duties extend to officers who do not have core participant status but whose actions are under scrutiny by the Inquiry.

26. The Chief Constable is not in possession of all the essential details in order to provide a balanced and informed view. The Chief Constable is conscious that she has only had sight of the application and the Minutes. She has not, as yet, heard from the Families, or new Senior Counsel now instructed for the Inquiry. From the current timetable it appears that their submissions will not be available

until the 2 June 2025. The explanation of the Chair is also awaited although a Note is to be provided by 2 June 2025.[5]

THE ASSESSORS

27. In respect of the application as regards Mr Bhatt, the Chief Constable is of the view that the Minutes, now unredacted and put in context, do not disclose apparent bias on his part. In any event, it is noted that Mr Bhatt (along with Mr Fuller, addressed below) was appointed by the Chair in accordance with his power under section 11 of the Inquiries Act 2005 in order to assist the Inquiry in its work. Both assessors have achieved eminence in their respective fields as set out by the Chair's introduction of each of them.[6]

28. Mr Bhatt has the requisite expertise to so assist the Inquiry on the question of 'race'. Secondly, as observed by the authors of *Public Inquiries*[7] at [3.66] – [3.68], *'assessors do not have any of the inquiry panel's powers and are not responsible for the inquiry report or its findings'*, and *'the substance of the advice that an assessor gives to an inquiry panel will ordinarily be disclosed to core participants [but] an assessor will not give evidence to the inquiry (and will not therefore be subjected to examination or cross-examination by advocates for core participants'*. It is considered that, given his expertise and limited role (which does not extend to fact-finding or drafting of the report), there is no basis to seek his recusal and the application is misconceived in this regard.

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[5] *Howell and others v Lees-Millais and others [2007] EWCA Civ 720* at paragraph 6 under reference to the earlier cases of *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 and *Locabail v Bayfield* [2000] QB 451

[6] 18 November 2021 PH-00018 18/1

[7] Jason Beer QC, 2011, *Public Inquiries*, Oxford University Press

29. It is noted that no application is made in respect of Mr. Michael Fuller, QPM. The Minutes disclose that he has provided proper and fair independent advice to the Chair in respect of 'race' and stressed the importance of taking an evidence-based approach. The Minutes do not disclose any basis for asserting that there is any apparent bias on the part of Mr Fuller. [8]

RELEVANT CASE LAW AND GUIDANCE

Case law

30. The case law as to the requirements of impartiality and fairness imposed on the Inquiry pursuant to sections 9 and 17 of the Inquiry Act respectively is clear and settled. The submissions made on behalf of the Applicants at [4] – [9], [62] and [65] as to the relevant case law are adopted. They represent an accurate statement of the law. The following further observations on the applicable law are made.

31. The test for whether there is apparent bias is that set out by Lord Hope of Craighead in *Porter v Magill,*[9] sometimes referred to as the '*Porter* test' and is as follows:

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[8] PH00002 4/12-4/13.However for completeness, see *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 in which the Court of Appeal held that held that a fair minded observer would apprehend a real risk that one of the members of the court below should recuse herself on the ground of apparent bias, as should the other two members of the court who may have been influenced by her bias.

[9][2002] 2 AC 357 at [103]. See also helpful review of the case law in *Alan Bates v Post Office Limited [2019] EWHC 871 (QB)* at [27]-[77] by Fraser J as regards the *Porter* test.

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

32. Apparent bias includes giving the impression of having pre-judged any issue. In *Otkritie International Investment Management Ltd and others v Urumov*,[10] Longmore LJ explained at [1] and [2]:

> *[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see Porter v Magill [2002] 2 AC 357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but 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.*

33. In *Helow v Secretary of State for the Home Department*[11], the House of Lords clarified that the fair-minded and informed observer '*is neither complacent nor unduly sensitive or suspicious*'.[12] They are someone who takes a balanced approach to any information they are given, takes the trouble to inform themself on all matters that are relevant, is '*the sort of person who takes the trouble to read the*

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[10] [2014] EWCA Civ 1315. See for example *Steadman-Byrne v Amjad* [2007] EWCA Civ 625 and the discussion at [10]-[16]
[11] [2008] UKHL 62
[12] At para [39]

text of an article as well as the headlines' and is able to put information into its overall social, political or geographical context.[13] Such a person reserves judgment until they have seen and understood both sides of the argument.

34. The case law also makes it clear that the fair-minded observer is not unduly sensitive or suspicious, but that where there are real grounds for doubt as to a lack of bias, the doubt must be resolved in favour of recusal. See Lord Bingham of Cornhill (now CJ) in *Locabail (UK) Ltd v Bayfield*:[14]

> *… a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v Kelly (1989) 167 C.L.R. 569); or if, for any reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and*

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[13] At para [3]

[14] *Locabail v Bayfield* [2000] QB 451, at [25] and the Inner House decision of *Millar v Dickson* 2002 SC (P.C.) 30 at [65] as to the inevitability of disqualification when there is doubt in the mind of a reasonable person in which it was cited. See also *Man O'War Station Ltd v Auckland City Council* [2002] UKPC 28 per Lord Steyn at [11]: *'This is a corner of the law in which the context, and the particular circumstances, are of supreme importance,'* and there should therefore be *'an intense focus on the essential facts of the case'*

predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. ***We repeat: every application must be decided on the facts and circumstances of the individual case****.* [Emphasis added]

35. In respect of the latter point, the length and complexity of the case can be a particular consideration as can the type of proceedings. It does not appear to be in dispute that the Chair is subject to a requirement to act with fairness and conform to the requirements of natural justice.[15]

36. In *Lawal v Northern Spirit*[16], it was stated that the possibility of bias can in this respect be of subconscious bias . This was something confirmed by the Court of Appeal in *Resolution Chemicals Ltd v H Lundbeck A/S*[17] where it was emphasised that there must be a real possibility of bias; although the standard of probability does not have to be reached, the test is not whether there is *"any possibility"* of bias. The test is *'a real possibility' of bias, whether subconscious or otherwise.'*

37. A key feature here is the hearing of evidence, the discussion of evidence and statements about evidence outwith the presence of other Core Participants. In this respect the House of Lords case of *Kanda v Government of the Federation of*

[15] See paragraphs [8]-[10] of the application.

[16] [2003] UKHL 35 at [2]
[17] [2013] EWCA Civ 1515 at [36]

Malaya[18] contains important authority. The next passage follows on from the paragraph quoted by the Applicants at paragraph [7] of their submissions:

> *If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in Board of Education v. Rice* [23] *down to the decision of their Lordships' Board in Ceylon University v. Fernando.* [24] ***It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice, Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.*** *No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.* [**emphasis added**]

38. When considering a recusal application based on more than one issue, the matters raised should be considered separately and also in combination. To fail to consider the matters in combination would be a misdirection. [19]

39. No doubt an important point for all concerned is the huge impact any disqualification would have at this stage of the Inquiry and the potential implications for further procedure. However, there is persuasive authority that

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[18] 1962 A.C. 322 at [337]

[19] *Dorman and others v Clinton Devon Farms Partnership* [2019] EWHC 2988 (QB), at [10]

the prejudice to the administration of justice and delays that arise from a successful recusal application are not relevant factors when determining whether the decision maker should accede to such an application. In *Morrison v AWG Group Ltd*[20], when dealing with an allegation of apparent bias, The Court of Appeal held that such issues:

> *…are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having.*

GUIDANCE TO JUDICIAL OFFICE HOLDERS ON JUDICIAL ETHICS IN SCOTLAND

40. Further assistance can be taken from Parts 4 and 5 of The Guidance to Judicial Office Holders on Judicial Ethics in Scotland (revised 2023)[21] (on Judicial Independence and the Principle of Impartiality) which are also relevant. In particular, [4.17] and [5.9] provide the following guidance:

> *4.17. A judge may be asked to chair a public inquiry, on a topic which may be non-legal, but highly technical. It is consistent with judicial office for a judge to serve in these capacities, if the reason for the appointment is the need to harness*

[20] [2006] EWCA Civ 6 at paragraph [29]
[21]https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/guidance-to-johs-on-judicial-ethics.pdf?sfvrsn=8c484132_1

to the task the special skills which a judge possesses; characteristically the ability to dissect and analyse evidence, appraise witnesses, exercise a fair and balanced judgement and write a clear and coherent report. A judge should not accept such an appointment where the purpose is to lend the respectability of the office of a judge, or the reputation of the holder, to a political end. A judge should, before accepting any such appointment, ensure that appropriate safeguards are in place to secure their independence and impartiality. A public inquiry set up under the Inquiries Act 2005 will normally provide such safeguards.

5.9 A judge should be circumspect as regards to contact with those legal practitioners who are currently appearing, or who may appear regularly, in the judge's court. A judge should not act in such a way as to give rise to a justified perception that they might be inclined to favour the submissions of a particular practitioner.

THE MEETINGS BETWEEN THE CHAIR AND THE BAYOH FAMILIES

41. The SPF has already set out the meetings in detail based on the information available. The submissions and material to come from the Families, the Inquiry Counsel and the Chair will no doubt provide further detail and context to those Minutes. The Chief Constable does not consider it appropriate for her to offer a view on the Minutes as regards the application made at this stage other than to state that on the face it they call for an answer .

OTHER RELEVANT CONCERNS

The 'impasse'

42. There is, however, one aspect of the Minutes upon which she requires to comment as regards Police Scotland.

43. In the speaking notes for the first meeting is also reference at section 5 to delay by the inquiry in using legal powers.[22] There is reference to an 'impasse' with the Crown and Police Scotland in the summer. The implication, which is likely to have troubled the Families, is that Police Scotland had made unilateral representations to Crown office to withhold documentation from the Inquiry. It is the position of Police Scotland that this section of the speaking notes is a misrepresentation of the position and is unfair. The fact is that the Inquiry had failed to produce a protocol to deal with the proper consideration of redaction of Police Scotland documentation (in which there was a potential public interest not to disclose parts thereof) when such documents had also been provided to the Inquiry by the Crown. Police Scotland were encouraged to liaise with the Crown to assist the Inquiry. This is all addressed in detailed letters to the Inquiry from Police Scotland legal services dated 15 September 2021 and 1 October 2021 which are produced herewith and the terms of which are adopted. [23] All of this resulted in the Inquiry redaction protocol being amended on 22 December 2021 with assurances from the Inquiry legal team that they would consult Police Scotland in future where they were the most appropriate provider to be consulted.

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[22] PH -00002

[23] For completeness and in fairness the response from the Solicitor to the Inquiry in that chain is also produced.

44. The Chief Constable requires to address this in these submissions because she is concerned that in a process whereby considerable expense and resourcing has been applied to provide the Inquiry with the fullest disclosure possible and where Police Scotland has supported the Families in seeking to establish the facts with absolute candour, there is a suggestion that they were involved in prevention or delay of disclosure. Nothing could be further from the truth. An entirely responsible question was raised by Police Scotland with the Inquiry regarding who could properly advise on public interest redaction for police generated material in particular where that material was of a specialist nature. The said letters of the 15 September 2021 and 1 October 2021 should have been before the Chair.

45. In a situation in which Police Scotland has been striving to restore the confidence of the Families it is incredibly disappointing that this misinformation has been given to them thereby risking undermining the trust that has been built up. A fair minded reader could infer that the bald assertion is in conflict with the commitment of Police Scotland to absolute candour.

CONCERNS RE THE INVESTIGATION OF TRAINING

46. The application having been raised and submissions called for, the Chief Constable requires to remind the Inquiry of her concerns regarding the approach to training.[24]

[24] Baker v Quantum Clothing Group [2009] EWCA Civ 566 at [36]

47. The Chief Constable has been particularly concerned about how the Inquiry has approached the crucial chapter of training, which is central to understanding the response of the Core Participant officers on the day.

48. The concerns of the Chief Constable as to the lack of procedural fairness on the part of the Inquiry were detailed in numerous letters to the Inquiry (particularly on 11 and 18 September 2024) and subsequently to the Deputy First Minister. The submissions to the Deputy First Minister paragraphs [74]-[83] are referred to for their terms and adopted.[25]

49. The Chief Constable's ongoing commitment to the Inquiry is with the express intention of ensuring that the Inquiry remain credible and fulfil its public aims, including the aim to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence.

50. The Chief Constable (as did her predecessor at the outset) has made clear that she does not seek any particular outcome or answer from the Inquiry. Instead, the Chief Constable is mindful of Police Scotland's role as a key institution within Scotland's Justice system. Accordingly, she has remained acutely aware of her duty of candour; sought to work with the Inquiry in order to get to the truth and to provide answers to the members of the Bayoh Families and the wider communities that Police Scotland serves. Police Scotland has embraced

[25] Submissions on behalf of the Chief Constable to the Deputy First Minister dated 7 February 2025 circulated to all Core Participants on that date.

the opportunity to learn lessons and make improvements wherever necessary and appropriate.

CONCLUSION

51. The Chief Constable has a strong preference for the Inquiry to continue. However, she recognises that in fairness the concerns raised by the Applicants require an answer.

52. Acting properly in accordance with what should be expected from an informed and fair minded analysis, the Chief Constable requires to await the disclosure of the full details and context of the Minutes which will come from the Families and the Chair.

Submitted on behalf of the Chief Constable, Police Scotland

Maria Maguire K.C.

Lisa Henderson K.C.

Suzanne Lambert, Barrister

22 May 2025

IN THE SHEKU BAYOH INQUIRY

SUBMISSION

on behalf of

Garry McEwan

on

THE APPLICATION FOR RECUSAL

by

THE SCOTTISH POLICE FEDERATION, CRAIG WALKER and NICOLE SHORT

Introduction

1. These submissions are made in response to the invitation of the Chair to all parties to respond to the motion of recusal and supporting submissions intimated by the SPF and various individual officers.

2. Mr McEwan wishes to make plain that he has at no stage experienced anything other than courtesy and professionalism from the Chair, the other members of the panel or Counsel to the Inquiry. There is accordingly no criticism made of the Chair nor any suspicion of any actual bias on his part, or that of Mr Bhatt (to whom the motion also refers).

3. Mr McEwan is additionally very conscious of the time and resource that has been invested in this Public Inquiry. Like every Core Participant, he is very keen for this matter to be concluded without any further unnecessary delay or public expense.

4. That said, for any findings from an Inquiry (whether critical or exculpatory) to carry weight, this process requires to be of obvious and demonstrable fairness. For recommendations to be adopted with confidence going forward,

they must emerge from an Inquiry which commands the confidence of the public. The overwhelming public interest is in an Inquiry of unimpeachable integrity and fairness.

The motion to recuse

5. Mr McEwan adopts a position of concern over the issues raised by the SPF but, at this time, reserves his position on the motion.

6. The content of the SPF submissions and the documents disclosed by the Inquiry do *prima facie* cause Mr McEwan significant concern. The concerns are both in terms of the general perception of fairness to all core participants and, separately, specific references to matters which may have a bearing on Mr McEwan directly.

7. Despite those concerns, Mr McEwan currently reserves his position on the motion to recuse. The principal reason for doing so at this time is that he does not feel able to make a fully informed submission on such an important motion. Specifically it is noted that

    a) no detailed response to the motion has yet been made by the Chair.

    Considering these matters outwith any context or detailed explanation the Chair chooses to give is extremely difficult. Doing so is also potentially unfair to the Chair. It is noted that by letter of 29th April 2025, the Solicitor to the Inquiry indicated that such a response from the Chair is to be given on 2nd June 2025.

    b) no detail of the opinion of the independent Counsel appointed by the Chair to review this matter is yet available.

Again, that person will doubtless have access to a fuller picture than that currently available to Core Participants. It is unknown whether this Opinion will be shared.

c) a new Counsel to the Inquiry has also recently been instructed. He too will be making submissions at a later date which may have a bearing on the position ultimately adopted by Mr McEwan. It is noted those submissions will be also be made available on 2nd June 2025.

8. The consequences of granting this motion are plainly very significant. Mr McEwan therefore seeks that fuller explanation and context and meantime reserves his position.

The question of apparent bias

9. If the Chair refuses the motion, the question of apparent bias is plainly still a live one for the Court of Session. Mr McEwan offers no view on that in this forum but supports the submission that the question of whether apparent bias is established is plainly not one for either the Chair or his Counsel, or for the independent Advocate appointed. It is properly a matter to be resolved by an entirely independent Judge in the Court of Session.

Duncan Hamilton KC

22nd May 2025

IN THE SHEKU BAYOH INQUIRY

SUBMISSION

on behalf of

Conrad Trickett

on

THE APPLICATION FOR RECUSAL

by

THE SCOTTISH POLICE FEDERATION, CRAIG WALKER and NICOLE SHORT

Introduction

1. These submissions are made in response to the invitation of the Chair to all parties to respond to the motion of recusal and supporting submissions intimated by the SPF and various individual officers.

Position on the Motion to Recuse

2. Mr Trickett adopts a position of concern over the issues raised by the SPF but, at this stage, reserves his position on the motion.

3. Mr Trickett wishes to record that he has found his personal contact with the Inquiry to be fair and professional. His concerns arise from a desire to ensure that the findings and recommendations of the Inquiry ultimately carry weight and respect. For that to be so, the Inquiry must be- and be seen by the public to be- fair.

4. Having considered the SPF submissions and the documents disclosed by the Inquiry, Mr Trickett's concerns are, at this stage, principally in relation to the general perception of fairness to all Core Participants. But those concerns may, after further explanation of the context to some of the discussions noted in the Minutes, extend to matters which have a bearing on Mr Trickett directly.

5. Mr Trickett is, however, conscious that he does not have a full and detailed response from the Chair on the SPF position. By letter of 29th April 2025, the Solicitor to the Inquiry indicated that such a response is to be given on 2nd June 2025. He also, like all other Core Participants, does not have any understanding of the findings of the independent Counsel appointed by the Chair to review this matter. A new Counsel to the Inquiry has also recently been instructed. He too will be making submissions at a later date which may have a bearing on the position ultimately adopted. It is noted those submissions will be published, again on 2nd June 2025. All of that will provide essential and helpful context.

6. Mr Trickett accordingly reserves his position at this time.

The question of apparent bias

7. Mr Trickett offers no view on the legal question of 'apparent bias' to the Inquiry but supports the submission that the question of whether apparent bias is established is plainly not one for either the Chair or his Counsel, or for the independent Advocate appointed. It is properly a matter to be resolved by an entirely independent Judge in the Court of Session.

Duncan Hamilton KC

22nd May 2025

IN THE SHEKU BAYOH INQUIRY

SUBMISSION

on behalf of

PATRICK CAMPBELL

on

THE APPLICATION FOR RECUSAL ("the Application")

by

(1) THE SCOTTISH POLICE FEDERATION, (2) CRAIG WALKER and (3) NICOLE SHORT

1. Mr. Campbell is grateful for the opportunity to comment on the application in advance of the hearing fixed for 12 and 13 June 2025.

2. In common with other core participants Mr Campbell is keen for the Inquiry to conclude its investigations and publish its report. He considers that fairness - and the appearance of fairness - are of critical importance in any process of public inquiry. In that regard, he believes that he was treated fairly in the course of his evidence, by inquiry counsel, and by the chairman of the inquiry ("the chair") for whom he has the utmost respect.

3. However, following the recent disclosure of minutes of meetings between the chair and Mr Bayoh's family, Mr Campbell has lost a substantial degree of trust and confidence in the inquiry.

4. Whilst it is understood that it may be necessary for a chair to meet with affected families at the outset of an inquiry, Mr Campbell is concerned about the amount and nature of the meetings, the absence of a similar opportunity being extended to other core participants (as far as he is aware), and the circumstances in which the existence of the meetings eventually emerged.

5.. Furthermore, it appears that matters that have been the subject of evidence have been discussed outwith the presence of Mr Campbell and other core participants. Such

discussions were not confined to the events that led to Mr Bayoh's death, but have included aspects of post-incident management, an area in which Mr Campbell played an important role.

6. In these circumstances, on the basis of the submissions and documentation produced to date, and with considerable regret, Mr Campbell supports the motion for recusal.

[redacted]

M A MacLeod KC

22 May 2025

THE SHEKU BAYOH INQUIRY

SUBMISSION ON BEHALF OF THE SOLICITOR GENERAL FOR SCOTLAND

ON THE MATTER OF APPARENT BIAS AND FAIRNESS

Introduction

1. By letter of 29 April 2025, the Solicitor to the Inquiry advised that the Inquiry would hold a public hearing on 12 and 13 June, and invited submissions, on the fairness of the conduct and procedure adopted by the Chair in meeting with the families of Mr Bayoh. This submission sets out the position of the Solicitor General on that matter.

2. Two points might be mentioned at the outset. First, in keeping with the approach taken on behalf of the SPF, Ms Short and Mr Walker, the Solicitor General would not see the issues raised as being about personal bias on the part of the Chair. The issues raised in (what will be referred to for convenience as) the SPF Submission are concerned with the objective appearance of events not with the subjective intentions of those involved. It is to be emphasised nevertheless that the Solicitor General shares the view that there is no basis for assuming anything other than good intentions on the part of the Chair.

3. Secondly, questions have been raised, at §78 of the SPF Submission and in correspondence on behalf of the Chief Constable, about the procedure adopted by the Inquiry for addressing the concern raised about apparent bias and fairness. While there may be force in certain of the points made, particularly as regards the nature and scope of the proposed hearing, the issues raised in the SPF Submission are very serious, as would be the ramifications of decisions to accede to the motion made. It is appropriate that CPs be given the opportunity to set out their position, at least in writing, and that there is a public record of what was said about the present matter.

4. The Solicitor General acts, and must be seen to act, in the public interest. 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 by the Inquiry. In addition, 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 Sheku Bayoh.

5. The Solicitor General is mindful that, subject to the matter just mentioned, it is for the Inquiry to complete the state's investigative obligations under Article 2 ECHR. The concerns discussed in the SPF Submission, no matter how they are resolved, have the potential to undermine and impede that task, and to have done so already. In this situation, it would not be open to the Solicitor General, standing her constitutional position, to decline to set out a position on the concerns raised. She would see the requirement to do that as arising also from her role as a CP with an obligation to assist the Inquiry.

Summary of the Solicitor General's position

6. The Solicitor General has reflected very carefully on the issues raised in the SPF Submission and in the material disclosed by the Inquiry. The Solicitor General is mindful of how long the Inquiry has lasted and the attendant effort and time that has been invested. It is therefore with great regret that she has come to the view that the circumstances of the Chair's meetings with Mr Bayoh's families and their legal advisers, seen in their proper context, do satisfy the test for apparent bias. The Solicitor General concludes that the procedure followed by the Inquiry was unfair.

7. The Solicitor General's conclusions are based on careful analysis of the following matters: the applicable legal principles; the content of the disclosed meeting minutes and other documents; and the surrounding context.

The applicable legal principles

8. Subject to what follows, the Solicitor General does not take issue with the articulation of the appropriate legal principles and the overall tests set out in the SPF Submission.

9. It is not in doubt that the principles of natural justice apply to the conduct of the Inquiry.[1] The "rule against bias" is one aspect of this requirement[2]. As stated above, we are concerned here with – and only with – the appearance of bias. The test for whether

[1] S.17(3) of the Inquiries Act 2005; *Greater Glasgow Health Board v Chairman Scottish Hospitals Inquiry* 2025 SLT 205; and see also *R v Lord Saville of Newdigate & Others* [2000] 1 WLR 1855 at §§ 32E & 38.
[2] *Kanda v Government of Malaya* [1962] AC 322

apparent bias on the part of a decision-maker or process is made out is that articulated by Lord Hope in *Porter v Magill*[3]*:*

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

10. In the context of whether private meetings with a decision-maker risked an appearance of bias, the *Porter* test might be expressed this way: whether the observer, having considered the facts, would conclude that there was a real possibility of the decision-maker being influenced by the meetings[4].

11. In asking what an observer would make of the present circumstances, it is important to keep in mind what the court said in *Helow v Advocate General for Scotland*[5]. The task for anyone assessing the concerns in the SPF submission is not to set out their own personal views. It is to consider what the person described below might make of the disclosed circumstances. That is the approach that the Solicitor General has followed.

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

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[3] [2002] 2 AC 357, at § 103
[4] Cf. De Smith, *Judicial Review,* 9th edition, § 12-034
[5] 2009 S.C. (H.L.) 1, §§ [2]-[3]

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

12. As just indicated, the observer would want to consider the Inquiry proceedings as a whole; the issue must be "judged in the round"[6]. That very point was made on behalf of the Inquiry in its letter of 6 May 2025 to Police Scotland Legal Services. The focus presently may be individual meetings, but the fairness of those can only be considered against the whole relevant background. The observer would want to ask herself whether that broader context addressed any concern about the possibility of bias arising from the meetings. She would want to consider the way in which the Inquiry had undertaken its investigation and other work, and to consider whether that allayed any concerns.

13. As an aspect of the principles applicable to apparent bias, the SPF Submission says that[7] "*it is settled that any decision maker tasked with arriving at a decision fairly and in compliance with the tenets of natural justice should not meet privately or secretly with a party with an interest therein*". The SPF Submission also indicates[8] that protestations by a decision-maker that they are not in fact biased are unlikely to be relevant (a point also made by Lord Hope in *Porter v Magill*[9].)

14. Subject to one caveat, as statements of general principle, this submission is in agreement with these points. The caveat is that it is always necessary to consider the circumstances. It may be true that meetings of the sort described in the quotation ought not to happen. The question is whether, in the circumstances, the meetings in the present case meet the *Porter v Magill* test. As indicated, that question falls to be determined by considering not just the fact that meetings took place but also – and this is the critical issue in the present case from the Solicitor General's perspective – the

[6] Beer, *Public Inquiries* 11.16(7)
[7] At §4
[8] At § 11
[9] At § [104]

indicated content of those meetings, as well as the broader context in which that took place. To be clear, the SPF Submission does not suggest that any different approach should be taken to the analysis.

15. A key part of the present context is that we are concerned here not with an adversarial court process but with a public inquiry under the 2005 Act. It is therefore necessary to consider the way in which the principles discussed in the preceding paragraphs fall to be applied in that context. Guidance on that matter is to be found in the discussion of Toulson LJ in *R (on the application of Associated Newspapers Ltd) v The Rt Hon Lord Justice Leveson*[10]:

> *"A duty of fairness does not exist in a vacuum. In that respect a duty to be fair is like a duty of care. In a case of a professional retainer, the professional person's duty of care is inexorably tied up with what he is retained to do. This point was eloquently made by Oliver J in Midland Bank v Hett Stubbs and Kemp [1979] 1 Ch 384, 434. So in the present case, the starting point for any consideration of the Chairman's duty of fairness is the task which he was appointed to perform under his Terms of Reference."*

16. Applying that methodology, Toulson LJ came to this view about the Leveson Inquiry[11]:

> "*Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible."*

17. This submission has sought to apply the methodology suggested by Toulson LJ, and it has come to the same view. The remit of the present Inquiry, in part, requires it to perform the same function as a Sheriff would undertake in a Fatal Accident Inquiry under the 2016 Act. The Sheriff undertaking that task is acting in a judicial capacity,[12] and the usual principles of procedural fairness that arise in that judicial context apply. Thus the comparison the SPF Submission seeks to draw with the Warren Fenty FAI is apposite.

18. The Inquiry is also tasked with addressing a number of points that could not be captured or fully captured in the FAI process. Overall, the Inquiry requires to

[10] [2012] EWHC 57 (Admin), § [35]
[11] At § [53]
[12] *Black v Scott Lithgow* 1990 SC 322 at p.328

investigate, and the Chair requires to determine, a number of very sensitive and serious questions in relation to which there are opposing interests among some CPs. These questions include whether the force used by each individual officer involved in the confrontation with and restraint of Mr Bayoh was no more than absolutely necessary; as well as whether their actions were racially motivated; as well as whether their actions caused or contributed to Mr Bayoh's death. Sensitive questions about the interactions of state agencies with Mr Bayoh's families and about race require to be addressed. Compliance with Convention rights and adherence to other standards requires to be considered.

19. Section 2(1) of the 2005 Act may preclude the Chair from determining civil or criminal liability, but s.2(2) is a reminder of how close to that point he is required to go where that is indicated. Plainly, the decisions to be reached by the Chair on the issues before him may have serious ramifications for those involved and for society. In this situation, the approach suggested by Toulson LJ falls to be applied: the obligation on the Inquiry was to take – and to be seen to take – as balanced an approach to its investigation as was practically possible. It follows that there really is no room here for watering down the usual rules and principles of apparent bias and of natural justice. It is against that legal framework that the present circumstances fall to be measured.

The Chair's meetings with the family and their legal representatives

<u>The setting-up and early months of the Inquiry</u>

20. On 12 November 2019, the Cabinet Secretary for Justice announced that there would be an inquiry into the circumstances surrounding the death of Sheku Bayoh. Terms of reference were disclosed on 21 May 2020. The Inquiry itself is understood to have been set up around 30 November 2020. On that date, the Chair provided an opening statement. He emphasised that the Inquiry was independent, that it was "entirely impartial" and that its role was inquisitorial. The Solicitor to the Inquiry had said something similar in her letter of 26 November 2020 to Professor Watson. She said that the Inquiry was independent of any person or organisation[13].

21. On 30 April 2021, the Chair provided an update. He said[14] that "*transparency and openness would be at the heart of this Inquiry*." The Chair's statement set out an assurance – in public – to the family of Sheku Bayoh and to all others with an interest

[13] PH-00014, 1/3
[14] PH-00015, 2/1

in the Inquiry that the investigation was moving forward with focus and determination. He explained that discussions with CPs were underway, and that these discussions were being conducted between the legal representatives of CPs and the legal team instructed to represent the Inquiry[15]. The Chair indicated that it would be by working in this way that everyone would have an opportunity to fully engage with the Inquiry's work.

22. The Chair also explained that a Framework Document would be used to enable the Inquiry to work through the matters that required to be determined under the Inquiry's Terms of Reference. Five matters were particularised, on the basis, presumably, that they were thought to contain the most important factual issues for determination. The matters mentioned included post-incident management, liaison with the family and race and equalities[16].

The meeting of 4 November 2021

23. According to the letter from the Solicitor to the Inquiry of 5 March 2025[17] ("the March '25 letter"), a meeting took place on 4 November 2021. Of what took place, the only thing referred to in the March '25 letter was this: "*At the 4 November 2021 meeting there was a discussion about the families' approach to their presentation on the life of Sheku Bayoh to be made on 10 May 2022 at the beginning of the first hearing*."

24. No minute of this meeting is said to exist. The Inquiry has provided a brief email chain[18], comprising two emails, regarding the arrangements for the meeting (though not any correspondence explaining how or why the requirement for a meeting came about). The email of 1 November 2021 from Aamer & Anwar & Co ("AA&Co") apparently had an agenda attached to it. That agenda has now been provided by the Inquiry, as has some further material. The email asks a number of questions about the detail of the evidence recovery process and suggests that the Inquiry provide a "schedule of s21 notices".

25. In her reply of 2 November, the Inquiry Solicitor said she would share the notices and reply on the individual points raised. Some correspondence relative to that has now been produced. This includes an email of 3 November from the Solicitor to the Inquiry

[15] PH-00015, 2/3&4
[16] PH-00015, 2/3-4
[17] PH-00013, 19/1
[18] PH-0001, 3/1-2

to AA&Co[19]. Attached to this email were certain documents. One of these, an overview of the s.21 Notices, has been produced. A second, a list of action points from an earlier meeting, has not.

26. The disclosed bundle contains what bears to be a speaking note for the Chair's use at the meeting[20]. It is unclear who was present at the meeting, but it appears not in doubt that the Chair and members of the Inquiry team were present along with members of the family and their legal representative(s). The speaking note would indicate that the Chair intended to tell the family that they would be "at the heart" of the Inquiry. Among the things that were apparently to be done to achieve this, there is a reference to keeping the family in the loop. The speaking note says on that matter: "*I think that in the summer we rather lapsed in that regard and I am sorry for that*".

27. That comment raises the possibility that the meeting itself and the statement – apparently made for the first time – that the family would be at the heart of the Inquiry may have come after the expression of some form of concern or complaint. In that regard, a comment in the March '25 letter might be of some interest: "*There was a real prospect that [the family] would not engage at all with the Inquiry process or at some point would cease to engage with it*."

28. The impression, that a concern or complaint – and perhaps even the prospect of disengagement – gave rise to the meeting, is supported by item 5 on the speaking note: "*Delay by the inquiry using legal powers*". Under that heading, there is a discussion of an impasse of some kind, and a reference to the Solicitor General having been advised by the Chair that the Crown's position on the matter in question was "*wholly unacceptable and untenable*". The Chair records how his intervention had broken the "*logjam and within days the matter was resolved*." He says that this experience reinforced in his mind the importance of the Inquiry being prepared to take a strong line.

29. No written record has been provided of what anyone – and not just the Chair – actually said at the meeting. But assuming the meeting covered the matters referred to in the speaking note, the discussion went well beyond the explanation of the meeting provided in the March '25 letter. The speaking note comprises 17 pages (including one

[19] PH-00033
[20] PH-0002

that is apparently a blank). The single matter referred to in the March '25 letter is referred to on the final page. Within the pages preceding it, are indications of an intention to discuss substantive issues. In particular, the Chair appears to have intended to invite comment on at least three of the five matters particularised in April 2021: the family's "*journey… and frustrations*" since 3 May 2015 (i.e. post-incident management and liaison with the family); and on questions of race.

30. Confirmation that discussion of these matters did take place comes in a series of letters from the Chair to family members just under one week after the meeting[21]. The Chair said that he felt "*humbled and honoured*" that the family members had shared the story of their loss and of the "*frustration you feel at the subsequent actions of the police and those investigating your brother's death*." He said: "*I want you to know that I heard your concerns about race*." He then set out his commitment to put the family at the heart of the Inquiry and to finding out the truth of what happened to Mr Bayoh on 3 May 2015 and identifying any failures.

Preliminary hearing 18 November 2021

31. At the hearing on 18 November 2021, the Chair said, apparently for the first time in public or to any other CP, that the family of Mr Bayoh would be "at the heart" of the Inquiry. Little detail of what that involved was provided beyond an indication that the Chair had begun discussion with the family about what form the opportunity to family members to speak publicly about Mr Bayoh would take. There was no indication in this statement that the discussion in question was with the Chair personally. Nor was there any indication that a discussion had already taken place which went significantly beyond the single matter mentioned at the hearing. The Chair repeated the commitment to carry out an investigation that was "*independent, impartial, fair and effective*".

Email exchanges 8 & 22 February 2022

32. The PH bundle contains an email exchange[22] between the Inquiry and AA&Co concerning the rearrangement of a proposed meeting involving the Chair and the family. The suggestion that the meeting be rearranged came from the Inquiry. The reason was that the Chair was currently considering the question of undertakings. The

[21] PH-0003-0005
[22] PH-00010, 9/1

email said: "*You will appreciate that we need to guard against any possible perception of partiality*."

33. That statement might be thought to indicate a view within the Inquiry: that the Inquiry may be subject to the usual principles applicable to apparent bias discussed above; and that discussions in private with a party prior to a decision being taken by the Chair on a contentious matter risked expressions of concern that those principles may have been breached.

The meeting of 13 April 2022

34. This meeting appears to have involved the Chair, at least one member of the counsel team, the family and representatives from AA&Co. In the March '25 letter the Solicitor wrote: "*The meeting of 13 April 2022 was essentially a follow up meeting to discuss the details ahead of the presentation [i.e. the so-called pen portrait of Mr Bayoh]*." While that may not be inconsistent at least with what is said in the minutes, it may be important to note that the minutes additionally record the Chair making this statement (emphasis added):

> "*When I spoke to you before when we met – each of you gave me **a very powerful account** of the way in which **you were treated** on 3 May 2015 and subsequently. I will want you to give evidence in due course about that*."

35. The Chair is recorded as going on to say of the presentation: "*Think that will be a very strong start to the hearings*."

The meeting on 21 November 2022

36. The March '25 letter says that aside the meeting of 13 April 2022, "*meetings were held on a more or less annual basis*". The letter states[23]:

> "*The purpose of the annual meetings 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*."

[23] PH-00013, 19/2

37. The natural reading of what is said in the letter is that, in order to check up on the welfare of the family, the Chair and other members of the team met with them on an occasional, roughly yearly, basis. The natural reading of the letter is that what was discussed at meetings was in keeping with that indicated purpose: the discussion was confined to issues of welfare. That reading of the March '25 letter is reinforced by the final sentence in the quotation. It indicates to the reader the provision of some sort of warning, caution or reminder that discussion of evidence was a matter for public hearings rather than private meetings with one CP.

38. The natural reading of the March '25 letter just suggested is not easily reconciled with the minute of the meeting of 21 November 2022. No correspondence explaining the reasons for the meeting has been provided. It is certainly true that the minute discloses discussion of what might be described as welfare issues (abuse of the family and of Mr Anwar). But the discussion goes well beyond that. The following passages might be mentioned.

39. One of the assessors, Mr Bhatt, is recorded as having said this (emphasis added)[24]:

> "*Sad to hear what I am hearing – won't come as a surprise. What we can do is support you – don't have the magic wand to change the world* ***but what we can is try to help achieve what you want***."

40. Context is of course everything. The minute records two people as having spoken before Mr Bhatt: a family member and Mr Anwar. It seems likely that at least part of what they each said was concerned with – or had as its context – recent racial abuse of the family (and perhaps Mr Anwar also). But the family member is also recorded as having said this:

> "*What happened on 3 May 2015 should never have happened. All asking for is to get to the truth. Plunged more into seeing how society is. Colour of skin. Day to day re-living the incident. This on top of it, it is crushing us. It is a heavy load to carry*."

41. There are likely a number of available interpretations of Mr Bhatt's words. But one of them certainly is that the minute records an assurance by him that he saw his – and

[24] PH-00007, 11/1

the Inquiry's – remit as being to try and help the family to "achieve what [they] want"; and that he said this after a family member had discussed the circumstances of the death of Mr Bayoh. There is no recorded demurral or qualification to Mr Bhatt's statement.

42. A family member, later in the discussion[25], provided their assessment of the evidence of – it is assumed – the police officers who appeared as witnesses in hearing 1. The family member is recorded as having said this (emphasis added):

> "*There are **a lot of good things came out** – approach – got the witnesses to step out side and demo – other side of things **liked** – **presenting evidence that contradicts their statements**. Questions family and friends asking – **what happens if lie under oath**. What happens after that*?"

43. The Chair apparently responded that it would be for the Crown to decide what happens next.

44. There is no record of any warning about discussing evidence. To the contrary, the Chair then steers the discussion to another topic that forms part of the issues before the Inquiry: the *post-mortem*. That topic is discussed along with a number of others.

45. The further issues discussed at the meeting include the report of Dr Crawford who was instructed by the Crown at the stage of the VRR to provide a report on the injuries to PC Nicole Short. A family member is recorded in the minute as having suggested Dr Crawford had mis-quoted the medical records.

46. The minute concludes with a discussion of the oral evidence given to the Inquiry by two witnesses: the first, an associate of Mr Bayoh who had been with him in the hours before his death; the second, one of the police officers in attendance at Hayfield Road. A family member is recorded as having expressed concern about the comparative treatment of these witnesses by the Inquiry. Both the Chair and Counsel to the Inquiry are recorded as having offered their views on that concern. Counsel is recorded as having said of the first witness (emphasis added):

[25] PH-00007, 11/2

"*Maybe I did push him – **encouraged him to help SB**. It was for that reason – to try to get really good evidence*."

47. The meeting concludes with this statement by a family member:

"*Like the questioning [Counsel to the Inquiry] put to witnesses – like them to give more examples – worked with or come into contact – white/black and comparison in approaches*."

The meeting of 18 January 2024

48. This meeting took place shortly before commencement of the hearings at which the PIRC and Crown witnesses would appear. Present at the meeting, according to the minute, were the Chair and representatives of the Inquiry team (including one counsel member), family members and three legal representatives. The meeting opened with a statement by the Chair that the family remained at the heart of the Inquiry. He is noted as having thanked the family for their perseverance and as having thanked them for their commitment to the process.

49. Once again, there is discussion of evidence. A family member is recorded as saying of evidence that has been heard (emphasis added):

"***Why are they lying**? You eventually through questioning get the answer but why is it that way. Grateful for the team and the way questions asked and put forward. **If not for creativity of your team and our team it would not come out***."

50. A little later, Mr Anwar is recorded as having offered some observations on disclosure of evidence concerning the PIRC and/or the Crown. He is noted as having said (emphasis added):

"*What is coming from the PIRC/Crown [redacted] – **lied repeatedly** to the family. [Redacted] – particularly difficult for the family to hear an (sic) see in disclosure what is being said*."

51. As the quotation perhaps indicates, it may be that the discussion was in part about the impact of the evidence of the PIRC and/or Crown witnesses upon the family; and it may be that there is an argument to be made that, in an indirect sense, this is *capable*

of appearing to have been a discussion in part about welfare, and about the impact of the process on the family. But the cause of the impact was not – or not principally – the process: the cause of the impact was said to be the evidence of, or evidence relevant to, witnesses who were said by the family's solicitor to have repeatedly lied and who were (presumably) shortly to give evidence to the Inquiry.

52. The Chair and Inquiry team were in effect being told that the family – whose trust the Chair and Inquiry had on the face of things been anxious to secure in the first place and to then retain – would find the evidence of PIRC/Crown witnesses very difficult because they had been lied to. Indeed, towards the end of the meeting, Mr Anwar is noted as having said[26]: "*this is going to be extremely difficult for the family*".

53. The redactions in the passage involving Mr Anwar have been queried by CPs. The Inquiry has advised that the Chair considers that the redactions should remain. It has been explained that the two redactions relate to observations which "*express the impact felt by members of the Bayoh families in attendance at that meeting. They do not refer to a further body or person*". Two points might be made about that.

54. First, if, despite use of the word "further", this explanation is intended to indicate that no body or person is referred to at all in, or is identifiable from, the redacted comments, that means the minute does not disclose who Mr Anwar described as having lied. That would mean the minute is not a complete record of what was discussed. Secondly, the explanation might tend to reinforce the impression that the recorded comments of Mr Anwar rather emphasised to the Chair the effect on the family of their perception that they were lied to.

<u>The meeting of 5 December 2024</u>

55. By this stage, all evidential hearings were concluded. A meeting took place at which the Chair and all senior members of the Inquiry team (and other team members) were present along with members of the family and three legal advisers. The question of extension of the Terms of Reference remained to be determined. The minute[27] – which records this meeting as being the fourth with the family – indicates that the Chair described the purpose of the meeting as being to enable the family to raise any issues they wished to discuss.

[26] PH-00008, 14/4
[27] PH-00009, 16/1

56. The minute indicates a discussion with an agenda comprising four matters. Item 1 was *Opening Remarks by Chair, including progress of Inquiry to date and consideration of Terms of Reference by the Scottish Government*. On the latter topic, only a brief exchange is recorded in the minutes with no reference to any substantive discussion.

57. There is extensive discussion of the family's view of the Inquiry. The family are recorded as having said that the Inquiry followed through on its intention of keeping them at the centre of things. The Inquiry is said to have been "good", and a family member expresses the view that they are "happy with the way things have gone".

58. Another family member expresses thanks to the Chair and to the Inquiry for following through on promises and for keeping the family at the centre of things; that there have been very few inquiries like this before; that the family had anticipated (as had others) that asking for an inquiry would be a waste of time; and that the family saw the present inquiry as being the benchmark for others.

59. Mr Anwar is noted as having echoed these observations. He is recorded as having "*expressed his thanks to the Chair and the team for being the only authority in nine years that has managed to retain the family's trust*."

Discussion

60. In the SPF Submission[28], the following is said: "*The minutes read, with great respect, less like detached discussions of formalities, and more like consultations with a client.*" Regrettably, and with the same measure of respect, that assessment is not easily dismissed. It does indeed provide something in the nature of a shorthand description of what appears (from the incomplete record) to have taken place at meetings. But before coming to a view on whether this gave rise to a risk of bias, the fair-minded and informed observer would want to consider the whole of the relevant circumstances and surrounding context. As indicated above, she would want to consider whether that context allayed the concerns that might arise from the content of the partial record of the meetings.

[28] § 65

Contextual matters

Additional comments made at the meetings with the families

61. The observer would be careful to ensure that she considered any indication within the minutes of statements having been made at the meetings that were capable of addressing concerns about the passages referred to above. She would want to consider whether there were any warnings that evidence ought not to be discussed at meetings, or reminders that the Chair's determination of all issues would be based on, and only on, the evidence properly before him.

62. At the meeting of 5 December 2024, some weeks after evidential hearings had concluded, the Chair advised the family that his report would be based on the evidence heard[29]. Plainly, that may be an important statement for present purposes. The observer would consider it was relevant to any concern that the Chair might base his decision on evidence provided to him in private rather than on evidence properly before the Inquiry.

63. But although that may be among the concerns that arise from the meetings, it is not the only one. Indeed, it might be thought that the greater concern is of discussions held in private being seen to create the possibility of influence, which may of course be unconscious, upon the Chair's assessment of the evidence. It is difficult to see how a statement that a decision will be taken on the evidence is an answer to a concern about how that evidence will be assessed.

64. By way of further example, in the speaking note prepared in advance of the first meeting it is said that the evidence will be laid out in public and that that is where the family would hear and form their view about it[30]. Again, that is clearly an important statement. But again its limits should be noticed. It seems unlikely that the notional observer would read this as having been intended as some sort of warning not to discuss evidence at meetings when the speaking note itself appears to have been designed to encourage that very thing.

65. The observer may think it potentially of significance that the minute of the meeting on November 2022 records this comment by the Chair: *"There will be times when I have*

[29] PH-00009, 16/2
[30] PH-00002, 4/6

to make decisions with which you do not agree. Always make decisions based on evidence."[31]

66. But the context of this comment is unclear. It seems unlikely that it records some qualification to the observations referred to above between §§39-47. For example, it does not seem likely that the observer would see this as having much impact on the significance to be attached to the expression of support by Mr Bhatt, the discussion about witnesses having lied or the discussion about the manner and content of questioning in oral hearings.

Whether CPs were made aware of the meetings with Mr Bayoh's family

67. In the March '25 letter, the Solicitor to the Inquiry said that from the beginning the Chair expressed his intention to have the family at the heart of the Inquiry and that there had been expressions of support for that from CPs. But, based on the disclosed record of the meetings, the indication at the hearing on 18 November 2021, was not a meaningful communication of what the family being at the heart of the Inquiry really meant. In her letter of 29 April 2025, the Solicitor refers to passing comments made in media reports, one attributed to a family member and a second, around the time of the December 2024 meeting, attributed to an Inquiry "media manager".

68. Correctly, neither letter suggests that the Inquiry positively took steps to advise CPs of the fact of meetings taking place or of their import. As the SPF Submission indicates under reference to the FAI into the death of Warren Fenty[32], one step that might have been taken would have been to tell CPs that it was proposed to hold meetings at which evidence would be discussed and to invite comment. The observer would consider the absence of that step relevant to the question of fairness and whether the Chair's meetings with the family and their legal representatives created a risk of bias.

The Inquiry's response to the concern about apparent bias

69. Concerns on behalf of the SPF, Ms Short and Mr Walker were initially set out by letter of 6 February 2025[33]. A number of questions were raised. These included whether there were minutes of meetings and whether those could be disclosed.

[31] PH-00007, 11/3
[32] § 72
[33] PH-00012

70. The Inquiry eventually responded substantively in the March ’25 letter. The letter explained that it was written in response to the concerns raised. It concluded:

> “*If your clients have any further concerns please do let me know as soon as possible. Absent any further correspondence on this matter, I will arrange to have this letter published on the website on 11 March*.”

71. Despite being asked the question, the letter did not say whether minutes had been taken of the meetings. The quoted passage indicates that it was hoped within the Inquiry that the explanation set out in the body of the letter would provide whatever assurance was needed to permit withdrawal of the concern.

72. Minutes and other documents did exist; they have now been produced. As discussed above, there is obvious tension between their content and the description of events in the March ’25 letter. The description of events set out in that letter is less full than, and not wholly consistent with, the narrative that emerges from the documents disclosed in the PH bundle. The description in the March ’25 letter had the potential to mislead.

73. The point has already been made that *ex post facto* explanations and justifications may not count for very much in the present situation. Here, the considerations just mentioned put that beyond doubt (and not to be forgotten is that the correspondence with PBW Law came itself after an even briefer description of the circumstances had been provided by the Inquiry in the letter to the Chief Constable of 4 February 2025).

74. One further aspect of the March ’25 letter ought to be mentioned. In setting out the rationale for meeting with the families, the following was said:

> *“The engagement of the families with the Inquiry is crucial to the effectiveness of the Inquiry in fulfilling its terms of reference. If the inquiry failed to obtain and retain the confidence of the families its effectiveness would be prejudiced.*
>
> *Over the years from 2015 the families lost confidence in the various state institutions with which they had dealings – Police Scotland, the Police Investigations and Review Commissioner, and the Crown Office. There was a real prospect that they would not engage at all with the Inquiry process or at some point would cease to engage with it.*

The Inquiry has been mindful of the obligation under article 2 ECHR to involve the next of kin in the Inquiry. From the beginning the Chair has publicly expressed his intention to keep the families at the heart of the inquiry. Core Participants have publicly expressed their support for this approach."

75. This explanation might indicate that the Inquiry saw the effective completion of its investigation as requiring the maintenance of the family's confidence in the process in a way that other institutions had not achieved. That reasoning is problematic. Putting to one side the point that the Inquiry should not be seen to be prejudging the circumstances of any prior loss of confidence (a matter the Inquiry requires to investigate), it is to be recalled that the Inquiry required to have in mind not just the family's perceptions of the process but also that of others with an interest in seeing the Inquiry complete its investigation thoroughly and fairly[34]. It should also be emphasised that the confidence of one party in a process is not the measure of its effectiveness. To use that as the measure of effectiveness is to run the very risk that the SPF Submission says has arisen. The stated reasoning raises obvious questions about its consistency with a commitment that the process be independent of any person.

76. Although it does not say so explicitly, the letter indicates that the Inquiry's explanation for the meetings may in part lie in its assessment of what Article 2 required. It should be emphasised that Article 2 required that the family be involved in the Inquiry process to the extent needed to safeguard their legitimate rights. Private meetings with one CP at which the Chair is present and at which evidence is discussed are not part of the Inquiry's process. The requirement under Article 2 to enable participation in an investigation by the family of a deceased person does not go the distance of requiring that other interested parties be treated unfairly[35]. Accordingly, if, based on the content of the minutes of meetings, the fair-minded observer considered that there was a real possibility of bias, the Inquiry's obligations to the family under Article 2 would not provide a justification.

77. In all the circumstances, were the observer to have regard to the way in which the Inquiry has responded to the concern about apparent bias, it is unlikely that any concern would be allayed.

[34] Cf. *R v Lord Saville* [2000] 1 WLR 1855, § 68(4). And cf. Lord Scott, "Procedures at Inquiries – the Duty to be Fair." (1995) 111 LQR 596 at p.615: "*There is a further point*. …"
[35] *Guiliani & Gaggio v Italy* (2012) 54 EHRR 10, §§ 303-304

The application to extend the terms of reference

78. Beginning at §39, the SPF Submission discusses aspects of the Chair's involvement in the families' application to extend the Terms of Reference. The submission describes the similarity of the points articulated by the Chair and by Mr Anwar; and it describes how the Chair's "*certain questions*" about the prosecutorial decision in September 2024 evolved, concluding with a statement attributed to him in the letter of 25 February 2025 that there were "*strong indications that the prosecutorial decision was flawed*".

79. The SPF Submission says this of the Chair's involvement[36]: "*The Chair has adopted the language of the family of Mr Bayoh and advocated their cause*". With the qualification that it is not clear who adopted whose language, there is force in this description of events. On 6 March 2025, the Crown raised certain concerns about the letter of 25 February. The Crown's letter said this of the "strong indications" comment: "*It is not unreasonable to think that this statement could give rise to a concern on the part of CPs that the Chair has formed a view on this matter*."

80. The question is not whether, on their own, the Chair's support for the extension of the Terms of Reference and his statements of concern about the prosecutorial decision meet the test for apparent bias or predetermination. The question is what assistance is to be derived from such surrounding context in determining what is to be made of the meetings. Would the fair-minded and informed observer see in these surrounding events reassuring indications of neutrality and impartiality, or would she see support for one party's position? To answer that question, the observer would want to fully understand the known circumstances surrounding the Chair's statements about the Terms of Reference.

The evidence of Mr Graves

81. As the SPF Submission explains, by letter of 6 September 2024, the Solicitor to the Inquiry advised CPs that the Chair had met the day before with the Deputy First Minister to discuss the application to extend the Terms of Reference. The letter stated that the Chair had mentioned that the questions he had about the Crown's investigation, and which he thought were likely to have been integral to the prosecutorial decision, were concerned with the Crown's understanding of the factual

[36] At §64

evidence; the instructions given to expert witnesses; and the absence of an examination of the issue of race.

82. As the SPF Submission also explains[37], some weeks later, on 18 November 2024, the Chair wrote to the Deputy First Minister. He reiterated the above concerns and then said this: "*Since my meeting with you in September the Inquiry has heard further evidence from an expert instructed by the Crown which only reinforces these concerns."* This was a reference to the evidence of Martin Graves, an OST and restraint expert who, between the time of the Chair's discussions with the Deputy First Minister in September 2024 and the letter of 18 November 2024, had returned to give evidence for a second time to the Inquiry.

83. Mr Graves gave his evidence between 2 & 4 October 2024. In advance of this hearing, the COPFS legal team sought clarification from the Inquiry team about its scope; COPFS asked whether a list of issues would be produced for the hearing. On 16 September, a member of the Inquiry team responded and indicated that the list of issues for the Training Hearing would be the relevant one for Mr Graves. A report prepared for the Inquiry by Mr Graves was disclosed to CPs. It was concerned with training. Within the COPFS team, consideration was given to whether it would be necessary to seek to have questions put to Mr Graves or to make a Rule 9 application. In light of the understanding that his evidence would be concerned with training, it was considered that this would not be necessary. For the same reason, it was considered that it would be unnecessary to incur the expense of having senior counsel present.

84. In keeping with the COPFS understanding of things, at the outset of the hearing on 1 October, the Chair indicated[38] that, following completion of Mr Anwar's evidence, the remainder of the hearing would be concerned with training. Counsel gave a similar indication to Mr Graves towards the beginning of his evidence[39]; and, for the first two days of his evidence, training was indeed the sole focus.

85. Senior counsel concluded her questioning slightly early on the second day. She indicated that she intended to move onto a different chapter the following morning. She did not say what that would be. The questioning the following day was not concerned with training. The focus was now upon the Crown's instruction of and interactions with

[37] §47
[38] 117/1/6-8
[39] 118/3/3

Mr Graves. The purpose of the questioning appears to have been the identification of deficiencies in the Crown's instruction of its OST and restraint expert: an aspect or example of what will be referred to for convenience in this submission as counsel's "case theory".

86. If Mr Graves had been given notice of the points put to him, this was far from obvious in his responses in evidence[40]. On the face of things, the documents put to him appeared to comprise material that he had either never seen before or had not seen or considered for some time. On important issues, he appeared to be working from memory, on the hoof, in the pressure of an Inquiry hearing. Additionally, in relation to each of the criticisms explored with him, the contextual evidence drawn to his attention for consideration was less complete than it might have been. A discussion of the evidence is beyond the scope of this submission. On the other hand, it may be important and only fair to give examples of the issues just touched upon. It is sufficient to mention three examples. There are others that might be canvassed but those would require detailed discussion of evidence, a matter for closing submissions, whereas the current focus is purely at the level of appearances.

87. A key component of counsel's criticisms appears to be a suggestion that the Crown wrongly delegated to Mr Graves the task of determining factual questions, specifically about the way in which the confrontation with and restraint of Mr Bayoh arose and progressed. Not put to Mr Graves in evidence was a statement in the body of his report that might be thought to have some bearing on that question.

88. In particular, in the section entitled *Summary of his Conclusions*, Mr Graves said this[41]: *Some issues in relation to this case are evidence of fact and it will be for the investigator or court to decide which are correct and which are not.* It might have been important to examine the criticism of the Crown instruction in the context of that statement. That might have some relevance to whether the Crown lawyers and the expert each understood their proper roles.

89. A second example worthy of mention involves Mr Graves's attendance at a consultation with Ms Edwards KC and Mr Brown. The consultation took place in August 2018. Mr Graves said he did not have a good memory of the content of that meeting[42].

[40] It is unclear whether the reference at 120/11/21-22 might indicate some prior warning to Mr Graves, although that might simply beg the question of why CPs were not given the same warning.
[41] COPFS-00024, §8(a)
[42] 120/43/20

He was asked if he had a recollection of a discussion about the speed of the incident involving Mr Bayoh. He indicated that he did not[43]. It was put to him that the consultation notes contained nothing about the matter[44], the implication apparently being that it had not been discussed. Not drawn to his attention was: that the consultation note is clearly not intended to be comprehensive[45]; that on the first page of the consultation note, there are at least two references consistent with a discussion of speed[46]; and that Ms Edwards appeared to think that the question of speed had indeed been discussed[47].

90. A similar point can be made about a third possible criticism pursued by counsel: whether the Crown – ever – asked Mr Graves to address matters from the perspective of what the hypothetical reasonable officer would have done[48]. Mr Graves was asked if he recalled being asked at the consultation with Ms Edwards KC to explore matters from that perspective. He said he did not recall that, but indicated that if the point was covered in the consultation note, he would be happy to review his recollection[49]. Standing an indication that he would review matters if there was other evidence bearing on his recollection, it might be thought that the evidence of Ms Edwards could have helped. She appeared to indicate that the matter had been canvassed at consultation and that the matter had certainly been covered in the Crown instruction[50].

Discussion

91. It must be emphasised that no one must read what has just been set out as indicating that inferences about intentions fall to be drawn. There may be several possible explanations for the circumstances surrounding the evidence of Mr Graves and its connection to the Chair's support for an extension to the Terms of Reference. There would be no proper basis for drawing inferences of the sort just mentioned. In any event, and to repeat, this submission is not concerned with intentions but with appearances.

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[43] 120/45/20
[44] 120/45/17
[45] COPFS-02143: email of 23 August 2018 time at 09:29: discussion of face mask at the consultation but not included in the note.
[46] COPFS-02337
[47] 103/96/5-12; 103/99/11-22; 104/144/20
[48] 120/22/19-20
[49] 120/44/16-20
[50] 103/98/20-22; 103/93/1-3; 104/145/3-10; & 104/148/12 - /104/49/23

92. The fair-minded observer is likely to consider the following matters relevant to her analysis: the evidence of Mr Graves was led at a time when the application to extend the Terms of Reference was pending; his evidence was considered by the Chair to be relevant to the question of whether the Terms of Reference should be extended; it was used by him to support the application; the Solicitor General had a direct interest in the application and is a CP; her team were given what proved to be a misleading explanation of the hearing's scope; Mr Graves's evidence on the above matters was slotted into a hearing that was supposed to be about something else; the evidence explored with Mr Graves was not as complete as it might have been; discussions at meetings appear to have included discussion of counsel's approach to questioning (though it is to be acknowledged that there is no record of a discussion about Mr Graves).

93. The question here is not whether, on their own, these events provide a basis for alleging apparent bias. This submission does not allege that. The question is about what this aspect of the broader context says about the concern created by the discussions taking place at private meetings. The observer's concern is likely to be around the risk that those discussions create the appearance of support for one party's interests. That concern is not likely to be allayed – it is much more likely to find support in – the Chair's support for the extension to the terms of reference and the part that the evidence of Mr Graves played in that process.

<u>The Inquiry's examination of witnesses</u>

94. The discussion about the evidence of Mr Graves connects to another contextual matter which has been raised in the SPF Submission[51] and about which the fair-minded observer would therefore want to be informed: the manner in which evidence has been adduced. The SPF Submission describes the questioning of some witnesses relative to others as "robust". Remembering the Inquiry's obligation under Article 2 that it demonstrate its independence from the state agencies under investigation, there is nothing wrong in principle with robust questioning. The SPF Submission does not suggest otherwise. But an issue about the questioning of witnesses has been raised, and the fair-minded observer, concerned by the content of the meeting minutes, would consider that this part of the context required further consideration.

[51] At § 25

95. As a starting point, the observer would wish to consider any explanation that the Inquiry had provided regarding the method to be used for taking evidence from witnesses. On that matter, at the preliminary hearing on 18 November 2021, the Chair said this of the procedure to be followed within the Inquiry[52]:

> "*In relation to that last issue, namely the examination of witnesses by representatives of core participants, it is important to bear in mind that the procedure is inquisitorial and investigative. It is not the adversarial procedure that is normal in the courts. I anticipate that, in the main, questioning of witnesses will be conducted by counsel to the Inquiry and there will not be routine cross-examination on behalf of core participants*."

96. In order to assess the way in which the stated approach has been followed in practice, the fair-minded observer would require to understand the key distinguishing features of an adversarial court process compared to an inquisitorial process conducted by a public inquiry[53]. The observer would be informed that in the latter context the rules of procedure and evidence applicable to a court process do not ordinarily apply; that that is because the Inquiry is engaged in an investigation not a contest between parties to a litigation; that the procedure to be followed is at the discretion of the Chair; but that the requirement to act fairly (and to be seen to do so) remains[54].

97. The observer would want to consider any authoritative descriptions of the techniques typically used in an inquiry setting for securing witness evidence. In his helpful discussion of this matter in *Public Inquiries*[55], Jason Beer KC, identifies a number of the models conventionally applied. The author is careful to emphasise the very general nature of his summary. Of those discussed, the model described as hybrid most closely resembles (without perhaps being identical to) the procedure that the Chair has directed should be followed here. The observer would notice from Mr Beer's description that the hybrid model might involve some cross-examination by counsel to an inquiry[56].

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[52] PH-00018, 8/8
[53] See e.g. Beer, §§ 5.01 -5.03
[54] *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319; R v Lord Saville of Newdigate & Others [2000] 1 WLR 1855 at § 38
[55] See, e.g. the discussion in Beer, at §§ 5.177-5.189
[56] Beer, §5.186(iii)(2)

98. As the current discussion is about the appearance of balance and of fairness, the observer would be interested to understand the safeguards conventionally built into the hybrid model to enable and ensure these things. In that regard, the observer would notice that there are a number of possible advantages to the hybrid model described by Mr Beer. These include fairness to witnesses. The author notes[57]: "*It ensures fairness to witnesses … witnesses can be warned of likely areas of criticism in advance of giving evidence*".

99. There is a connection here to the Salmon principles.[58] The observer would consider that these are an authoritative source for understanding some of the key indicators of fairness in an inquiry. The second Salmon principle is in these terms: "*Before any witness who is involved in an inquiry is called as a witness, they should be informed of any allegations made against them and the substance of the evidence in support of them*." Although it is to be kept in mind that the present Inquiry proceeds under the 2005 Act as well as the 2007 Rules, it cannot seriously be doubted that fulfilment of the second Salmon principle continues to provide the means of securing an important stamp of fairness in any inquiry[59].

100. Finally, the observer would want to consider useful examples or discussions about the taking of evidence in an inquiry context. Sir William Macpherson's discussion within Volume 1 of the Lawrence Inquiry report[60] would be one source of information. The observer would notice the precautions taken in that inquiry to ensure fairness to witnesses, including notice of allegations and access to "all potentially relevant documents" prior to witnesses giving evidence[61]. It is important to notice that in the Lawrence Inquiry, the model for taking evidence was the so-called traditional one: an essentially adversarial process where all witnesses had legal representation. That was not the position in the present Inquiry: CPs were not given the automatic rights of participation associated with an adversarial process; many of the witnesses (including all of the COPFS ones) were not legally represented. The case for the precautions taken by Sir William Macpherson was acute.

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[57] § 5.188(5)
[58] Royal Commission on Tribunals of Inquiry 1966 (Salmon Report). See the discussion in Beer at § 9.10 *et seq.*
[59] Cf. Lord Scott, "Procedures at Inquiries – the Duty to be Fair." (1995) 111 LQR 596
[60] In particular at §§ 3.1-3.22. See also the discussion of the (so-called traditional model) procedure in that Inquiry in *Public Inquiries* at §§ 5.178-5.179.
[61] §§ 3.5 and 3.7

101. A second source of understanding, with a particular focus on the utility of the Salmon principles, might be found in Lord Scott's reflections on the so-called Arms to Iraq Inquiry[62]. The observer might find these observations of some interest:

> *"The overall problem, in my view, with the six Salmon 'cardinal principles' is that they are too heavily based on procedural requirements of fairness in an adversarial system. In an inquisitorial Inquiry, the questioning of the witnesses by the Inquiry is not an examination-in-chief, nor is it a cross-examination. Hearsay evidence may be sought. Opinions, whether or not expert, may be sought. Questions to which the questioner does not know the answer will frequently be asked--and, indeed, will be asked because the questioner does not know the answer. The techniques of questioning witnesses in adversarial litigation can be set aside. The questioning process is, or should be, a part of a thorough investigation to determine the truth. It is not a process designed either to promote or to demolish a 'case'".*

102. With the benefit all of this information, it would be possible for the observer to return to the description within the SPF Submission. It is certainly the case that counsel's questioning of Police, PIRC and Crown witnesses was very directed. The focus tended to be on the adducing of evidence that met aspects of what was described above as counsel's "case theory". The case theory usually appeared to align with the position of the family. The examination of Mr Graves would be an example of that. As in that example, the case theory was at times pursued with notable vigour, creating the impression that the purpose was to validate rather than test the theory. The questioning of Fiona Carnan would be a further example of that. In relation to a number of witnesses, techniques of cross-examination – specifically, closed leading questions – were regularly used. Long passages of evidence and documents were put to witnesses in very short order and questions were then put for their agreement.[63]

103. For a number of witnesses, only limited access to documents appears to have been permitted at the time of statements being provided. Criticisms were pursued in oral examination that had not been foreshadowed in Rule 8 questions. Ms Edwards presents a good example of these matters. The concerns about Mr Graves were not raised with her at the time of providing her statement; he was not mentioned in the Rule 8 questions; she was provided with a very limited amount of material along with

[62] Op cit.
[63] *See, e.g.,* the evidence of Fiona Carnan at 92/33/16 – 92/61/4

the Rule 8 question set. Prior to Ms Edwards giving oral evidence, the Inquiry indicated that it was considering issuing a further Rule 8 question set to her. To the knowledge of the COPFS Inquiry team that did not happen.

104. Serious allegations about individuals who had previously given evidence to the Inquiry were canvassed with later witnesses, without those allegations first having been put in evidence to the individuals themselves. The individuals concerned are not CPs; they are not represented in the Inquiry.

105. The observer would keep in mind the challenges faced by a public inquiry, and the need for flexibility as well as the requirement to proceed in a way that avoided unnecessary cost. The requirement to maintain the appearance of independence from state agencies is also an important consideration. *Some* of the techniques just mentioned might be useful methods for cutting through matters expeditiously, depending on the nature of the inquiry's remit and the issues under investigation. Whether this Inquiry was suited to that approach is a matter for consideration in closing submissions. The present question is whether the observer, concerned by the content of the meeting minutes, would find reassurance in the Inquiry's investigative procedures: was the approach to taking evidence at all times conspicuously inquisitorial and as fair and balanced as possible?

106. It cannot be denied that aspects of the approach described above have a strong resonance in adversarial proceedings. Notwithstanding that, the observer would notice that the overall process remained inquisitorial. That had certain consequences for CPs. Three aspects might be mentioned.

107. First, on 30 June 2022, the Chair requested that CPs did not take statements from witnesses. The Crown acceded to that request; they did not discuss the issues before the Inquiry with Crown witnesses. Secondly, Inquiry witness statements were provided very late in the day. In the case of Crown witnesses, many of them – including those of Crown Counsel and James Wolffe KC – were produced only after the Crown hearing commenced and important witnesses had completed their evidence. This was compounded by the fact that, despite sharing the first one or two Rule 8 questions with the COPFS Inquiry team, there came a point when the Inquiry determined that this was not to happen. Thus, for most Crown witnesses, the Crown Inquiry team were unaware of the questions raised by the Inquiry until disclosure of the witness statement. Thirdly, by direction issued on 23 January 2023, the Chair indicated that it would not be

appropriate for a CP representative, in effect, to object to evidence other than in exceptional circumstances.

108. In a situation where the witnesses themselves may have had limited access to materials or advance notice of issues, the foregoing features created an obvious risk of imbalance for CPs seeking to respond to a robustly directed approach. The observer is likely to see in the Inquiry's approach features of the adversarial system, but without the protections that that system builds in to ensure fairness and balance: early disclosure of evidence, notice of lines of attack, the automatic right to cross-examine, the right to object to questioning. These features were absent here. Having informed herself of the usual features of the inquisitorial system discussed above, the observer might be concerned by the possibility that missing from the Inquiry's approach to that system here were a number of elements that would usually be thought important to ensure the process had the stamp of balance and of fairness at all times.

109. The impact of all of this on the evidence is for another day. The key point just now is that the observer is unlikely to find her concerns about imbalance allayed upon consideration of the process adopted by the Inquiry for adducing evidence.

Conclusion

110. The Solicitor General's constitutional position in the context of the state's currently incomplete Article 2 investigation, as well as her role as an institutional CP in the present Inquiry, requires her to set out her position on the issues raised in the SPF Submission.

111. To repeat, there is no question of the present circumstances indicating anything other than good intentions on the part of the Chair. He is, and remains, a highly respected judge. It is a matter of profound regret that, as a result of the way in which the Inquiry has conducted itself, he finds himself in the present situation. Unfortunately, however, it is not possible to avoid the conclusion that there is force in the concerns raised within the SPF Submission.

112. The partial record of the meetings made available indicates significant and repeated discussion of evidence and of counsel's questioning of witnesses in the presence of the Chair. Present at the meetings were members of the family who, like their principal legal adviser, were witnesses before the Inquiry. Discussions took in the

evidence of the family but also that of other witnesses. The Chair requires to make assessments of the evidence of all of these individuals. Their interests do not align.

113. On more than one occasion there was discussion at meetings about witnesses having lied. There was discussion of the impact on the family of that, and of the events under investigation. There was a reminder of that impact and of its suggested cause – lying – shortly before the PIRC/Crown chapter of hearings. On occasion, the Chair is noted to have recorded the impact of the family's descriptions of events upon him. There is also a strong expression of support from one of the assessors. Overall, the minutes indicate a desire to gain and to then maintain the trust of the family, and the Inquiry is congratulated at the conclusion of its investigations for having achieved this.

114. An explanation from the Inquiry for the meetings rather confirms that it did indeed see the family's confidence in the process as being the key measure of the investigation's effectiveness. The fair-minded observer would question whether that was consistent with a stated intention to proceed in a way that was entirely impartial and independent of any person. The obligation within Article 2 to enable participation of the family did not require private discussions of the sort indicated. Overall, the observer is unlikely to be reassured by the Inquiry's response to the concerns raised.

115. It also seems unlikely that the observer would find the required reassurance in other aspects of the surrounding context. She is unlikely to find that the Inquiry has always been seen to take as balanced an approach as reasonably possible to its investigation; she is likely to see, on occasion, the appearance of support for one party's position; she is unlikely to find, on what she now knows of the meetings, that transparency and openness were always at the heart of the Inquiry.

116. The comparison with the Warren Fenty FAI is apt. It is also stark. In all the circumstances, and with repeated regret, this submission has come to the view that the concerns about apparent bias, about the risk of the appearance of influence on the Chair, and about unfairness require to be acknowledged as valid.

Alastair Duncan KC

22 May 2025

Police Investigations &
Review Commissioner

Solicitor to the Inquiry

Sadif Ashraf

By email only: [redacted]

22 May 2025

Dear Sadif,

PROCEDURAL HEARING
CONDUCT AND PROCEDURE OF THE INQUIRY BY THE CHAIR

I refer to the above and your correspondence of 29 April 2025 addressed to the Legal Representatives of Core Participants in this Inquiry.

In said correspondence you advise that" the Inquiry is holding a public hearing on 12 and 13 June 2025 on the fairness of the conduct and procedure adopted by the Chair in meeting with the families of Mr Bayoh." You further invite written submissions from Core Participants by 1pm on 22 May 2025 together with a list of authorities.

I write to advise that, following consideration of the written submission intimated on behalf of the Scottish Police Federation and others, no written submission will be made in this matter on behalf of the Commissioner. The Commissioner will, however, be represented at the public hearing by Counsel.

Yours sincerely

[redacted]

[redacted]

Head of Legal Services

In the matter of the Inquiries Act 2005

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

The Sheku Bayoh Inquiry

SUBMISSIONS OF COUNSEL TO THE INQUIRY

Representation:

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

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

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[1] Hereafter "the SPF".

[2] Hereafter "the Families".

[3] Hereafter "the Chief Constable".

[4] Hereafter "the Solicitor General".

[5] Hereafter "the CRER"

[6] Hereafter "CTI".

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

[13] Chief Constable, [28].

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

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

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

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

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

[15] Chief Constable, [26].

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

[17] SPF, [78].

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

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

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

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

[18] SPF, [78].

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

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

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

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

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

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

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

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

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

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

[21] SPF, [3].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] SPF, [10].

[27] See paragraphs 80 to 135 below.

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

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

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

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

Porter v Magill

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

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

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

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

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

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

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

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

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

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

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

Considerations of cost and inconvenience

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

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

Statements by applicants of a loss of confidence or faith

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

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

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

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

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

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

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

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

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

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

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

No allegation of actual bias

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

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

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

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

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

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

51. The SPF alleges that:[34]

> …the provision to the family of the s21 notices does not involve treating the Core Participants equally. Other Core Participants had asked for sight of the s21 notices. That request was, for a long time, refused. It was not known until now that the refusal applied only to the other Core Participants, and that the s.21 notices had been shared with the family. There is no good reason why those notices should have been shared with the family and yet denied to others. From the very outset, accordingly, the family was treated differently from other participants.
>
> [emphasis added]

52. This allegation of differential treatment – disclosing s21 notices to the family, and not to other Core Participants – is made in error:

    a. On 1st November 2021 the families, through their solicitor, asked the Inquiry for a "schedule of the s21 notices".[35]

    b. On 3rd November 2021 the Inquiry sent to the families' solicitor a 14-page schedule setting out an "overview of the s21 notices that we have issued to date".[36]

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[34] SPF, [15].

[35] PH-00033.

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

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

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

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

54. The SPF submit as follows:[38]

> The first day of the Inquiry then commenced with the showing of a professionally shot video, depicting the life of Mr Bayoh and involving drone footage over his home village in Sierra Leone. This was arranged, and paid for, by the Inquiry.
>
> It is accepted that such a presentation is not unheard of in public inquiries. This has been done, for example, in the COVID inquiries. However, in other instances where it has taken place, **the subject of such a "pen portrait" was incontestably the innocent victim.** In the present case, as must have been apparent, there is an acute dispute as to who was the wrongdoer: Mr Bayoh, or the officers who arrested him. Arranging and paying for a video tribute to the life of one Core Participant when it was known that other Core Participants did not accept the description of Mr Bayoh as the "victim" is again problematic – all the more so when the Chair had indicated in advance (privately) that this would "be a very strong start to the hearings.
>
> [emphasis added]

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

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

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

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

[39] Inquiry launched into the death of Anthony Grainger

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

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

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

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

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

[42] Inquiry launched into the death of Jermaine Baker

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

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

[45] Inquiry launched into the death of Azelle Rodney

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

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

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

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

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

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

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

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

[49] SPF, [22].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The nature and style of the examination of witnesses

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

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

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

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

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

Overall

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

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

[59] Solicitor General, [101].

[60] Solicitor General, [102].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[63] *Cf Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [1]: "Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction…she has attributes which many of us might struggle to attain to."
[64] And PIRC, who have filed no submissions.

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

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

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

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

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

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[65] SPF, [33].

[66] SPF, [61].

[67] SPF, [64].

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

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

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

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

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

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

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

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

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

77. Third, the fair minded and informed observer is not swayed by the subjective opinions of those that make the complaint about the apparent bias of the decision maker, instead looking for objective evidence – see e.g. *Helow* at [2]: "…the approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively."

78. Fourth, the fair minded and informed observer is not complacent either – see e.g. *Helow* at [2]: "…She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they

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

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

79. Fifth, the fair minded and informed observer knows that the context in which the decision falls to be made is critical and actively seeks information about that context – see e.g. *Helow* at [3]: "Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

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

The inquisitorial nature of a public inquiry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Consequences

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

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

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

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

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

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

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

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

Contrast with the SPF's approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[87] Hudgells announcement of 22 April 2025.

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

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

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

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

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

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

[88] Chair's Opening Statement in Nottingham Inquiry

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

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

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

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

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

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

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

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[91] Announcement of the Scottish Covid Inquiry

[92] Courier article of 6th October 2022

[93] Lord Brailsford appointed Chair of the Inquiry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Natural justice

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

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

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

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

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

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

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

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

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

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[101] CRER, [5].

[102] SPF, [62].

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

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

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

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

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

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

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

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

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

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

Kanda v Government of Malaya

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

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

132. At pp337-338 Lord Denning held:

> The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that Report without Inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and indeed before the Courts in Malaya proceeded on the footing that this depended on this further question: Was there a "real likelihood of bias", that is, "an operative prejudice, whether conscious or unconscious", on the part of the adjudicating officer Mr. Strathairn against Inspector Kanda? …
>
> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.
>
> If the right to be heard is to be a real right which is worth anything, it must carry with it a right **in the accused man** to know **the case which is made against him**. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L. C. in *Board of Education v. Rice* [1911] A.C. at p. 182 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that **the judge or whoever has to adjudicate** must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one **who has lost a case** will believe he has been fairly treated if the other side has had access to the Judge without his knowing…

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

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

Drawing the threads together

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

H. The position of the Assessors

The role performed by an Assessor

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

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

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

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

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

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

The position of Mr Bhatt

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

> At the same meeting, Mr Bhatt is noted as having said to the family that he was sad to hear what the family had to say, and that we (namely, the Inquiry) "don't have the magic wand to change the world but what we can is try to help achieve what you want". That assertion appears to have gone uncontradicted by anyone else at the meeting. That statement is redolent of partiality and unfairness. No other Core Participant has been told that the Inquiry will "try to help achieve what you want".
>
> [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

[110] PH-00007.

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

[emphasis added]

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

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

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

The position of Mr Fuller

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

[111] PH-00060.

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

145. Mr Paton then submits:

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

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

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

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

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

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

[114] Paton, page 4, second paragraph.

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

[116] PH-00007.

[117] PH-00059.

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

Jason Beer KC

5 Essex Chambers

Gray's Inn

London

2nd June 2025

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

Sheku Bayoh Public Inquiry

Conduct & Procedure Hearing – 12-13 June 2025

Note by Michael Fuller, Assessor

I totally refute any suggestion of bias or apparent bias. Apparent bias cannot be suggested without an evidential basis for it. The meeting minutes do not disclose any basis for asserting that there is any bias or apparent bias on my part.

Michael Fuller

29 May 2025

Sheku Bayoh Public Inquiry

Conduct & Procedure Hearing – 12-13 June 2025

Note by Raju Bhatt, Assessor

My contribution at the Chair's meeting with the family of Sheku Bayoh on 21 November 2022 has been the subject of some comment in the submissions on behalf of some core participants.

In particular, much has been made of my remarks which are recorded in the minutes as follows: "*What we can do is support you – don't have the magic wand to change the world but what we can is try to help achieve what you want.*"

I would draw attention to the context of my remarks and, in particular, the preceding contributions on behalf of the family as recorded in the minutes, especially Ade Johnson's contribution explaining the family's objective in relation to the inquiry: "*All asking for is to get to the truth*."

That is the objective which is the obvious subject matter of the remarks attributed to me and recorded in the minutes as quoted above.

Such a reading is also entirely consistent with the concluding words attributed to me in the minutes: "*Process is stressful. Hearing will have been very draining. In order to get to the bottom – this is the process we have.*"

In order to avoid any doubt, and for the sake of completeness, I can confirm that the family's stated objective of getting to the truth of what happened to Sheku Bayoh was precisely what I had in mind when I said to them that the inquiry could support them and try to help them achieve what they wanted, i.e. the truth.

I should add that I reject any suggestion of apparent or actual bias on my part in the performance of my role as an assessor in the inquiry: at all times, I have sought to conduct myself with an open mind, and my sole motivation has been to help the inquiry to fulfil its terms of reference in the hope of preventing future deaths in the circumstances that Sheku Bayoh came by his death.

Raju Bhatt

29 May 2025

Conduct and procedure hearing

Note by Chair

Importance of family participation

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

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

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

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

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

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

[1] PH-00066

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

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

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

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

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

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

November 2020 - November 2021

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

Meeting 4 November 2021

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

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

[2] PH-00064; PH-00064(a)
[3] PH-00063; PH-00063(a)
[4] PH-00001; PH-00020

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

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

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

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

[5] PH-00002
[6] PH-00002
[7] PH-00006

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

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

> "I would expect certain members of the family to give evidence in hearing three in relation to what happened after the death and in the course of the investigation into it…"[9]

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

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

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

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[8] PH-00002
[9] Day 1/3/13
[10] SBPI-00236; SBPI-00248; SBPI-00233; SBPI-00231; Day 34
[11] PH-00002
[12] PH1/7/15
[13] PH-00020

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

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

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

[14] PH-00002
[15] PH-00003; PH-00004; PH-00005
[16] PH-00003; PH-00004; PH-00005
[17] PH-00003; PH-00004; PH-00005

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

[22] In the course of the meeting on 4 November 2021 I referred to an impasse in which the Crown had refused to consent to disclosure of documents by Police Scotland and that that had been resolved.[19] This was the issue discussed in the course of my meeting and telephone call with the Solicitor General, noted above. At the meeting on 24 September 2021, which was held remotely, I was not accompanied by any member of the Inquiry team. My speaking note is available.[20] A similar speaking note is available in respect of my telephone conversation on 4 October 2021.[21]

Cancellation of meeting 24 February 2022

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

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

[18] PH-00040(b)
[19] PH-00002
[20] PH-00064(a)
[21] PH-00063(a)
[22] PH-00010

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

Meeting 13 April 2022

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

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

Meeting 21 November 2022

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

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

[23] PH-00006
[24] PH-00002
[25] PH-00006
[26] PH-00007

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

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

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

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[27] 23/5/5
[28] PH-00007
[29] PH-00060
[30] PH-00007

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

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

[31] In May 2022 I considered an application by the legal representatives of Alan Paton, a retired police officer who had been an attending officer on 3 May 2015, for the use of special measures for taking his evidence, namely, that his evidence should be pre-recorded and later played in the hearing room and broadcast. The application was supported by medical evidence. The legal representatives of the families opposed the application. Having considered the application and the opposition of the families I granted the application.[33] The evidence of Alan Paton was pre-recorded on 13 June 2022. The tape was played and broadcast on 21 June 2022.[34]

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

[31] PH-00007
[32] PH-00007
[33] Decision by Chair on restriction order application
[34] 20/1/4

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

[33] Zahid Saeed gave evidence on Friday, 13 May 2022.[36] In March 2022 he had provided a written statement to the Inquiry.[37] In the course of his evidence he repeatedly claimed not to remember things about which he had given evidence in the written statement only two months before. Senior counsel to the Inquiry sought to put some pressure on him and in the course of that said to him, "The biggest help you could be to your friend, your brother [Zahid Saeed referred to Sheku Bayoh as his "brother"[38]], Shek, right now is to help the Chair understand some of what you said in your statement and that is the biggest help you personally could be to him and I would like you to help".[39] Mr Saeed responded by saying "To who? To Shek? Or to the inquiry?" Counsel then said, "the biggest help you could be to Shek right now is to tell the Chair the whole truth about everything that happened so he can consider it all". Mr Saeed continued to fence with the questions, trying to avoid answering them. I formed the view that Mr Saeed was prevaricating. I warned him about this and directed him to answer the questions.[40] He did then begin to answer questions but after a time resorted to claiming that he could not remember. Senior counsel to the Inquiry indicated that she wished to end the examination and explore whether his evidence could be taken in an alternative environment or other arrangements might be put in place.[41] I acceded to that motion. I was also mindful of the limited powers that the chair of an inquiry has in relation to dealing with prevaricating witnesses.

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[35] PH-00007
[36] 4/1/10
[37] SBPI-00071
[38] 4/3/14
[39] 4/25/20
[40] 4/27/13
[41] 4/31/11

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

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

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

[42] PH-00007
[43] PH-00007
[44] PH-00007

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

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

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

[39] At the conclusion of the playing of the pre-recorded evidence of Alan Paton on 21 June 2022 I heard an application by the legal representative of the families for questioning under rule 9.[48] I permitted a number of lines of questioning and ordered that these would be pursued by counsel to the Inquiry in a further pre-recorded hearing. That hearing took place on 29 September 2022.

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

[45] PH-00007
[46] PH1/26/13
[47] PH-00016
[48] 20/194/20

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

[41] Later that day Kadi Johnson was quoted on the BBC website as stating:

> "We are so upset. We came here today to hear his evidence. We feel he has special treatment over everybody else, and we are asking, why is that? They promised us that we would be at the centre of this but at the moment we are not feeling like that. We have waited seven years. Why should we wait any longer?"[50]

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

Meeting 18 January 2024

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

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

This is a reference to submissions made by senior counsel for the Chief Constable. On Day 2, 11 May 2022 senior counsel for the Chief Constable in her opening statement said:

[49] 32/1/3
[50] PH-00065
[51] PH-00008

> "The Chief Constable was powerfully affected by Kadi's statement yesterday that she does not feel safe in Scotland, that she fears for her children and for her nieces and nephews."[52]

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

> "73. The second issue which is a question for the police service as an organisation, however, was a matter which, as part of the anti-racist strategy, needed to be addressed by the Chief Constable.
>
> 74. The Chief Constable made a commitment to listen to the experience of the families of Mr Bayoh and members of the community. Having heard the evidence to date, he was satisfied that a proper and fair assessment of the organisational learning and awareness as at 3 May 2015, in the recently formed Police Service of Scotland, was such that there was a systemic issue. This was seen in the evidence of the families of Mr Bayoh, the evidence that some diversity training did not appear to have been retained and, importantly, in the fact that there appeared to be a lack of awareness of some officers of the importance of not treating everyone the same. That approach to equality fails to address cultural needs, sensitivities and concerns of individuals. That is an institutional matter. It means that it is a failing of the organisation and not individual officers."[53]

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

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[52] 2/32/9
[53] SBPI-00345
[54] PH-00008

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

Meeting 5 December 2024

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

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

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

[55] PH-00008
[56] PH-00008
[57] PH-00009
[58] PH-00009
[59] PH-00009

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

> "A spokeswoman for the Sheku Bayoh Inquiry said Lord Bracadale had stated throughout that the families of Sheku Bayoh were 'at the heart of' the Inquiry.
>
> An important part of this commitment is providing opportunities for them to meet the chair from time to time. Lord Bracadale held a private meeting with members of the family today."[60]

References to evidence in the meetings

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

Application for extension of terms of reference

[50] On 13 June 2024 members of the families of Sheku Bayoh met the Deputy First Minister. They requested the Deputy First Minister to extend the terms of reference to include the prosecutorial decision. I was unaware of their intention to make such a request. On 13 August 2024 the Deputy First Minister wrote to me indicating that she wished to have a discussion with me about the request made at her meeting with members of the families.[64] I agreed to meet the Deputy First Minister on 5 September 2024.[65]

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[60] PH-00017
[61] PH-00002
[62] PH-00006
[63] PH-00009
[64] PH-00054
[65] PH-00025

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

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

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

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[66] PH-00053
[67] COPFS-00024

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

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

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

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[68] 97/56/5
[69] 99/76/10; 98/91/5
[70] 99/53/5; 98/56/3; 98/62/19
[71] 100/77/24
[72] PH-00025

> "**Q** … was it ever explained to you by the Crown that it appeared from the eyewitness evidence that there were different factual versions emerging of what actually happened in Hayfield Road and they could not all be true and accurate, but different witnesses said different things and that it would not be for you to make up your mind which version you preferred.
> **A** Yes, I took into consideration all the - - I had access to all the witness statements so I used those to blend and look at the timeline to make my own - - form my own opinions".[73]
> …
> "**Q** Looking at the top of page 8 [COPFS-00008], it appears that the Crown has set out perhaps two factual scenarios, two possibilities here, one that an officer believed to be PC Walker appeared to be lying lengthwise on top of Mr Bayoh or that the same officer appeared to be lying beside Mr Bayoh. Can you help the Chair understand what…you understood the crown to be asking you in regard to those two factual possibilities?
> **A** I believe that was them - - their review of the CCTV footage once the compilation, the timeline compilation had been done, that was their interpretation of two possible opinions on that video and I was asked or I was under the impression from that I was asked as to which one I believed was correct or if I had a different view, to express that opinion".[74]

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

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

[73] 120/20/3
[74] 120/21/22
[75] PH-00055
[76] PH-00032
[77] PH-00057

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

[57] The letters dated 16 September 2024 and 3 October 2024 from Mr Anwar to the Deputy First Minister were also disclosed to the Inquiry for the first time on 28 January 2025.[79]

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

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

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

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

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[78] PH-00028
[79] PH-00030; PH-00031
[80] PH-00026
[81] PH-00027

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

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

[62] On 16 January 2025 I wrote to the Deputy First Minister noting these developments and assuring the Deputy First Minister that if she was otherwise minded to grant the extension the Inquiry would be able to carry out the work despite the difficulties outlined in my letter dated 18 November 2024.[84]

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

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

[82] PH-00051
[83] PH-00056
[84] PH-00058

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

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

> "These considerations, without reference to other aspects of the public interest, *might tilt the balance* in favour of granting an extension."[87]

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

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

Evidence of Martin Graves

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

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[85] PH-00029
[86] PH-00027
[87] PH-00029
[88] Days 118, 119 and 120

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

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

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

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

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

[89] 23/3/1

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

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

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

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

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

Concern about the manner in which evidence has been adduced

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

[90] PH-00062(a)
[91] Questioning of witnesses

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

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

The campaign by the families

[92] SBPI-00335
[93] PH-00051

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

No substantive decision on evidence

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

Alastair P Campbell
The Rt Hon Lord Bracadale
2 June 2025