Application for recusal of the Chair and the Assessors in the Sheku Bayoh Inquiry

Decision by The Rt. Hon. Lord Bracadale, Chair of the Inquiry

The decision

[1] For the reasons set out below I refuse to recuse myself and I refuse to terminate the appointments of the assessors Raju Bhatt and Michael Fuller (the assessors).

The recusal application

[2] The Scottish Police Federation, PC Craig Walker and Nicole Short (the applicants) lodged a written application moving me to recuse myself as Chair of the Sheku Bayoh Inquiry (the Inquiry) on the ground that my conduct in meeting members of the families of Sheku Bayoh has given rise to the appearance of bias (the recusal application).[1] It is also contended that these meetings have given rise to procedural unfairness arising from a breach of natural justice.

[3] I met members of the families of Sheku Bayoh on five occasions between 30 November 2020 and 5 December 2024 (the meetings):

- 4 November 2021,
- 13 April 2022,
- 21 November 2022,
- 18 January 2024, and
- 5 December 2024.

At the meetings I was accompanied by counsel and solicitor to the Inquiry and members of the Inquiry team. The assessors attended the meeting of 21

[1] PH-00023

November 2022. The members of the families of Sheku Bayoh were accompanied by their legal representatives.

[4] The recusal application also sought recusal of an assessor, Raju Bhatt. The applicants stressed that they were not alleging actual bias on my part or that of Raju Bhatt.

Background

[5] The Inquiry was set up under the Inquiries Act 2005 (the 2005 Act) on 30 November 2020. I was appointed by the Scottish Ministers to chair the Inquiry. Between May 2022 and October 2024 evidence was introduced in the Inquiry in a series of hearing blocks.[2] All the evidence has now been introduced. In June 2024 the families of Sheku Bayoh requested the Scottish Ministers to extend the terms of reference. In February 2025 the Scottish Ministers refused the request. Closing submissions, which had been set down for December 2024, required to be postponed pending the outcome of the request and, in the light of the concerns raised in the current recusal application, have not yet been heard.

[6] The terms of reference of the Inquiry are in the following terms:

> "The aim of this Inquiry is twofold: firstly, the Inquiry will establish the circumstances surrounding the death of Sheku Bayoh in police custody on 3 May 2015 and make recommendations to prevent deaths in similar circumstances, as would have been required under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.
>
> Secondly, the Inquiry will assess and establish aspects of the case that could not be captured, or fully captured through the FAI process, namely (a) the post incident management process and subsequent investigation and make any recommendations for the future in relation to these; and (b) the extent (if any) to which the events leading up to and following Mr Bayoh's death, in particular the actions of the officers involved, were

[2] See annex 2.

affected by his actual or perceived race and to make recommendations to address any findings in that regard.
The remit of the Inquiry is accordingly:

- to establish the circumstances of the death of Sheku Bayoh, including the cause or causes of the death, any precautions which could reasonably have been taken and, had they been taken might realistically have resulted in the death being avoided, any defects in any operating models, procedures and training or other system of working which contributed to the death and any other factors which are relevant to the circumstances of the death;

- to make recommendations, if any, covering the taking of reasonable precautions, improvements to or introduction of any operating models, procedures and training, or other system of working, and the taking of any other steps which might realistically prevent other deaths in similar circumstances;

- to examine the post-incident management process and the investigation up to, but not including, the making by the Lord Advocate of the prosecutorial decision communicated to the family of Sheku Bayoh on 3 October 2018 (and the Victims' Right to Review process that was undertaken by the Crown Counsel in 2019), including: (i) the effectiveness of procedures for gathering and analysing information, (ii) the securing and preserving of evidence, (iii) the roles and responsibilities of those involved, (iv) liaison with the family of the deceased and (v) compliance with any relevant Convention rights; and make recommendations, if any, for the future in respect of these matters;

- to establish the extent (if any) to which the events leading up to and following Mr Bayoh's death, in particular the actions of the officers involved, were affected by his actual or perceived race and to make

recommendations to address any findings in that regard; and

- to report to the Scottish Ministers on the above matters and to make recommendations, as soon as reasonably practicable."

The hearing

[7] I considered that a motion for recusal of the chair of a public inquiry required to be examined thoroughly and publicly. It would be necessary to give all core participants the opportunity to make submissions and comment on the submissions of other core participants and counsel to the Inquiry. In addition, core participants should have the opportunity to comment on the factual position set out in notes prepared by me and each of the assessors. Accordingly, I appointed an oral hearing on 12 June 2025[3] and put in place arrangements to provide all core participants with an opportunity to make written submissions.[4]

[8] As counsel to the Inquiry had attended the meetings I appointed Jason Beer KC as senior counsel to the Inquiry for the purposes of dealing with the recusal application. He lodged written submissions and made oral submissions at the hearing.[5]

[9] Between the receipt of written submissions and the hearing on oral submissions I issued a note setting out my position on the facts giving rise to the recusal application (the Note) .[6] That Note should be treated as part of this decision.

[10] The following core participants submitted written submissions supporting the recusal application: PCs Kayleigh Good and Alan Smith and DC Ashley Tomlinson;[7] PCs Daniel Gibson and James McDonough and Sgt Scott Maxwell;[8] and Chief Superintendent Patrick Campbell.[9] Alan Paton supported the recusal application and, in addition, sought the recusal of the other assessor, Michael

[3] The transcript and footage from the oral hearing is available on the Inquiry's website.
[4] See annex 1 for a list of the core participants to the Inquiry and those that made oral submissions.
[5] PH-00068
[6] See annex 3.
[7] PH-00038
[8] PH-00039
[9] PH-00044

Fuller.[10] Senior counsel for PCs Good and Smith and DC Tomlinson and senior counsel for Alan Paton made oral submissions.

[11] The Solicitor General submitted that the meetings satisfied the test for apparent bias.[11] In written submissions the Solicitor General made a number of criticisms of the way in which the evidence had been adduced. I addressed these at paragraphs [66]-[75] of my Note. In oral submissions, however, senior counsel for the Solicitor General indicated that these were matters that would be addressed in closing submissions in the Inquiry rather than in the context of the recusal application. In these circumstances it is not necessary to explore this aspect further in this decision.

[12] Garry McEwan and Chief Superintendent Conrad Trickett reserved their positions in relation to the recusal application.[12]

[13] The Chief Constable made written submissions followed by a letter dated 6 June 2025.[13] The Chief Constable did not invite me to recuse myself. She submitted that the record of the meetings did not show apparent bias on the part of Raju Bhatt nor was there any basis for asserting bias on the part of Michael Fuller. The Chief Constable submitted that while her strong preference was for the Inquiry to continue, the concerns raised by the applicants required to be considered. It would be for the representatives of the applicants to submit, if and why, the Note by the Chair and/or the submissions on his behalf by senior counsel to the Inquiry did not allay their concerns. Counsel for the Chief Constable did not make oral submissions.

[14] The Police Investigations and Review Commissioner (PIRC) made no written or oral submissions.[14]

[15] In written submissions and oral submissions the Coalition for Racial Equality and Rights (CRER) opposed the recusal application, submitting that the fair-minded

[10] PH-00040
[11] PH-00045
[12] PH-00042; PH-00043
[13] PH-00041: PH-00073
[14] PH-00046

and informed observer would consider that there was no real possibility that the Chair or the assessors were biased.[15]

[16] The families of Sheku Bayoh opposed the recusal application.[16] Senior counsel for the families submitted that a public inquiry was different from a court. The process was inquisitorial rather than adversarial. There were different duties incumbent on the chair in respect of the rights of the families under article 2 of the European Convention on Human Rights. In addition, senior counsel for the families advanced a further submission which I address below.

Submission by the families of Sheku Bayoh on the test to be applied

[17] Senior counsel for the families advanced a submission on the test to be applied. Section 9(1) of the 2005 Act provides:

> "(1) 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."

Section 12(2) of the 2005 Act provides:

> "(2) A member of an inquiry panel may at any time resign his appointment by notice to the Minister."

Section 12(3)(c) of the 2005 Act provides:

> "(3) The Minister may at any time by notice terminate the appointment of a member of an inquiry panel–
> …
> (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,

[15] PH-00036
[16] PH-00037

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

[18] Senior counsel for the families submitted that whilst in terms of section 12(2) of the 2005 Act a member of an inquiry panel may at any time resign his appointment by notice to the minister, 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 one of the grounds in section 12(3)(c) of the 2005 Act. To do otherwise would be to usurp the statutory function as set out in section 9 of the 2005 Act and to remove himself from office in circumstances not required or anticipated by the 2005 Act. The test, therefore, was not the common law test of apparent bias but the statutory test that would have been applied by a minister before removing the chair from office.

[19] Senior counsel to the Inquiry submitted that I should not accede to this aspect of the submission on behalf of the families. First, section 12(2) of the 2005 Act is widely drawn and apt to permit a member of an inquiry panel to resign for a broad range of reasons, including because the chair was satisfied that he should recuse himself on the ground of apparent bias. Second, the powers set out in section 12(3)-(7) of the 2005 Act are exercisable by the minister and set out the grounds on which they can be exercised by the minister, not by members of the inquiry panel. Third, there was no express link drawn between the exercise of the power of resignation under section 12(2) of the 2005 Act and the exercise of the powers by the minister in section 12(3)-(7) of the 2005 Act.

[20] I consider that the submissions of senior counsel to the Inquiry are well-founded and that if I was satisfied, applying the common law test, that apparent bias was demonstrated, it would be competent for me to recuse myself.

Submissions in support of the recusal application

Apparent bias

[21] The applicants and those core participants who support them submitted that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that I was biased. While the written submissions

examined each of the meetings in detail, the main features which, it was submitted, would give rise to that conclusion may be summarised as follows:

- The meetings were private and were not intimated to other core participants. The record of the meetings was incomplete.
- At the first meeting members of the families of Sheku Bayoh were given an opportunity to give an account of their experience which was of an evidential nature. That was followed by letters sent to members of the families indicating the impact of the accounts on me. In addition, at the meeting on 13 April 2022 the accounts were described as “very powerful”. In other meetings there was reference to the evidence.
- The families of Sheku Bayoh were campaigners, whose objective, as with all campaigners, was to influence a decision-maker. In the course of the meetings opportunities were taken by members of the families to advocate and seek to persuade me in favour of their position.
- On a number of occasions inappropriate things were said by members of the families and their solicitor. It would be impossible to guard against such things, but I did not intervene to warn them against this behaviour or indicate that it was inappropriate.
- The meetings took place at various stages during the hearings on evidence.

Breach of natural justice: the right to be heard

[22] In the submissions on behalf of the applicants it was also contended that the meetings gave rise to procedural unfairness arising from a breach of natural justice. The rules of natural justice applied to the Inquiry. It was submitted that private meetings with the party in any proceedings whether inquisitorial or otherwise were fatal to the process. No one who has lost a cause will believe he has been fairly treated if the other side has had access to the judge without his knowing. That was particularly so where, as here, the discussion involved evidential matters and expressions of sympathy toward the party with whom the meeting had taken place.

[23] Senior counsel for PCs Good and Smith and DC Tomlinson contended that repeated private meetings gave rise to apparent bias and, in addition, were procedurally unfair to the officers and therefore the proceedings were vitiated. Both were essentially labels or stickers placed upon the same underlying complaint of repeated secret meetings with one party behind the back of the others. The interests of the officers as individuals were so grave that the context forbade private secret meetings with the families running in parallel with the Inquiry. There was nothing exceptional within the inquiry context which relieved the Inquiry from the application of the ordinary rules of natural justice and fairness ordinarily demanded in an administrative and quasi-judicial context.

Discussion and decision

Apparent bias: *Porter* v *Magill* test

[24] The test for apparent bias is that set out 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 was a real possibility that the tribunal was biased."

Senior counsel to the Inquiry identified a number of features of the test none of which I understood to be in dispute.

[25] First, there was a two-stage process, the first stage of which was to ascertain the relevant facts which have a bearing on the suggestion that the decision-maker has the appearance of bias. The second stage involved asking whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased. The application of the second stage was objective.

[26] Second, 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 Ltd* v *Reshat Lusha* [2018] EWCA Civ 468, at paragraph [17]; and *Secretary of State for the Home Department* v *AF (No2)* [2008] 1 WLR 2528, at paragraph [53]).

[27] Third, the application of the test for apparent bias is intensely fact sensitive (see e.g. *The Belize Bank Limited* v *The Attorney General of Belize and others* [2011] UKPC 36 at paragraph [73] (*per* Lord Kerr)).

[28] Fourth, considerations of inconvenience, cost and delay are irrelevant (*AWG Group Ltd and another* v *Morrison and another* [2006] 1 WLR 1163 at paragraph [29]; *Marie Joseph Charles Robert Lesage* v *The Mauritius Commercial Bank Ltd* [2012] UKPC 41 at paragraphs [59]-[60]).

[29] Fifth, 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 paragraph [40]).

[30] Sixth, 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. *Locabail (U.K.) Ltd.* v *Bayfield Properties Ltd. And Another* [2000] QB 451 at paragraph [19]).

[31] In addition, it is necessary to consider the judge's conduct in the proceedings as a whole: *Sarabjeet Singh* v *Secretary of State for the Home Department* [2016] 4 WLR 183, *per* Lord Justice Davis at paragraph [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".

[32] In *Re AZ (A Child)* [2022] 4 WLR 78 the Court of Appeal held 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 paragraph [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 *In re G (A Child)* [2015] EWCA Civ 834 at [52],

> "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."

The qualities of the fair-minded and informed observer

[33] In *Helow* v *Advocate General for Scotland* 2009 S.C. (H.L.) 1 at paragraph [1] Lord Hope of Craighead described the fair-minded and informed observer:

> "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."

He went on to describe her qualities:

> "[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."

The approach of the fair-minded and informed observer

[34] I now turn to the approach of the fair-minded and informed observer in the circumstances of the Inquiry. The fair-minded and informed observer would examine the facts relating to the contents of the meetings themselves together with all the background and contextual facts. Having done so she would form her conclusion.

The inquisitorial nature of a public inquiry

[35] The fair-minded and informed observer might begin by understanding the inquisitorial nature of a public inquiry. In particular, she would note that a public inquiry has features which are in marked contrast to the approach in conventional adversarial proceedings, including the following.

No pleadings

[36] In a civil action the parties draft pleadings in order to identify the relevant issues for proof. In criminal proceedings the Crown Office and Procurator Fiscal Service (COPFS) prepare an indictment which forms the basis of the trial. There are no similar documents in a public inquiry. The inquiry itself determines, within the

scope of its terms of reference, the lines of inquiry that it wishes to pursue and gathers evidence that is potentially relevant to those lines of inquiry.

Control of the proceedings

[37] In contrast to the adversarial process where parties control what is placed before the court, the chair is in control of the process. Senior counsel to the Inquiry drew attention to evidence to the justice select committee given by the former Chief Coroner of England and Wales in relation to inquest proceedings:

> "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."[17]
>
> [emphasis added]

No findings of civil or criminal liability

[38] Section 2(1) of the 2005 Act provides that a public inquiry does not make findings as to civil or criminal liability. An inquiry does not determine the legal rights of any person. In the context of an inquest, which bears many similarities to

[17] Evidence to Justice Select Committee, HC 490, 30 January 2024, response to question 19.

a public inquiry, in *R* v *South London Coroner ex parte Thompson & Others* (1982) 126 SJ 625 Lord Chief Justice Lane said:

> "Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt... In an inquest it should never be forgotten that 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 defends, the Judge holding the balance or the ring, whichever metaphor one chooses to use."

Inquiry not bound by the rules of evidence

[39] A public inquiry is not bound by the rules of evidence. Counsel to the Inquiry referred to a passage in *Ross* v *Costigan* (1982) 41 ALR 319 at paragraphs [334]-[335]:

> "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. <u>It is not bound by rules of evidence</u>."
>
> <u>[emphasis added]</u>

The passage was cited with approval in *Sir William Randolph Douglas and Others* v *Sir Lynden Oscar Pindling* [1996] AC 890. Recently, in *R (Cabinet Office)* v *Chair of the UK Covid-19 Inquiry* [2024] KB 319 the Divisional Court held at paragraph [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 <u>it is not bound by the rules of evidence</u>."
>
> <u>[emphasis added]</u>

No standard of proof

[40] A public inquiry does not require to adopt any particular standard of proof. Some public inquiries have adopted a flexible approach in making findings in fact.

Disclosure by an inquiry

[41] Using the provisions under section 21 of the 2005 Act and rule 8 of the Inquiries (Scotland) Rules 2007 (the 2007 Rules) a public inquiry ingathers documents and information. After assessing and analysing the material it may disclose some, but not all, of it to the core participants. It is for the inquiry to decide what is relevant and should be disclosed.

Communication with core participants

[42] In conventional adversarial litigation where parties communicate with the court it is necessary for them to disclose the communication to other parties. In a public inquiry the inquiry may communicate with individual core participants without any involvement of other core participants. This reflects the inquisitorial nature of the process and the status of core participants who are not parties in the conventional sense. Such communications may take the form of written communications or meetings and may involve the chair personally.

The way in which evidence is adduced

[43] The way in which a public inquiry adduces oral evidence is quite unlike the approach taken in conventional litigation. The inquiry decides which witnesses should give oral evidence. Core participants cannot call their own witnesses. In relation to the examination of witnesses, rule 9(1) of the 2007 Rules provides:

> "Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only–
>
> (a) the inquiry panel;
>
> (b) counsel to the inquiry;
>
> (c) if counsel has not been appointed, the solicitor to the inquiry; or
>
> (d) persons entitled to do so under paragraphs (2) to (4),
>
> may examine that witness."

[44] Where counsel to the inquiry have been appointed they will examine the witness. Core participants have no right to ask questions. They must apply to examine a witness and justify why they should be permitted to do so (rule 9(2)-(5) of the 2007 Rules).

[45] This is to be contrasted with the rights enjoyed in litigation. It is an aspect of natural justice in adversarial proceedings that the parties should be given an opportunity to call their own witnesses and cross-examine the opposing witnesses.

Fatal accident inquiry

[46] There are significant differences between the conduct and procedure of an inquiry under the 2005 Act, and that of a fatal accident inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the 2016 Act). While a fatal accident inquiry is described as inquisitorial in the sense that it does not make findings of liability, it retains in many respects the aspects of a court. Section 19(1) of the 2016 Act provides:

> "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."

Section 20(3) of the 2016 Act provides:

> "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."

[47] In a fatal accident inquiry the procurator fiscal carries out the investigation and presents the evidence. The fact that the present Inquiry is required by its terms of reference to examine issues which would ordinarily be examined in a fatal accident inquiry does not affect the differences in conduct and procedure which characterise a public inquiry under the 2005 Act.

The application of these features in the Inquiry

[48] The fair-minded and informed observer would wish to understand how these features, which are common to all public inquiries, were manifested in the Inquiry.

[49] I appointed a number of individuals and organisations as core participants. They are not parties in the sense understood in adversarial proceedings. They are individuals or organisations who meet the criteria of rule 4(2) of the 2007 Rules:

> "(2) In deciding whether to designate a person as a core participant the chairman must have particular regard for the desirability of including as core participants persons who–
> (a) played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;
> (b) have a significant interest in an important aspect of the matters to which the inquiry relates; or
> (c) may be subject to significant or explicit criticism–
> (i) during the proceedings at the inquiry, or
> (ii) in the report (or any interim report) to be delivered under section 24 of the Act (submission of reports)."

As core participants they would be able to make opening and closing submissions; participate in suggesting lines of investigation to be pursued by the Inquiry; engage in the procedure under rule 9 of the 2007 Rules allowing them to propose lines of questioning for counsel to the Inquiry to pursue; and seek leave to examine witnesses.

[50] I invited core participants to suggest lines of investigation which the Inquiry could pursue as part of its inquisitorial process. The Inquiry followed leads which arose out of its investigations, including those suggested by core participants.

[51] The Inquiry divided the subject matter of the terms of reference into chapters. It carried out investigations in relation to each chapter. This involved using the powers under section 21 of the 2005 Act to recover documents from core participants and others. The result was the ingathering of tens of thousands of documents. The Inquiry analysed and assessed the material and decided which

documents to disclose to core participants. Of the large amount of material ingathered only a limited amount was disclosed to core participants.

[52] The Inquiry took statements from witnesses either through a process of interview by the Inquiry solicitors or by a request for a written statement from a witness under rule 8 of the 2007 Rules. I discouraged core participants from obtaining their own statements. On 30 June 2022 I made the following statement:

> "I would like to remind all core participants that it is for the Inquiry to conduct the investigation into the terms of reference. I expect as part of the commitments given by all core participants to co-operate with the Inquiry on that investigation, including the taking of statements from current or prospective witnesses, will be a matter for my Inquiry team alone."[18]

I also discouraged core participants from instructing their own experts.

[53] Counsel to the Inquiry decided which witnesses should give oral evidence. In relation to the examination of witnesses I put in place a protocol based on the provisions of rule 9 of the 2007 Rules. It included an arrangement whereby before a witness gave evidence core participants could propose lines of questioning to counsel to the Inquiry. In the event that counsel to the Inquiry were not willing to pursue these the core participant could approach the Chair directly without reference to other core participants. After counsel to the Inquiry had examined a witness I gave an opportunity for core participants to apply to examine the witness. There was no right of cross examination and no right for core participants to call their own witnesses.

[54] As is common in public inquiries these processes involved communications between the Inquiry and individual core participants without involving any other core participants in the exercise. This extended to core participants inviting me to make a ruling on certain matters without reference to other core participants.

[18] PH-00050

[55] In oral submissions at the hearing senior counsel to the Inquiry drew attention to examples of this in the Inquiry. By letter dated 15 September 2021 the solicitor for the Chief Constable wrote to the solicitor to the Inquiry in relation to a procedural issue of disclosure of sensitive material to the Inquiry. The heading is "FOR THE URGENT ATTENTION OF THE CHAIR, THE Rt. HON LORD BRACADALE" and the first paragraph states, "I shall be obliged if you would place this letter before the Chair, and confirm when that has taken place."[19] The letter contains submissions to me on important matters of substance and concludes "I respectfully submit same for consideration and determination by the Chair. I await hearing from you at your convenience, once the Chair has had an opportunity to consider matters." Senior counsel to the Inquiry correctly described this as a unilateral, private communication to me that was not copied to any other core participant. In a subsequent letter dated 1 October 2021 the solicitor for the Chief Constable stated, "I am obliged to the Chair for the careful consideration which has been given to the matters set out in my said letter". [20] After making a number of further submissions the solicitor for the Chief Constable concludes "I respectfully submit same for consideration and determination by the Chair."

[56] Another example of a unilateral communication between a core participant and the Inquiry is a meeting which I had with the Solicitor General on 24 September 2021 and a subsequent telephone call at her request on 4 October 2021. In these conversations issues of substance in relation to ingathering of documents and the running of the Inquiry were discussed.

[57] These examples illustrate that there is nothing unusual about a core participant communicating directly with the chair of a public inquiry. The fair-minded and informed observer would note that within the four walls of the Inquiry itself meetings and communications between core participants and me were not unique to members of the families of Sheku Bayoh. She would note that in the examples cited above the Chief Constable had sought a determination from me

[19] PH-00041(b)
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on a matter of substance and that I had met with the Solicitor General to discuss matters of substance.

The practice of other inquiries in relation to the chair conducting private meetings with families of deceased persons

[58] The fair-minded and informed observer would have regard to the practice in other public inquiries of the chair meeting with the families of deceased persons. At paragraphs [104]-[120] of his submissions senior counsel to the Inquiry identified a number of public inquiries in which the chair had privately met with the families of the deceased. It is convenient to quote this passage from his submissions:

> **"**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,[21] was subsequently announced publicly on 22nd April 2025.[22] 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:[23]
>
> > 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.

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

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

[23] Hudgells announcement of 22 April 2025.

> …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).

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.[24]

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.

[24] Chair's Opening Statement in Nottingham Inquiry

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.[25] 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:[26]

> 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.
>
> 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.[27] Lady

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

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

[27] Announcement of the Scottish Covid Inquiry

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.[28]

114. Lord Brailsford was appointed chair of the Scottish COVID-19 Inquiry with effect from 28th October 2022.[29] 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:[30]

> 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]

115. At the Inquiry's Preliminary Hearing on 28th August 2023, counsel to the Inquiry added:[31]

> 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

[28] Courier article of 6th October 2022

[29] Lord Brailsford appointed Chair of the Inquiry

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

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

> 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.[32] On 7th April 2025 the Home Secretary announced the appointment of Sir Adrian Fulford PC[33] 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:[34]

> "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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[32] Home Secretary's announcement of the Southport Inquiry

[33] 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.

[34] 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:[35]

> 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]

The 2005 Act: post-legislative scrutiny

[59] The fair-minded and informed observer would note the report of post-legislative scrutiny of the 2005 Act conducted by a select committee of the House of Lords, published 11 March 2014.[36] The committee recommended at paragraph [241] that the chairs of public inquiries should meet victims and families:

> "Inquiry chairmen and counsel to the inquiry should as a matter of course meet victims and families as early as possible in the inquiry process. There should be a dedicated team or named members of staff responsible for liaising with witnesses."

In support of this recommendation at paragraph [240] the committee quoted from a number of judges who had served as chairmen:

> "Some inquiry chairmen met witnesses in advance. Lord Cullen of Whitekirk explained the value of this: "Certainly I find it helpful to have meetings with the bereaved and possibly the injured – mostly the bereaved – before the inquiry gets going, so they have a chance to see

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

[36] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HL 2013-2014, HL Paper 143)

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

Criticisms of relying on what happened in other public inquiries

[60] Senior counsel for the applicants advanced a number of criticisms of placing reliance on what happened in other public inquiries. He submitted that none of the instances involved any sort of challenge to the impartiality of the chair or a judicial ruling thereon. Information about these meetings was available. They took place in plain sight and were tolerated by others. The development of the practice of such meetings did not confer a stamp of legitimacy. In the cases to which senior counsel to the Inquiry had referred the families were incontestably the victims of the subject matter of the inquiry. In none of these cases was the deceased potentially at fault.

[61] I am unable to accept these criticisms. A clear, consistent and well-established pattern of the chair of a public inquiry meeting privately with family members of deceased persons has developed. That is in keeping with the recommendations of the select committee of the House of Lords. In the examples identified by senior counsel to the Inquiry it is clear from the publicly available materials that information about the meetings was issued after the meetings had taken place. Very little information about the details of the contents of the meetings was made public. It would be wholly unrealistic to restrict such meetings to families of persons who can be identified in some way as being "innocent". It would be inappropriate for the chair of a public inquiry to carry out an exercise to ascertain whether the family of the deceased were worthy of a meeting. I consider that the fair-minded and informed observer would be entitled to have regard to the

practice of other public inquiries and the recommendations of the select committee of the House of Lords.

Importance of family participation

[62] The fair-minded and informed observer would recognise the importance of the families of Sheku Bayoh having confidence in the Inquiry and engaging with, and participating in, the Inquiry. She would understand, for the reasons set out in paragraphs [1]-[5] of my Note, that there was a public interest in obtaining and retaining the confidence of the families of Sheku Bayoh in the Inquiry:

> "[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."

[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 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."

Fragility of the confidence of the families of Sheku Bayoh in the Inquiry

[63] The fair-minded and informed observer would also note my concern about the fragility of the confidence of the families of Sheku Bayoh in the Inquiry at various stages and my view 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 as set out at paragraph [6] of my Note:

"[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."

The families of Sheku Bayoh at the heart of the Inquiry

[64] The fair-minded and informed observer would note that my declared intention to put the families of Sheku Bayoh at the heart of the Inquiry was supported by core participants, including the Chief Constable and senior counsel for the applicants.[37] In her opening submissions on 11 May 2022 senior counsel for the Chief Constable said:

"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."[38]

And in her interim closing submissions on 27 June 2023:

"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."[39]

In her written submissions in this process the Chief Constable puts it in this way:

"[She] 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." [40]

In his opening submission senior counsel for the applicants said:

"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

[37] PH1/1/18 (transcript references are in the format day/page/line of transcript)

[38] 2/32/3

[39] 61/33/22

[40] PH-00041 at paragraph 5

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." [41]

[65] Senior counsel to the Inquiry, who has extensive experience of public inquiries in other parts of the UK, submitted that the approach of having the families of Sheku Bayoh at the heart of the Inquiry reflected the approach taken in most public inquiries involving death and injury over the last 20 years or so.

Undertakings

[66] The fair-minded and informed observer would note that my concerns about the participation in the Inquiry by core participants were not restricted to the families of Sheku Bayoh. In January 2022 I was asked to consider a request on behalf of certain core participant police officers that I should seek an undertaking from each of the Lord Advocate and the Deputy 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 Deputy Chief Constable.

[67] After a process for written submissions I convened a hearing for oral submissions on 22 February 2022. Senior counsel for the families opposed the requests and submitted that I should not make them.

[68] I was concerned that the absence of undertakings might inhibit the ability of the individual officers to give full and frank evidence to the Inquiry. I was given to understand that the advice being given at least to some of the officers as witnesses would be to refuse to answer questions because of the risk of self-incrimination. The exercise of the right against self-incrimination could limit the evidence which they were able to give. I came to the view that in order that the officers would fully participate in the Inquiry I would seek undertakings from both

[41] 2/60/16

the Solicitor General and the Deputy Chief Constable and I issued my decision on 1 March 2022.[42] The names of the officers on whose behalf I 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.

Frequency of meetings

[69] The fair-minded and informed observer would note that, with the exception of the follow-up meeting on 13 April 2022, the meetings occurred on a more or less annual basis over a period of four years. They could not be regarded as frequent meetings. She would also bear in mind that it is somewhat artificial to read the records of the meetings together at one time.

Private but not secret

[70] The fair-minded and informed observer would note that, as set out in paragraph [7] of my Note, although the meetings with the families of Sheku Bayoh were private, they were not kept secret. On a number of occasions the Inquiry and members of the families made public reference to the meetings. At the preliminary hearing on 18 November 2021 I said:

> "I want them to be at the heart of this Inquiry and, in due course, before the evidence begins, I will give an opportunity for members of the family to speak publicly about the person that Sheku Bayoh was, what he meant to them and the impact of his death on them. I have already begun discussion with family members about what form that might take."
>
> [emphasis added]

[71] On 4 February 2022 the solicitor to the Inquiry advised the legal representative of Alan Paton that the letters from me to certain members of Sheku Bayoh's family were issued following a meeting with those members of the family.

[72] As set out in paragraph [38] of my Note, on 22 November 2022 in an interview to the press Kadi Johnson referred to meeting me on 21 November 2022 and said,

[42] Ruling on undertakings

"But we welcome a meeting with Lord Bracadale yesterday and his condemnation of the racist abuse to our family and threats made to our lawyer."

[73] As set out in paragraph [48] of my Note, 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'."[43]

[74] In my letter to the Chief Constable dated 4 February 2025,[44] which was copied to all core participants, I made reference to meeting with the families of Sheku Bayoh from time to time.

Importance of evidence

[75] The fair-minded and informed observer would note and understand the importance of evidence in the Inquiry.

Extent of the evidence

[76] First, she would note the sheer bulk and wide reaching extent of the evidence introduced in the course of the Inquiry reflecting the breadth of the terms of reference. The Inquiry heard around 120 days of oral evidence. More than 100 witnesses gave evidence and, in addition, many statements and documents were introduced in evidence and published on the Inquiry's website.

Report and recommendations require to be founded in the evidence

[77] Second, she would understand that the report and recommendations would require to be founded in the evidence. If the findings were not supported in the

[43] PH-00017
[44] PH-00011

evidence the report would be open to judicial review. She would note that the provisions in rule 12 of the 2007 Rules for issuing warning letters to persons who may be criticised are consistent with this requirement: criticism must be grounded in the evidence. Rule 12(2) of the 2007 Rules stipulates:

> "The warning letter must–
> (a) state what the criticism or proposed criticism is;
> (b) contain a statement of any facts that the chairman considers may substantiate the criticism or proposed criticism;
> (c) refer to any evidence or documents which may support those facts;
> (d) invite the person to make a written statement if the person wishes; and
> (e) note that the information is subject to confidentiality restrictions."

Families of Sheku Bayoh informed of the importance of the evidence

[78] Third, she would note the references to the importance of the evidence which I made in the course of meetings with the members of the families of Sheku Bayoh. At the meeting on 4 November 2021 I explained that the public hearings were important; that is where the evidence would be laid out in public and, in particular, where members of the families would hear the evidence and form their own view about it.[45]

[79] At the meeting on 13 April 2022 I told members of the families that I would want them to give evidence in due course about the way in which they had been treated on 3 May 2015 and subsequently. At the meeting on 21 November 2022 I explained to the members of the families that there would be times when I would make decisions with which they would not agree. I explained that I would always make the decisions based on evidence and give reasoned decisions. At the meeting on 5 December 2024 I told them that the chapters of the report would be based on the evidence heard. The fair-minded and informed observer would note the importance that I attached to the evidence in the Inquiry.

[45] PH-00002

No substantive decision on the evidence

[80] Fourth, the fair-minded and informed observer would note that while all the evidence in the Inquiry has now been introduced, I have not yet made any substantive decision based on that evidence. The decision-making process has not yet begun.

Procedural decisions were evidence based

[81] Fifth, she would note that the procedural decisions that I made in the course of the Inquiry were all founded in evidence. As noted, above, at the meeting with the members of the families on 21 November 2022 I explained that I always made decisions based on evidence and gave reasoned decisions. Examples include the decision to allow special measures in respect of the evidence of Alan Paton, which I explain below at paragraphs [105]-[109] and the decision referred to above at paragraphs [66]-[68] whether to seek undertakings from the Solicitor General and the Deputy Chief Constable.

Closing submissions still to come

[82] Sixth, she would note, too, that I have not yet heard closing submissions on the evidence; she would understand the importance of closing submissions as an opportunity for core participants to engage in an analysis of the evidence and present submissions based on the evidence. And she would note that in analysing and assessing the evidence I will require to take the submissions into account.

Focusing effect of evidence

[83] Seventh, the fair-minded and informed observer would recognise the focusing effect of listening over a prolonged period to evidence. The focusing effect of listening to evidence has been recognised in a number of cases relating to pre-trial publicity. In *Montgomery* v *HM Advocate* 2001 S.C. (P.C.) 1 at page [28], Lord Hope of Craighead referred with approval to the matters identified in *Attorney General* v *MGN Ltd and others* [1997] 1 All ER 456:

> "The three matters to which Schiemann LJ referred in para (10) in *Attorney General v MGN Ltd* at p 461B - the length of time since publication, the focusing effect of listening to evidence over a prolonged period and the

likely effect of the directions by the trial judge - are all taken into account in practice in the application of the *Stuurman* test in cases of alleged oppression due to pre-trial publicity. Applied in this way the test is, in my opinion, well suited for use in the context of a complaint which is made under art 6(1) of the Convention. It fits in well with the approach which the Strasbourg court took to this matter in *Pullar v United Kingdom."*

[emphasis added]

[84] In *Ex parte Telegraph plc and other appeals* [1993] 2 All ER 971 at page [978], Lord Chief Justice Taylor of Gosforth said:

"a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's minds on the evidence before them rather than on matters outside the courtroom".

[emphasis added]

[85] In *HM Advocate* v *Sheridan* 2012 SCL 298 I refused a plea in bar of trial based on pre-trial publicity. In relation to the focusing effect of listening to evidence over a prolonged period I said, see pages [304-305]:

"As to the focusing effect of listening to evidence over a prolonged period, contrary to the submissions of counsel for Mr Sheridan, I consider that in the circumstances of this case this will be a powerful safeguard. The focusing effect of listening to evidence is not a polite fiction. It is within the daily experience of judges and counsel that juries do become engrossed in the evidence and return verdicts which reflect the evidence. It seems to me that listening to the evidence and hearing it being tested in cross examination in the immediacy of the court environment will be likely to focus the minds of jurors on what they are hearing in court. That is more likely, in my view, to dispel notions that they may have picked up from reading prejudicial material, rather than to reinforce preconceived views. In addition, the jury will have regard to the evidence as a whole, which is a significant consideration."

[86] I have already noted the scale and extent of the evidence in the Inquiry. It was introduced over a lengthy period of time. The fair-minded and informed observer would recognise the focusing effect on the finder of fact of listening to that prolonged evidence.

Experienced judge: awareness of the need to disregard irrelevant material

[87] Eighth, the fair-minded and informed observer would recognise that I was an experienced judge. An experienced judge can be assumed to be aware of the need to disregard irrelevant material. She would note what was said in *R (on the application of Mahfouz)* v *The Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233. Lord Justice Carnwath giving the judgment of the Court of Appeal said:

> "23.. The jury is at one end of the spectrum of tribunals, in that the members will generally have no previous experience of court procedures and practices. Further along the line are magistrates' courts, where the justices although not legally qualified should, by virtue of the training and experience, be better able to "put out of their minds matters that are irrelevant". (see *Johnson v Leicestershire Constabulary Times 7.10.98* , per Simon Brown LJ).
>
> 24.. The committee members in this case included two professionals and three lay members, selected from a panel of persons chosen as having experience in public life. We were told that the panel includes retired judges, justices of the peace, barristers, solicitors and academics. They can be assumed to understand the proper approach to issues of law and to be aware of the need to disregard irrelevant material."

[88] *R (on the application of Mahfouz)* v *The Professional Conduct Committee of the General Medical Council* (cited above) was followed in *R (on the application of Short) and Ors* v *(1) Police Misconduct Tribunal (2) Chief Constable of Bedfordshire Police* [2020] EWHC 385 (Admin). Mr Justice Saini said:

> "91. In my judgment, the position of the Tribunal in this case is directly analogous to that of the panels in *Mahfouz* and *Subramanian*. As I have

already observed, the Chair is a legally qualified non-practising solicitor who, for many years, sat as a judge; one member of the Tribunal is an experienced magistrate, the other an experienced senior police officer; and every one of them is well-placed to identify and ignore irrelevant and inadmissible material."

[89] In *Helow* v *Advocate General for Scotland* (cited above) Lord Rodger of Earlsferry referred to the training and experience of judges at paragraph [23]:

> "In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased."

Awareness of core participants of the context and contents of the meetings

[90] Ninth, the fair-minded and informed observer would note that as a result of the current process core participants are now aware of the content and context of the meetings. She would take account of that in light of the stage that the Inquiry has reached. As noted above, I have not yet made any substantive decisions on the evidence and I have not yet heard closing submissions. Core participants are now in a position where in closing submissions they will have an opportunity to challenge things that were said in the course of the meetings and make submissions about what was said.

Requirement to justify findings in fact from the evidence

[91] Tenth, the fair-minded and informed observer would note that in analysing and assessing the evidence I would require to justify my conclusions. In doing so I would have regard to the directions given by the Inner House in *MacLeod's Legal Representatives* v *Highland Health Board* 2016 SC 647:

> "[94] Where a decision requires the resolution of disputed issues of fact an opinion should make clear how these issues have been resolved. That

means making findings of fact, whether findings of primary fact or findings of the nature of inferences based on primary facts. There is no requirement that they appear as an enumerated list as, for example, is the practice in the sheriff court, but if any matter of fact is relevant to the decision it should be apparent on the face of the opinion what the court has found that fact to be. Equally, if the court declines to resolve a particular matter of fact as to which parties were in dispute, on the view that it is unnecessary to do so or it has not proved possible to do so, that should be stated in terms.

[95] An opinion should make clear the basis upon which facts have been found. Some will never have been contentious in that they were the subject of admission in the pleadings or formal agreement by joint minute. Some will turn out not to be contentious as a consensus develops among the witnesses or between counsel in the course of a proof. Evidence may simply not be challenged. Where findings in fact are uncontentious for one or other of these reasons that should be explained. Where a finding is made in respect of facts that were disputed, the opinion should explain the basis upon which that has been done. That will include identifying evidence which is to contrary effect. Where the explanation is the acceptance of a witness who was challenged or the preference of one witness or a number of witnesses over another or other witnesses that again must be explained. The explanation will usually be articulated in terms of credibility and reliability but mere certification of a witness or witnesses as credible and reliable and therefore worthy of acceptance is not good enough. If a judge has believed a witness and taken the witness's account to be accurate, he or she must say why that was so, at least in cases where that witness or the witness's account has been challenged in some way. Demeanour can be of importance but generally a judge should explain whether or not he found a witness's testimony internally consistent and consistent with other evidence, particularly objective and documentary evidence. If motivation or overall probabilities have been relied on, that should be made clear."

[emphasis added]

[92] In considering the need to follow these directions in the Inquiry, the fair-minded and informed observer would recognise that where, as here, the finder of fact requires to assess evidence relating to events which have occurred a number of years earlier, the existence of contemporaneous notes would be an important consideration. Thus, for example, recollection by a member of the families of what was said years earlier could be tested against a contemporaneous note made by another witness.

The campaign by the families of Sheku Bayoh

[93] The fair-minded and informed observer would note, as set out in paragraph [76] of my Note, that members of the families of Sheku Bayoh and their solicitor have over the years conducted a campaign in relation to the death of Sheku Bayoh and the treatment of the members of the families. In addition to calling for a public inquiry, on many occasions they have made public statements critical of the actions of police officers, representatives of PIRC and representatives of COPFS. These have been extensively covered in the press and media.

The meetings

[94] Informed by that background the fair-minded and informed observer would examine what happened at each of the meetings.

Meeting 4 November 2021

[95] She would note my increasing concern in the lead up to the meeting and the basis on which I exercised my discretion by deciding to meet members of the families, as recorded in paragraph [9] of my Note:

> "[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."

[96] She would note that the first meeting on 4 November 2021 was held just under a year into the life of the Inquiry and before the first preliminary hearing on 18 November 2021. It was held six months before any evidence was introduced in the Inquiry. She would note that there is no record of this meeting but would be able to read my speaking note. She would have regard to the account of the meeting set out in paragraphs [10]-[22] of my Note:

"[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. Receiving an agenda allowed me to assess in advance whether the issues they raised were appropriate for 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. 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. 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.

[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.

…

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

[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. 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. My speaking note is directed to the level of expertise within, or available to, the Inquiry. I stated that I was prepared to consider the proposal to appoint an in-house expert.

…

[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. 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. A similar speaking note is available in respect of my telephone conversation on 4 October 2021."

[97] The fair-minded and informed observer would note that much of the meeting related to process and procedure as well as practical matters relating to the Inquiry.

[98] The fair-minded and informed observer would examine the letters, written in similar terms, which I sent to members of the families after this meeting, in their context.[46] As set out in paragraph [19] of my Note, 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 the letters were designed to reinforce the importance of them participating in the Inquiry and the commitment of the Inquiry to finding the truth.

[99] She would also examine the contents of the letters. She would understand that, as set out in paragraph [20] of my Note, in 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 of a relative and their frustration. The fair-minded and informed observer would note that nothing in the letters indicated that I had formed any view as to the accuracy of what they had said or whether their frustration was well-founded. She would recognise that any such conclusion could be reached only after I had heard evidence. She would not read the letters as prejudging any issue. She would understand that I wanted to communicate to them that the Inquiry would be compassionate and would listen.

[46] PH-00003; PH-00004; PH-00005

[100] As set out in paragraph [18] of my Note, the statement in the letters that I had heard their concerns about race was a reference to the discussion arising from the agenda point and my speaking note. 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. The discussion was about process in relation to the approach to the issue of race. The fair-minded and informed observer would understand that the paragraph in the letters relating to race reflected that position:

> "It is central to this Inquiry and constantly in the mind of my team as they go through all the evidence. It will be considered as part of every hearing and all of those strands will also be pulled together in a hearing after all other evidence has been considered."

[101] The fair-minded and informed observer would note my reference in the meeting on 13 April 2022 to "very powerful" accounts given at the meeting on 4 November 2021. She would remind herself that members of the families of Sheku Bayoh were highly articulate and effective campaigners who had often spoken publicly and powerfully about their experience. She would note that my comment was qualified by my indication of the requirement for evidence. My description of the accounts said nothing about their accuracy which would require to be explored in evidence.

Cancellation of meeting 24 February 2022

[102] In my Note I explained the cancellation of the follow-up meeting due to take place on 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."

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

Meeting 13 April 2022

[103] The fair-minded and informed observer would have regard to what I said in my Note about this meeting:

"[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. 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.

[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."

Meeting 21 November 2022

[104] The fair-minded and informed observer would study the record of this meeting. She would also have regard to what I said in my Note about it:

"[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. 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 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."

[105] The record of this meeting includes reference to Alan Paton and Zahid Saeed. In order to make sense of these references the fair-minded and informed observer would require to understand the background set out in my Note:

> "[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. The evidence of Alan Paton was pre-recorded on 13 June 2022. The tape was played and broadcast on 21 June 2022.
>
> [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 November 2022 to explain to them that there would be times when I would have to make decisions with which they would not agree. 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. In March 2022 he had provided a written statement to the Inquiry. 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”], 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”. 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. 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. 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.

[34] It was against that background that Kadi Johnson raised the comparison of the treatment of Zahid Saeed and Alan Paton. 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.”

[106] The fair-minded and informed observer would find it instructive to have regard to subsequent events in relation to the evidence of Alan Paton. 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 of Sheku Bayoh for questioning under rule 9.[47] 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.

[107] As set out in paragraph [40] of my Note, 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 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 postponed to permit a written application to be made on behalf of Alan Paton.[48] In response to this statement members of the families of Sheku Bayoh walked out of the hearing room.

[108] As set out in paragraph [41] of my Note, 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?"[49]

[47] 20/194/20
[48] 32/1/3
[49] PH-00065

[109] The fair-minded and informed observer would note two points from these events. First, that the decisions which I made in relation to the evidence of Alan Paton subsequent to the meeting on 21 November 2022 were not influenced by anything said by members of the families at that meeting. Quite the contrary, I continued to make decisions about the way in which the evidence of Alan Paton was introduced on the basis of the relevant information available to me. Second, she would note that the reaction of members of the families by walking out of the hearing room and the statement to the media by Kadi Johnson demonstrated the continuing fragility of the confidence of the families in the Inquiry.

[110] At the end of the meeting on 21 November 2022 Ade Johnson commented on the approach to questioning by senior counsel to the Inquiry in relation to race.[50] In their written submissions the applicants suggested that senior counsel to the Inquiry had followed the suggestion of Ade Johnson in her future questioning. The fair-minded and informed observer would, however, note that 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."[51]

Meeting 18 January 2024

[111] In their written submissions the applicants and others were critical of the entry in the record of this meeting which stated, "Profoundly affected by your evidence Kadi" in the following passage:

[50] PH-00007
[51] PH1/26/13

> "This hearing will of course take place against 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. Profoundly affected by your evidence Kadi."[52]

They had understood this to be a reference to my reaction to the evidence of Kadi Johnson. As set out in my Note at paragraph [42] this is a misunderstanding of the record of the meeting. It would be important that the fair-minded and informed observer would understand that I was referring to the reaction of the Chief Constable to the evidence of Kadi Johnson, not my own reaction to her evidence. The statement was 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:

> "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."[53]

[112] In the interim written closing submissions, senior counsel for the Chief Constable stated:

> "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

[52] PH-00008
[53] 2/32/9

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."[54]

[113] As set out in paragraph [43] of my Note, this meeting was largely focused on the impact of the Inquiry on members of the families. Kosna Bayoh described the experience as very challenging and draining.[55] 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 families spoke of personal issues that arose from their day-to-day engagement with the Inquiry. Welfare issues arose as a result of that engagement as well as the nature of the evidence they heard. It was sometimes difficult to separate these issues.

Inappropriate remarks

[114] The fair-minded and informed observer would note that as set out in paragraph [36] of my Note 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. Under reference to my Note and careful reading of the records of the meetings she would note how I exercised my discretion to deal with these situations.

[115] The applicants and others criticised me for not challenging remarks of this kind. The fair-minded and informed observer would understand that it is natural that sometimes under the stress of participating in an inquiry into the death of a loved one emotions would flare up and that in a heightened emotional state people might make inappropriate remarks. Challenging such remarks would be likely to lead to further distress and undermine the purpose that I was seeking to achieve. The fair-minded and informed observer would note that as a more diplomatic alternative I did not engage with such remarks and moved on.

[54] SBPI-00345
[55] PH-00008

21 November 2022 meeting

[116] The meeting on 21 November 2022 began with a discussion about the impact of racism that the families of Sheku Bayoh, including the children, had recently been experiencing. In the course of that discussion Ade Johnson made a remark, "What happened on 3 May 2015 should never have happened."[56] It was not clear what he meant by this remark. It was a statement of a very general nature. There does not seem to me to be a basis for the contention by senior counsel for the applicants that Ade Johnson was saying that the arrest of Sheku Bayoh should never have happened at all. Nor was it clear, as suggested by senior counsel for the applicants, that Ade Johnson was making a link to the colour of Sheku Bayoh's skin. The discussion was about the impact of the recent racism being suffered by the young people of the families. Ade Johnson said that day-to-day they were reliving the incident and added, "This", which I understood to be a reference to the racist treatment of members of the families of Sheku Bayoh, "on top of it, it is crushing us. It is a heavy load to carry." The remark that "What happened on 3 May 2015 should never have happened" was of such a general nature that it would not have been necessary to respond to it. It is clear from the record of the meeting that I did not engage with it. I concentrated on the racism being experienced by members of the families.

[117] Later in the same meeting in the context of preparation for the cause of death hearing Aamer Anwar, solicitor for the families, made an inappropriate remark about the facts:

> "Within 48 hour [sic] of SB dying – asked for Pm to be held back – so Mrs Bayoh could see her son. LA agreed to that – PIRC went ahead - ".

[118] The record of the meeting indicates that senior counsel to the Inquiry interrupted and explained the process through which matters would be explored:

> "Important point AA raised with us previously – not just CoD but also PIRC/COPFS. Number of issues re PM, alleged repatriation and they are

[56] PH-00007

definitely issues going to explore. Those issues might not be in the CpD [sic] because in the medical side – PIM of PIRC/COPFS."

Ade Johnson then tried to return to the factual issue saying:

"You can imagine why suspicious – went ahead. Tried to send the body away where ebola and mass burial."

Senior counsel to the Inquiry began to say something and I interrupted to introduce the next topic about process and practicalities in relation to CCTV.

[119] From that passage in the record of the meeting the fair-minded and informed observer would see that I did not engage with what was said by Aamer Anwar and Ade Johnson and I moved on to the next item for discussion.

[120] Later in this meeting 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."[57] That was an inappropriate remark. The fair-minded and informed observer would note that I did not engage with the remark but brought the meeting to an end as soon thereafter as practically possible.

[121] In oral submissions senior counsel for the applicants submitted that there was an inconsistency between the recollection in my Note and the record of the meeting in respect that in my Note I said that I had brought the meeting to an end almost immediately. He submitted that after Ade Johnson had made the inappropriate remark that "a lot more seems to have been said" and that the minute came to an end without "the chair saying anything, let alone closing matters down." I reject this submission. The record of the meeting shows that I did not engage with the inappropriate remark and that after further relatively brief contributions from each of Aamer Anwar and Ade Johnson the record comes to an end. It is a reasonable inference from the record that the record comes to an end because as Chair I brought the meeting to an end.

[57] PH-00007

18 January 2024 meeting

[122] At the meeting on 18 January 2024 in the course of describing the impact of the Inquiry on the members of the families Ade Johnson said "why are people saying things? Why are they lying?"[58] The fair-minded and informed observer would note that this remark could not have been anticipated and that I did not engage with it. The discussion quickly turned to issues about disclosure. I explained the practical challenges of statement taking. In response, in a remark which could not have been anticipated, Aamer Anwar said:

> "What is coming from the PIRC/Crown [redaction] – lied repeatedly to the family. [Redaction] – particularly difficult for the family to hear an [sic] see in disclosure what is being said."

I did not engage with this remark and after brief contributions from senior counsel for the families and Ade Johnson I moved discussion on to the practical issue of changes of Inquiry days.

[123] Again, in relation to this matter senior counsel for the applicants submitted that the record of the meeting was not consistent with the recollection in my Note. In my Note, at paragraph [44], I referred to Aamer Anwar's comment and stated, "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". It seems to me clear from the record of the meeting that after Aamer Anwar made his remark I did not engage with it and after two brief contributions from senior counsel for the families and Ade Johnson I moved on to the next item, Inquiry days. I reject this criticism.

[124] From her review of the way in which I dealt with these inappropriate remarks the fair-minded and informed observer would conclude that the approach reflected a reasonable exercise of discretion in these circumstances.

[125] She would also bear in mind that, as noted at paragraph [93] above, both before and during the course of the Inquiry members of the families, personally or

[58] PH-00008

through their solicitor, had on many occasions made public statements critical of the actions of police officers, representatives of PIRC and representatives of COPFS which had been extensively covered in the press and media. She would remind herself, as noted at paragraphs [87]-[89] above, that an experienced judge can be assumed to be aware of the need to disregard material not forming part of the evidence. That would apply whether inappropriate statements were made in the public forum or in the course of a meeting.

5 December 2024 meeting

[126] In my Note I made the following comments on this meeting:

> "[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.
>
> [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." 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. 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."

The fair-minded and informed observer would note that there was no substantive discussion of the application to extend the terms of reference. She would note that I directed the discussion towards welfare issues and how members of the families had been coping.

She would note that 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." She would understand 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.

The application for extension of the terms of reference

[127] At paragraphs [50]-[65] of my Note I set out, under reference to various documents, my position in relation to the application by the families of Sheku Bayoh for extension of the terms of reference. It seemed to me that in the written submissions on behalf of the applicants and other core participants in relation to this process there were a number of gaps and misunderstandings. In oral submissions senior counsel for the applicants made reference to two matters: first, that in correspondence my language mirrored that of Aamer Anwar; and, second, that I made increasingly strident calls to extend the terms of reference.

[128] The fair-minded and informed observer would wish to examine these two allegations with care. In relation to the language used in correspondence, she would note the form of words used by Aamer Anwar in his letter to me dated 29 August 2024:

> "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."

[129] In his letter to the Deputy First Minister dated 4 September 2024 Aamer Anwar used similar words. As explained in my Note at paragraph [56] I did not see that letter until 28 January 2025. In the wake of my meeting with the Deputy First Minister on 5 September 2024 the solicitor to the Inquiry wrote to core participants on 6 September 2024 giving an account of the meeting. In it she wrote:

> "However, he 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."

[130] In his letter to the Deputy First Minister dated 16 September 2024 Aamer Anwar referred to my meeting with her and included the paragraph quoted above from the letter of 6 September 2024 from the solicitor to the Inquiry to core participants. In his letter to the Deputy First Minister dated 3 October 2024 Aamer Anwar used similar language. As noted at paragraph [57] of my Note I did not see either of these letters from Aamer Anwar to the Deputy First Minister until 28 January 2025. In my letter to the Deputy First Minister dated 18 November 2024 I expressed myself in words similar to those used by the solicitor to the Inquiry in her letter dated 6 September 2024. It would be immediately obvious to the fair-minded and informed observer that if there was any mirroring of language Aamer Anwar had adopted the language used by the solicitor to the Inquiry in her letter to core participants dated 6 September 2024. She would particularly note that I did not see either of Aamer Anwar's letters to the Deputy First Minister dated 16 September and 3 October 2024 until January 2025. I could not therefore have been mirroring his language.

[131] In relation to the allegation that I made increasingly strident calls to extend the terms of reference, the fair-minded and informed observer would note the sequence of events. She would note that between my meeting with the Deputy First Minister on 5 September 2024 and my letter to her dated 18 November 2024 Martin Graves, an expert in officer safety training, had given further evidence as set out in paragraph [55] of my Note. She would also note that on 17 February 2025 I had a final 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 to the Inquiry set out what I said to the Deputy First Minister. As to my reference to there being "strong indications", having regard to what appeared to be clear additional evidence from Martin Graves in relation to the way in which he was instructed 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. In addition, in her note for the Deputy First Minister, dated 13 December 2024, disclosed to the Inquiry on 31 January 2025, in which the Solicitor General explained that she would not "stand in the way of an examination of the prosecutorial decision-making", she stated, "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." 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 COPFS and had not yet conducted a full analysis of the evidence. It remained a provisional view.

[132] The fair-minded and informed observer would also note that in relation to whether it was in the public interest for the Inquiry to examine the prosecutorial decision I took a cautious, even tentative, approach. In my letter dated 18 November 2024 I stated:

> "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."
>
> [emphasis added]

At the meeting on 17 February 2025 I again expressed myself cautiously:

> "These considerations, without reference to other aspects of the public interest, might tilt the balance in favour of granting an extension."
>
> [emphasis added]

[133] The fair-minded and informed observer would also note that at that meeting 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."

[134] Throughout the process I expressed my increasing concerns about the impact of delay and additional expense.

The conclusion of the fair-minded and informed observer

[135] The fair-minded and informed observer would consider the meetings in the light of all the circumstances. She would remind herself of the intensely fact-specific nature of the test and the need to look at my conduct of the Inquiry as a whole. She would have regard to the nature of a public inquiry. The chair of a public inquiry is an inquisitor seeking after the truth rather than holding the ring in which the parties compete. The chair will make no findings as to criminal or civil liability. The chair is an investigator, ingathering evidence, assessing it and following leads. The chair will decide what material is relevant and should be disclosed to the core participants. The chair is in control of the process. This will involve communications with a core participant outwith the presence of other core participants. She would note examples of this in the course of the Inquiry.

[136] The fair-minded and informed observer would be aware of the well-established practice in numerous other public inquiries of the chair holding private meetings with the families of deceased persons. She would note that in the examples of these meetings cited by senior counsel to the Inquiry matters of substance were discussed. These matters included 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 the terms of reference and identifying issues which the inquiry should explore (Nottingham Inquiry) and the impact on individuals (Scottish Covid-19 Inquiry; Omagh Bombing Inquiry; and Lampard Inquiry).

[137] The fair-minded and informed observer would take account of the evidence heard and the recommendation made by the select committee of the House of Lords conducting post-legislative scrutiny of the 2005 Act. Chairs of public inquiries are encouraged to meet bereaved families.

[138] She would examine the contents of the meetings in the context of the importance of the families of Sheku Bayoh having confidence in the Inquiry and

engaging with, and participating in it. She would note the fragility of that confidence exemplified in the anger and frustration felt by the members of the families at the meeting on 4 November 2021 and the statement to the press made by Kadi Johnson on 8 December 2022. She would note the impact on the Inquiry of any decision by the families to walk out of the Inquiry and my concerns in that regard. She would be aware that over the years the families of Sheku Bayoh had publicly lost confidence in each of Police Scotland, PIRC and COPFS.

[139] The fair-minded and informed observer considering my conduct of the Inquiry as a whole would note that in seeking undertakings from the Solicitor General and the Deputy Chief Constable I was endeavouring to ensure that the police officers concerned were able fully to participate in the Inquiry.

[140] She would note that the meetings were on a more or less annual basis. She would note that while private they were not kept secret.

[141] The fair-minded and informed observer would understand the importance of evidence in the Inquiry and that I had stressed the importance of evidence when I met members of the families. She would have regard to the stage at which the Inquiry has reached in relation to evidence: I have made no substantive decision on the evidence and await closing submissions. She would note the focusing effect on a finder of fact of listening to evidence over a prolonged period. She would understand the need for careful analysis of the evidence and the requirement to explain and justify every decision on evidence in dispute.

[142] The fair-minded and informed observer would note that as a result of the current process all core participants are now aware of the existence and contents of the meetings and will be able to make submissions in relation to the meetings.

[143] In relation to the meeting on 4 November 2021 she would examine what happened at it and subsequently in the light of all these considerations. She would come to the view that although family members made reference to material relevant to the terms of reference the purpose of the meeting was not to take evidence but to allow members of the families to speak freely about their loss and

frustration. The meeting was held at a stage about six months before any evidence was introduced. She would note my reference in the meeting on 13 April 2022 to “very powerful” accounts. She would remind herself that members of the families were highly articulate and effective campaigners who had often spoken publicly and powerfully about their experience. She would note that my comment was qualified by my indication of the requirement for evidence. My description of the accounts said nothing about their accuracy which would require to be explored in evidence.

[144] As to the letters which I sent to members of the families after the meeting on 4 November 2021, the fair-minded and informed observer would see these in the context of the process of seeking to obtain and retain the confidence of the members of the families of Sheku Bayoh in the Inquiry and that the Inquiry was committed to getting to the truth as well as being compassionate and listening. She would understand that the letters did not prejudge the evidence which was to come.

[145] In relation to the meeting on 21 November 2022 the fair-minded and informed observer would understand the discussion about Zahid Saeed and Alan Paton in the context provided in my Note.

[146] In relation to the meeting on 18 January 2024 it would be clear to the fair-minded and informed observer that my reference was to the Chief Constable being affected by the evidence of Kadi Johnson rather than to my own reaction.

[147] In relation to the way in which I dealt with inappropriate comments in the course of a number of the meetings, the fair-minded and informed observer would take the view that the record of the meetings demonstrates that emotion and strength of feeling flared up from time to time. She would come to the view that my decision not to engage with these comments but to ignore them and move on was a reasonable exercise of discretion. In addition, she would recognise that an experienced judge can be assumed to be aware of the need to disregard material not forming part of the evidence, including inappropriate statements whether made in public or in a meeting.

[148] She would note that at the meeting on 5 December 2024 there was no substantive discussion of the application to extend the terms of reference. In relation to that application she would review my approach to it and conclude that it was a balanced response to a request from the Deputy First Minister for my views in accordance with the requirement of section 5 of the 2005 Act. She would reject the propositions that I mirrored the language of Aamer Anwar and that I demonstrated increasingly strident support of the application.

[149] Having reviewed the facts the fair-minded and informed observer would conclude that there was no real possibility that I was biased.

The assessors

[150] The applicants seek to extend recusal to assessor Raju Bhatt and Alan Paton seeks to extend recusal to both of the assessors, Raju Bhatt and Michael Fuller. Raju Bhatt is a solicitor practising in London who has considerable experience of dealing with bereaved families. Michael Fuller was formerly the Chief Constable of Kent and also had extensive experience in race-related matters in the Metropolitan Police.

[151] The assessors were appointed by the Scottish Ministers under section 11 of the 2005 Act to assist me. They are not members of the Inquiry panel. As Chair I am the only member of the Inquiry panel. They have none of the duties imposed on the Chair in relation to procedure of the Inquiry and they have no responsibility for the production, submission or publication of the report under sections 24 and 25 of the 2005 Act.

[152] Both the assessors attended the meeting on 21 November 2022; this was the only meeting attended by an assessor. The record of the meeting records that in the course of the meeting Raju Bhatt said, “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.”[59]

[59] PH-00007

[153] Both the applicants and Alan Paton contend that the reference to "help achieve what you want" is a reference to criticism and eventual prosecution of the police officers. I can see no basis for that contention. I understood the comment to be a reference back to a comment made by Ade Johnson, "All asking for is to get the truth." Raju 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 Raju Bhatt confirms my understanding of his remarks.[60] The fair-minded and informed observer might find that to be a reasonable understanding of the context. In these circumstances I consider that it would not have been necessary or appropriate for either Michael Fuller or me to challenge Raju Bhatt.

[154] In his contribution later in the meeting Michael Fuller stressed the importance of a thorough examination adding, "Support you in getting to the truth."

[155] Section 11(5) of the 2005 Act provides for termination of the appointment of an assessor:

> "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."

[156] I am not satisfied that the applicants or Alan Paton have established a basis on which I should terminate the appointment of Raju Bhatt or Michael Fuller and I refuse to do so.

Natural justice: the right to be heard

[157] Section 17 of the 2005 Act allows a wide discretion to the chair of a public inquiry to direct the procedure and conduct of the inquiry. The chair is required to act with fairness. What is meant by acting fairly?

[60] PH-00060

[158] Having regard to the passages in *Humphrey Errington (t/a H J Errington & Co)* v *Mrs Elizabeth Wilson and Others* 1995 SC 550 to which I was referred in oral submissions, I would accept as a matter of high-level principle that the rules of natural justice apply to a public inquiry under the 2005 Act (see also *Greater Glasgow Health Board* v *Chairman of the Scottish Hospitals Inquiry* 2025 SLT 205). In *B. Surinder Singh Kanda* v *Government of the Federation of Malaya* [1962] AC 322 Lord Denning, delivering the judgment of the House of Lords, described the rules of natural justice at page [337]:

> "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."

[159] The rules of natural justice are succinctly summarised by Lord Bingham in Tom Bingham, *The Rule of Law* (Allen Lane 2010) at page [62]:

> "But the so-called rules of natural justice have traditionally been held to demand, first, that the mind of the decision-maker should not be tainted by bias or personal interest (he must not be a judge in his own cause) and, secondly, that anyone who is liable to have an adverse decision made against him should have a right to be heard (a rule the venerability of which is vouched by its Latin version: *Audi alteram partem*, hear the other party)."

[160] A statement that the general principles of natural justice apply to a public inquiry takes us only so far. I have already addressed the issue of apparent bias under reference to *Porter* v *Magill* (cited above). The extent to which specific aspects of the right to be heard, familiar in adversarial procedure, can be read across to an inquisitorial public inquiry raises a number of questions. The starting point is to note that the application of the rules of natural justice is highly specific to the facts and context of the individual case. In *Russell* v *Duke of Norfolk and Others* [1949] 1 All ER 109 Lord Justice Tucker at page [118] stated:

> "There are, in my view, 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."

This statement was approved by the Privy Council in *University of Ceylon* v *Fernando* [1960] 1 WLR 223 and by the House of Lords in *Official Solicitor to the Supreme Court* v *K. and Another (Appeal from In re K. (Infants))* [1965] AC 201. In *R* v *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417 Lord Denning referred with approval to the statement of Lord Justice Tucker in *Russell* v *Duke of Norfolk* (cited above) and at page [430] stated:

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

[161] In *Lloyd and Others* v *McMahon* [1987] AC 625 Lord Bridge of Harwich said at pages [702-703]:

> "My Lords 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. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

[162] The authorities relied on by the applicants and other core participants are to the same effect. In *Humphrey Errington (t/a H J Errington & Co)* v *Mrs Elizabeth Wilson and Others* (cited above), Lord Clyde quoted at page [560] the

observation about natural justice made by Lord Morris of Borth-y-Gest in *Furnell* v *Whangarei High Schools Board* [1973] AC 660 at page [679]:

> "It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But … the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.'"
>
> [emphasis added]

[163] In *R* v *Secretary of State for the Home Department, Ex parte Doody and Others* [1994] 1 AC 531, addressing what fairness required in the context of a case relating to the fixing of tariffs in life sentences for murder, Lord Mustill said at page [560]:

> "The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness.
>
> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually

cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[emphasis added]

[164] From these cases it is clear that in applying the principles account should be taken of the statutory framework under which the tribunal operates, the nature and character of the tribunal, the subject matter it considers, the kind of decisions it has to make and the context of its decisions. In the case of a public inquiry under the 2005 Act that will include its terms of reference.

[165] Before examining the operation of the Inquiry in the light of these considerations it is convenient to look at the cases on which the applicants relied for the proposition that meeting the families of Sheku Bayoh was contrary to natural justice. In *B. Surinder Singh Kanda* v *Government of the Federation of Malaya* (cited above) Inspector Kanda was accused of misconduct in relation to evidence in a prosecution. A board of inquiry reported that evidence had been fabricated for use at the trial. In the misconduct proceedings the adjudicating officer had available to him the report of the board of inquiry. A copy of the report was not given to Inspector Kanda. The question was whether the hearing by the adjudicating officer was vitiated by his being furnished with the report without Inspector Kanda being given any opportunity of correcting or contradicting it. Inspector Kanda was subsequently dismissed for misconduct. The Judicial Committee of the Privy Council decided the case on the basis of the right to be heard, carrying with it the right of an accused man to know the case which is made against him. Lord Denning at pages [337-338]:

"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… 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 [sic] 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."

[166] It is clear that the decision to dismiss Inspector Kanda was made on the basis of evidence which was given outwith his presence and which he was not given an opportunity to correct or contradict. In what was clearly a case of an adversarial nature a person accused of serious misconduct was not given access to material evidence which contributed to the decision against him.

[167] Senior counsel for the applicants referred to a number of other cases in which a breach of natural justice was said to vitiate the proceedings. These included *Errington and Others* v *Minister of Health* [1935] 1 KB 249 in which the question was whether to quash an order of the Minister of Health confirming a clearance order made by the council of Jarrow. The appellants, who had an interest in properties within the clearance area, objected to the order, contending that the situation could be met by repairs rather than by the demolition of the area. The Minister appointed an inspector to conduct a public hearing at which objections were presented.

[168] Later in the process the principal assistant secretary in charge of housing at the ministry and the inspector visited Jarrow and met members of the council. They visited the site and officials of the council pointed out the issues with the buildings that would make it unsatisfactory to leave them and repair them. This was done outwith the presence of the appellants. At page [268] Lord Justice Greer said:

"if, instead of directing his mind solely to those matters, he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte afterwards without the owners

having any opportunity whatever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act."

[169] The decision in *Hibernian Property Co. Ltd* v *Secretary of State for the Environment and Another* (1974) 27 P & CR 197 related to an application to quash an order for compulsory purchase made by Liverpool City Council and confirmed by the Secretary of State. The council made a compulsory purchase order covering 115 houses unfit for human habitation and other houses. The applicants, who had an interest in all the land covered by the order, objected and an inspector held a public local inquiry. The day after the inquiry was closed the inspector inspected the order area and neighbouring areas. In the course of that she obtained further information about the wishes of the occupiers as between demolition and improvement. She did so in the absence of any representative of the applicants. There was no opportunity for the applicants to cross-examine those who gave evidence to the inspector about the houses. The inspector and the Secretary of State were acting in a quasi-judicial capacity and they were therefore bound to observe the rules of natural justice, including in particular the rule embodied in the maxim *audi alteram partem*.

[170] *Furmston* v *Secretary of State for the Environment* [1982] JPL 49 concerned an application to the county council for planning permission to build a residential development which was refused as contrary to the local structure plan and for other reasons. The applicant appealed to the Secretary of State. An inspector was appointed. The inquiry consisted of written representations, the inspector viewing the site and the site meeting. Before the site meeting the inspector spoke to an officer of the local district council responsible for recommending refusal at local level. After the site meeting the inspector had a meeting with the county council's representative. The inspector acted contrary to the rules of natural justice.

[171] What emerges from these cases is that in the course of making a specific decision evidence was introduced outwith the presence of a party who was not given an opportunity to contradict it or make submissions about it before the decision was made. This constituted a breach of the right to be heard.

Considerations in applying rules of natural justice

Statutory framework

[172] Returning to the considerations to be taken into account in applying the rules of natural justice to the particular circumstances of the Inquiry, I note, first, that the statutory framework in which a public inquiry operates gives a wide discretion to the chair in the conduct and procedure of the inquiry. On the face of it the exercise of that discretion would extend to a meeting with core participants, including bereaved families.

Nature and character of a public inquiry

[173] As to the nature and character of the Inquiry, at paragraphs [35]-[45] above I have set out in detail the inquisitorial character of a public inquiry under the 2005 Act and the ways in which an inquisitorial inquiry differs from adversarial procedure in the criminal and civil courts. While at a high level of principle the rules of natural justice may be said to apply to a public inquiry, the application of the rules relating to the right to be heard has to take account of the very different ways in which an inquisitorial inquiry operates compared with an adversarial process. This means that aspects of the rules of natural justice familiar in the adversarial setting will not apply in the inquisitorial setting. For example, in adversarial proceedings it is an aspect of the right to be heard that the parties should be given an opportunity to call their own witnesses and cross-examine the opposing witnesses. In a public inquiry there is no right to cross-examine witnesses and no right to lead evidence.

[174] In addition, as noted above, in a public inquiry the chair will have direct communications with individual core participants without the involvement of other core participants. It is also a well-established feature of public inquiries that the chair should meet bereaved families and chairs are encouraged to do so. Accordingly, aspects of the right to be heard that would prevent such meetings in an adversarial process cannot simply be read across to a public inquiry.

[175] There is nothing in the cases relied on by the applicants that supports the proposition that the chair of a public inquiry under the 2005 Act is forbidden from

meeting with families of the deceased. The nature, character and context of the processes in these cases is entirely different from an inquisitorial inquiry under the 2005 Act.

The terms of reference

[176] The importance of the terms of reference in underpinning the conduct of a public inquiry and as a consideration to be taken into account in the application of the principles of fairness has been stressed in a number of cases. In *R (On the Application Of EA (by her litigation friend MA) and BT)* v *The Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) at paragraph [45]:

> "The Chairman gains his authority and legitimacy from the Terms of Reference. The Terms of Reference define the scope and limits of that authority. It is the starting point for any analysis of how he can, and must, act."

In *In the Matter of An Application by LP for Judicial Review* v *In the Matter of a Decision of the Inquiry Into Historical Institutional Abuse 1922-1995* [2014] NICA 67 the Court of Appeal in Northern Ireland quoted with approval, at paragraph [18], the statement of Lord Justice Treacy at first instance:

> "The Chairman's duty to act with fairness in terms of the procedures must be considered in light of the purpose of the Inquiry as set out in the 2013 Act and the terms of reference. Subject to the requirements of fair procedures and justice a wide margin of appreciation is to be afforded to the Inquiry in respect of the procedures they adopt influenced by factors such as speed, efficiency and costs."

At paragraph [39] above, in the context of noting that a public inquiry is not subject to the rules of evidence, I referred to the decision of the Divisional Court in *R (Cabinet Office)* v *Chair of the UK Covid-19 Inquiry* (cited above) at paragraph [52] of the judgment. The contrast between the adversarial process in a civil or criminal court and the investigative nature of an inquiry is stressed in the same paragraph:

> "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]

[177] A court does not have an investigative purpose or obligations. My terms of reference set my investigative obligations. These include (a) an investigation of whether the events leading up to and following Sheku Bayoh's death were affected by his actual or perceived race; and (b) an investigation into the post-incident management process and investigation conducted by various bodies in the aftermath of the death. Such investigations would be foreign to any court. The fairness of my conduct as a whole and individual steps that I took in the course of the Inquiry have to be examined in the light of the need to carry out such investigations efficiently and effectively. This is one of the reasons why the 2005 Act and the decisions referred to above give the chair of a public inquiry a wide discretion in the conduct and procedure of the inquiry.

[178] One of the reasons for seeking undertakings from the Solicitor General and the Deputy Chief Constable, as described at paragraphs [66]-[68] above, related to the requirements in the terms of reference to examine the issue of race. In giving my decision at paragraph [24] I stated:

"The terms of reference include the remit "to establish the extent (if any) to which the events leading up to and following Mr Bayoh' [sic] death, in particular the actions of the officers involved, were affected by his actual or perceived race and to make recommendations to address any findings in that regard". The issue of race will be explored as a thread throughout the hearings. This is an area which may very much depend on drawing inferences from a body of circumstantial evidence. More than one inference may be capable of being drawn from the same body of evidence. Explanations for acts or omissions of officers might require to be taken into account. In the absence of undertakings it is likely that explanations would not be available. I consider that fulfilling the remit in relation to race will require full exploration of the actions of the officers and former officers

concerned, including full, frank and uninhibited evidence from them as witnesses."

Thus, in seeking to fulfil the obligation in the terms of reference to investigate issues relating to race I required to exercise discretion in order to ensure the participation and engagement in the Inquiry of certain officers by seeking the undertakings. That step was necessary in order to effectively achieve the purpose of the terms of reference. It was within the wide margin of appreciation allowed to the chair of a public inquiry under the 2005 Act.

[179] My purpose in meeting members of the families was in order to obtain and retain their participation and engagement in the Inquiry. In the event that they had ceased to participate and engage with the Inquiry the ability of the Inquiry to conduct an investigation in relation to race and also the post-incident management and investigation carried out by various bodies would have been severely jeopardised. I consider that the holding of such meetings was within the wide margin of appreciation allowed to the chair of a public inquiry under the 2005 Act when assessing the fairness of the procedure adopted.

Subject matter and kind of decisions: centrality of evidence

[180] The terms of reference of the Inquiry require it to make findings in fact and recommendations. This means that evidence is central to the Inquiry. In *Peter Thomas Mahon* v *Air New Zealand Ltd. and Others* [1984] AC 808, at page [820], Lord Diplock giving the judgment of the Privy Council said:

"The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. <u>The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value</u> in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting

with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made."

[emphasis added]

[181] At paragraphs [75]-[92] above I have set out in detail various ways in which evidence is crucial in the Inquiry. Everything turns on the evidence. Findings in fact and recommendations require to be founded in the evidence. If the findings were not supported in the evidence the report would be open to judicial review. There is a specific requirement for criticism in a warning letter under rule 12 of the 2007 Rules to be founded in the evidence. The importance of the evidence is reinforced by the requirement to justify under reference to the evidence decisions on credibility and reliability and the makings of findings in fact. The focusing effect of evidence on the finder of fact is a significant safeguard in this respect.

[182] Anything said in the course of the meetings with the families of Sheku Bayoh cannot be relied on as evidence. Members of the families have given evidence either orally or in written statements. Core participants will have an opportunity to make submissions on the evidence, including the evidence of family members.

[183] I have not yet made any substantive decision based on the evidence.

Further safeguards of the right to be heard

[184] In addition, there are further safeguards designed to ensure that the right to be heard is fully respected within an inquisitorial process. Public inquiries put in place structures, processes and procedures to protect the right to be heard. In the Inquiry I have put in place such arrangements. I have appointed police officers and others who satisfy the requirements as core participants. They are legally represented by senior counsel, junior counsel and solicitors. I have encouraged them to suggest lines of investigation to the Inquiry. They made opening submissions. They have received disclosure of statements from witnesses and relevant documents. They have had the opportunity of listening to

all of the evidence. They have given evidence. At paragraphs [68]-[72] of my Note I outlined the flexible procedures of the Inquiry in relation to the evidence of a witness. Before a witness gave oral evidence they had an opportunity under rule 9 of the 2007 Rules to suggest lines of questioning to counsel to the Inquiry. Where in the course of the oral evidence of a witness an issue arose that gave a core participant cause for concern their counsel could approach counsel to the Inquiry informally at breaks and raise matters with them. This was done on a daily basis in the course of the Inquiry. In addition, I put in place a formal process under the "*Guidance on 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.
> - 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."[61]

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

[61] PH-00062(a)

[186] After the examination of a witness by counsel to the Inquiry was complete I gave an opportunity to counsel for core participants to make an application under rule 9 of the 2007 Rules to be permitted to examine the witness.

[187] Even after the evidence of a witness was complete, it was open to the legal representatives of a core participant who had concerns to take steps, including moving for recall of the witness. In the course of the Inquiry a number of witnesses were recalled. Alternatively, the legal representative could provide further information to the Inquiry and invite the Inquiry to obtain a further written statement from the witness under rule 8 of the 2007 Rules. Again, this was done in respect of a number of witnesses.

[188] Core participants will have an opportunity to make closing submissions.

[189] Any officer or other person who is liable to be criticised in the course of the Inquiry will be subject to the warning letter procedure under rule 12(2) of the 2007 Rules as set out at paragraph [77] above. It is clear from these provisions that any criticism must be demonstrably grounded in the evidence and not based on any extraneous material.

Awareness of core participants of the context and contents of the meetings

[190] At paragraph [90] above I noted that as a result of the current process core participants are now in a position where in closing submissions they will have an opportunity to challenge things that were said in the course of the meetings and make submissions about what was said. In the context of the right to be heard this puts them in a different position from the parties in the cases on which the applicants relied. In these cases, in the course of making a specific decision evidence was introduced outwith the presence of a party who was not given an opportunity to contradict it or make submissions about it. The difficulty was discovered after the decision had been made. In the current stage of the Inquiry I have not yet made any decisions and the core participants are aware of the context and contents of the meetings.

Conclusion

[191] While the applicants assert that any meeting with the families of Sheku Bayoh was forbidden, the authorities on which they rely make it clear that the mischief is in receiving evidence and representations outwith the presence of a party without that party having the opportunity to contradict and make submissions about what was said. Thus, the applicants' case based on the right to be heard must be founded on the proposition that in the course of meeting the families I received evidence and representations without the applicants having an opportunity to contradict what was said or make submissions about it.

[192] Having regard to the statutory framework under which it operates and the nature and character of an inquisitorial inquiry I consider that having meetings with the families was not in itself unfair. Taking into account (a) the content and context of the meetings, in the course of which, as I have already examined in detail in the context of apparent bias, I was not receiving evidence or submissions; (b) the centrality and focus of the evidence; (c) the structural and procedural protections of the right to be heard established in the Inquiry; and (d) that as a result of the current process core participants are aware of the context and contents of the meetings and will have an opportunity to make submissions, I am satisfied that the meetings with the families of Sheku Bayoh did not constitute a breach of the right to be heard.

Lord Bracadale

13 August 2025

ANNEX 1

Core Participants to the Sheku Bayoh Inquiry:

The families of Sheku Bayoh

Sheku Bayoh's two sons

Collette Bell

Aminata Bayoh

Kosna Bayoh

Adama Jalloh

Adeyemi Johnson

Kadijartu Johnson

Connie Barcik as parent and guardian of Sheku Bayoh's eldest son

Officers and retired officers of the Police Service of Scotland

Chief Superintendent Patrick Campbell

PC Daniel Gibson

PC Kayleigh Good

Sgt Scott Maxwell

PC James McDonough

Garry McEwan

Alan Paton

Nicole Short

PC Alan Smith

DC Ashley Tomlinson

Chief Superintendent Conrad Trickett

PC Craig Walker

Bodies and institutions

The Chief Constable of the Police Service of Scotland

The Lord Advocate

The Police Investigations and Review Commissioner

The Scottish Police Federation

Coalition for Racial Equality and Rights (CRER)

Counsel who made oral submissions at the hearing on 12 June 2025:

The Scottish Police Federation, Nicole Short and PC Craig Walker (Applicants): Dean of Faculty KC

PC Kayleigh Good, PC Alan Smith and DC Ashley Tomlinson: Dan Byrne KC

Alan Paton: Mark Stewart KC

Solicitor General for Scotland: Alastair Duncan KC

The Coalition for Racial Equality and Rights: Mark Moir KC

The families of Sheku Bayoh: Claire Mitchell KC

Senior counsel to the Inquiry: Jason Beer KC

The written submissions relating to this hearing and any supporting documents are available at the Inquiry website: Evidence library | Sheku Bayoh Inquiry.

The video of the full hearing on 12 June 2025 and the transcript of the hearing are also available on the Inquiry website: Day 123: Procedure and conduct hearing 12/06/2025 (am) | Sheku Bayoh Inquiry.

ANNEX 2

Hearing schedule overview:

Hearing block (subject matter)	Dates of hearing block
Preliminary Hearing 1 – Opening remarks & assessor introductions	18 November 2021
Preliminary Hearing 2 – Submissions on undertakings	22 February 2022
Hearing 1a – Events at Hayfield Road on 3 May 2015	10 May – 24 June 2022
Hearing 1b – Expert evidence on the events at Hayfield Road	22 November – 9 December 2022
Hearing 2 – Police Service of Scotland post-incident management	31 January – 9 February 2023 28 February – 17 March 2023
Procedural Hearing re overlap between hearing dates & M9 Fatal Accident Inquiry	10 February 2023
Hearing 3 – Cause of death	9 – 26 May 2023
Oral Submissions – Submissions from legal representatives of **core participants** on: • Hearing 1 (events at Hayfield Road on 3 May 2015); and • Hearing 3 (cause of death).	27 June 2023
Hearing 2 – Police Service of Scotland post-incident management (continued)	28 August – 1 September 2023 13 September – 15 September 2023
Hearing 4 – Training in Police Service of Scotland	22 November – 6 December 2023
Hearing 5 – PIRC post-incident management	6 – 16 February 2024 27 February – 8 March 2024

Procedural Hearing – Extent of the terms of reference	12 April 2024
Hearing 6 – COPFS post-incident management	16 April – 2 May 2024
Hearing 7 – Race	4 – 7 June 2024 19 June – 4 July 2024
Hearing 8 – Training and race (continued)	1 – 9 October 2024

ANNEX 3

Note by the Chair [see next page]

Conduct and procedure hearing

Note by Chair

Importance of family participation

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

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

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

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

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

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

[1] PH-00066

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

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

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

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

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

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

November 2020 - November 2021

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

Meeting 4 November 2021

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

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

[2] PH-00064; PH-00064(a)
[3] PH-00063; PH-00063(a)
[4] PH-00001; PH-00020

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

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

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

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

[5] PH-00002
[6] PH-00002
[7] PH-00006

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

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

> "I would expect certain members of the family to give evidence in hearing three in relation to what happened after the death and in the course of the investigation into it…"[9]

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

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

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

[8] PH-00002
[9] Day 1/3/13
[10] SBPI-00236; SBPI-00248; SBPI-00233; SBPI-00231; Day 34
[11] PH-00002
[12] PH1/7/15
[13] PH-00020

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

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

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

[14] PH-00002
[15] PH-00003; PH-00004; PH-00005
[16] PH-00003; PH-00004; PH-00005
[17] PH-00003; PH-00004; PH-00005

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

[22] In the course of the meeting on 4 November 2021 I referred to an impasse in which the Crown had refused to consent to disclosure of documents by Police Scotland and that that had been resolved.[19] This was the issue discussed in the course of my meeting and telephone call with the Solicitor General, noted above. At the meeting on 24 September 2021, which was held remotely, I was not accompanied by any member of the Inquiry team. My speaking note is available.[20] A similar speaking note is available in respect of my telephone conversation on 4 October 2021.[21]

Cancellation of meeting 24 February 2022

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

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

[18] PH-00040(b)
[19] PH-00002
[20] PH-00064(a)
[21] PH-00063(a)
[22] PH-00010

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

Meeting 13 April 2022

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

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

Meeting 21 November 2022

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

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

[23] PH-00006
[24] PH-00002
[25] PH-00006
[26] PH-00007

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

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

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

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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]

[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:

[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