

The Fingerprint Inquiry | Scotland

Initial Hearing
20th October 2008

The Chairman's Opening Statement

Good morning, Ladies and Gentlemen

As you know I have been appointed by the Scottish Ministers to conduct this Inquiry.

This is our Initial Hearing, which is essentially to deal with business matters.

In a moment, I would like to say something about the inquiry as a whole and to introduce the team that will assist me, to say who has been given the status of a core participant and to refer to their legal representation and funding. I will then be inviting contributions in writing in preparation for a Procedural Hearing in November.

Following this we will have a short break before I invite legal representatives and others to introduce themselves, and to raise any matters that they may wish to ask me to consider at this stage.

This Inquiry was announced and set up officially in March. At that time it was stated that I would not be beginning work on the Inquiry until September when I would cease to be an appeal court judge in Northern Ireland.

The Scottish Ministers consulted me before they decided on the Inquiry's terms of reference which are:

- to inquire into the steps that were taken to identify and verify the fingerprints associated with, and leading up to the case of *HM Advocate v McKie* in 1999, and
- to determine, in relation to the fingerprint designated Y7, the consequences of the steps taken, or not taken, and
- to report findings of fact and make recommendations as to what measures might now be introduced, beyond those that have already been introduced since 1999, to ensure that any shortcomings are avoided in the future.

I can appreciate that for many of those who have been involved in these matters it will be very stressful to have to return to them yet again. However, I am encouraged by the number of people who have already been in touch with the Inquiry and who have expressed a willingness to assist me in this task. It is my aim that the Inquiry should be thorough and that when it ends all those who have been involved in it should feel that they have been given a full and fair hearing. I hope that I can count on the cooperation of everyone who has a contribution to make to the work of the Inquiry to help me to achieve this.

As already announced, I have appointed Mr Gerry Moynihan QC as senior counsel to the Inquiry, Miss Ailsa Carmichael as junior counsel and Mrs Ann Nelson as solicitor and secretary. Ann will be assisted in her dual role by Mr Roddy Flinn as deputy solicitor and Ms Carole Ross on the administrative side, with an appropriate support team. All of us are independent of government.

Information about the Inquiry is already available on the web site and I would encourage all those who want to keep in touch with the Inquiry and to find out about hearing dates and other information to visit the site. Once the actual hearings begin the daily transcripts will be found on the web site along with other evidence in the inquiry.

This is an Inquiry under the Inquiries Act 2005 and it is essential to make it clear from the outset that it is not an adversarial contest – it is inquisitorial and I have considerable discretion as to the procedure to be followed, the witnesses who are to be called upon to give evidence and the extent, if any, to which they may be questioned by others.

I am required both by the Act and the Inquiries Rules not only to act with fairness but also to avoid any unnecessary expense not only to public funds but also to witnesses and others who may be involved in the Inquiry.

Before the Inquiry gets fully underway in the sense of dealing with evidence there are various preliminary matters to attend to and that is why we are holding this hearing today, and the hearing we have scheduled for 21 November.

The purpose of this morning's Initial Hearing is to allow me to identify who will be core participants in the Inquiry from the outset. I say from the outset because others may wish to apply to be designated as core participants during the course of the inquiry as it progresses – my power to designate a person as a core participant continues throughout the inquiry.

I want to explain the distinction between a core participant and others who may be involved in the Inquiry. For example there may be witnesses who are required to give oral evidence to the Inquiry. While they are not obliged to appoint a lawyer to represent them they may choose to do so. If they do I may permit their lawyer to participate in the hearing to a limited extent such as asking questions of their own client or to question someone whose evidence relates directly to their client's evidence. In any event their lawyer will be regarded as their recognised legal representative in respect of the proceedings of the inquiry.

A core participant on the other hand, who may or may not be a witness, is eligible to have a wider role in the Inquiry. For example, it's normal in an inquiry for core participants to have advance access, for preparation purposes, to the evidence that will be given at a particular day's hearing.

Core participants are not guaranteed a right to separate representation by a lawyer of their own choice. I have power to require those with a common interest to be represented by one lawyer or legal team. Before doing so three requirements will have to be met:

- the interests of the relevant core participants in the outcome of the inquiry have to be similar
- the facts they are likely to rely on during the inquiry have to be similar, and
- it has to be fair and proper for them to be jointly represented.

In September, at the time the Inquiry's website went live, we published a public notice in the national and local press. In this we invited those who wanted to seek core participant status from the outset, to apply by 3 October. This was in order that I could consider the applications and respond to the applicants before today's hearing. We provided notes and application forms to assist people in providing me with the information that I might need in order to reach a decision.

In reaching a decision as to whether or not someone should be a core participant I have to have particular regard for the desirability of including those who

- played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates
- have a significant interest in an important aspect of the matters to which the inquiry relates or
- may be subject to significant or explicit criticism during the proceedings at the inquiry or in any report by the inquiry.

I have power to specify before the end of the Inquiry that a person ceases to be a core participant. As the remit of this Inquiry falls into two distinct areas - first the fact finding and then secondly making recommendations - it is possible that some of those who have been designated as core participants may cease to be for the second part. I have not made any decision about this but I mention it as some core participants may wish to indicate, at a later stage, that they have no interest in that particular part of the Inquiry.

A number of written applications to be designated as a core participant have been received and I have been able to consider these. From the information available I am able to announce that I have designated the following to date as core participants.

David Asbury
The Lord Advocate, for the Crown Office & Procurator Fiscal Service
The Chief Constable, Strathclyde Police (Stephen House)
Terence Foley
Alister Geddes
David Halliday
Fiona McBride
Anthony McKenna
Robert Mackenzie
Iain McKie
Shirley McKie
Hugh Macpherson
Charles Stewart
Peter Swann
Pat Wertheim.

When requesting applications from potential core participants we gave an opportunity for those who wished to have a legal representative to say so, and for those who wished to seek public funding from the inquiry for legal representation to apply for this.

As it will be public funding it is right that I give some detailed information as to how this will be administered.

My power to make awards for the funding of legal representation is not limited to core participants. I have power to make such an award to others – for example witnesses in respect of their attending or otherwise in relation to the inquiry. I also have power to make awards by way of compensation for loss of time and for other expenses. However my focus at this time has been on core participants and the funding of their legal representation where applicable as we are not yet at the stage of identifying the involvement of others in the

inquiry. In due course further information about the other kinds of awards will be available on the Inquiry website.

My power under the Inquiries Act 2005 to make awards for public funding in respect of legal representation for core participants is subject to the Inquiries Rules 2007 and also the qualifications and conditions imposed by the Scottish Ministers under section 40 of the Act.

The relevant legal context is this:

In terms of section 40(3) of the Inquiries Act I have power to award amounts in respect of legal representation where, in my opinion, the person seeking such an award “has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award”.

That power must be exercised in light of section 17(3), which requires me to act “with fairness and with regard also to the need to avoid unnecessary cost (whether to public funds or witnesses or others)”.

Section 40(3) is amplified by rule 18 of the 2007 Rules which requires me to take account of the applicant’s financial resources and the public interest so far as relating to the making of an award.

Rule 19 requires me, in making an award, to set certain conditions, and gives me power to add others.

Rules 5 and 6 make provision regarding recognised legal representatives, and joint representation.

And finally, the Scottish Ministers made a Determination under section 40(4) of the Act, announced in the Cabinet Secretary for Justice’s Written Answer to the Scottish Parliament dated 5 June 2008. This states that awards in respect of legal representation may be made only in circumstances in which I consider it is necessary, fair, reasonable and proportionate for such an award to be made. The Ministers’ Determination also imposed certain limitations on the costs which may be incurred in terms of any award I make. Where I do make an award it has to be subject to the condition that payment will be made only for work that is evidenced and can be identified as having been done in an effective and efficient manner, avoiding unnecessary duplication and making best use of public funds.

Awards are only be made in respect of legal representation provided by one or more named legal representatives and their involvement has to be approved in advance by me. I am required to approve the size and composition of any legal team to be engaged, including the seniority and number of any counsel. Costs associated with work carried out by legal representatives not approved in advance of the work being carried out are not to be met from public funds.

Since the Inquiry is inquisitorial in nature, legal representatives will not be paid for any investigative work or for work in relation to obtaining expert reports, unless I give express permission in advance for this work to be carried out.

The Ministers’ Determination also states that legal representatives will agree in advance, with the solicitor to the inquiry, hourly rates for counsel and solicitors, subject to specified maximum hourly rates and a maximum number of hours that can be charged.

I have duly considered the various applications that I have had for funding for legal representation, and the question of joint representation.

I can say that I have made the following decisions to date as regards the funding of legal representation, and joint representation.

I have decided that, having regard to the considerations I mentioned earlier, for reasons of efficiency and effectiveness certain core participants should be jointly represented.

I have determined that David Asbury, Iain McKie & Shirley McKie should be publicly funded by the inquiry and represented by a single recognised legal representative. He is Mr Gordon Dalyell of Digby Brown, Solicitors, Edinburgh.

I have determined that Terence Foley, Alister Geddes, David Halliday, Fiona McBride, Anthony McKenna, Robert Mackenzie, Hugh Macpherson & Charles Stewart should be publicly funded by the inquiry and represented by a single recognised legal representative. He is Mr Stuart Holmes of Turcan Connell, Solicitors, Edinburgh.

The recognised legal representatives for the following, who are not publicly funded by the inquiry are:

- for the Lord Advocate – The Crown Agent, Mr Norman McFadyen
- for the Chief Constable of Strathclyde Police – Mr Randal Macpherson of Simpson & Marwick. Solicitors, Edinburgh
- for Peter Swann – Mr David Russell of Towells, Solicitors, Wakefield.

Pat Wertheim has not appointed a lawyer and so does not have a recognised legal representative.

At the conclusion of this statement I intend to invite the core participants and recognised legal representatives here today to introduce themselves. Once they have done so I will give those who wish to address me an opportunity to do so. However, I intend to have a short adjournment before we turn to that part of the proceedings.

It may be helpful if I say something about the likely programme for the Inquiry. I began working on the Inquiry on 1 September and although we have made considerable progress it is still early days in the process of receiving documents and other information, and statements from potential witnesses. As we are going back to January 1997 a number of files have still to be traced and recovered from storage. These will then all have to be reviewed and an inquiry bundle prepared which will be made available to the core participants in electronic form. They will then require time to consider the material. Accordingly, at this stage the only indication I am able to give about oral hearings is that they will not commence until early next year and by that I mean certainly not before February. I expect to be able to announce the venue at or before the November hearing.

It will be a Procedural Hearing and will be held here on the morning of Friday 21 November at 10.30am.

In preparation for 21 November, I would like to hear in writing from those who have suggestions as to the matters – within our terms of reference - that the Inquiry should consider. I would like to have that information beforehand so that I can consider it ahead of the hearing. The purpose of this is to ensure that the Inquiry covers all relevant issues.

I am therefore inviting the representatives of those who have been designated as core participants - and others who so wish - to provide to me prior to the next hearing three things:

- an outline of the issues within the terms of reference that they would wish to see the Inquiry pursue;
- the lines of evidence that they would regard it as necessary for the inquiry to follow; and
- the witnesses and documents that they would regard as relevant to such lines of inquiry.

So that I may have time to consider these suggestions in advance of the hearing I need this information to be sent to the Inquiry by 14 November. Full details about contacting the Inquiry are on the Inquiry website.

Sir Anthony Campbell
Chairman
The Fingerprint Inquiry

20 October 2008