

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 essentially an initial hearing to deal with business matters.

In a moment, I am going to say something about the Inquiry as a whole and introduce the team that is going to assist me, to say who has been given at this stage the status of a core participant and to refer to their legal representation and the arrangements for funding. Then I will be asking for contributions in writing in preparation for a Procedural Hearing which is going to take place here in November.

When I have dealt with these matters, we will have a short break and then I am going to invite the legal representatives and others to introduce themselves, and to raise any matters that they wish to ask me to consider at this stage of the Inquiry.

The Inquiry was officially announced in March and at that time it was made clear that I would not be beginning any work on the Inquiry until September, which is when I would have ceased to be a judge in the Court of Appeal in Northern Ireland.

Before the terms of reference of this Inquiry were settled, I was consulted by the Scottish Ministers and it would be helpful if I just repeat what the terms of reference of the Inquiry are:

- first, 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,
- secondly, to determine, in relation to the fingerprint designated Y7, the consequences of the steps taken, or not taken; and
- thirdly, 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 would be very stressful indeed to have to return to them yet again. However, I am greatly encouraged by the number of people who have already been in touch with the Inquiry and who expressed a willingness on their part to assist me in the task that I have been given. It is my aim that this Inquiry should be as thorough as possible and that when it ends all those who have been involved in it should feel they have been given a full and fair hearing. I hope 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 the Solicitor and Secretary to the Inquiry. Because she has a dual role, she is going to be assisted by Mr Roddy Flinn as deputy solicitor and Ms Carole Ross on the administrative side, with an

appropriate support team. I want to stress, of course, that all of us are independent of Government. So this is a completely independent inquiry.

Information about the Inquiry is already available on the website and I really encourage those who want to keep in touch with the Inquiry and to find out about hearing dates and any other information to visit the site. Once the actual hearings begin, the daily transcripts will be on the website along with other evidence in the Inquiry, so that anyone, any member of the public, anyone who wants to follow, can see the transcripts of the evidence.

This is an Inquiry under the Inquiries Act 2005 and because it is under that Act, it is very important that I make it clear from the very 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.

As you would expect, 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 obviously preliminary matters to attend to and that is really the purpose of this hearing today, and the hearing scheduled now 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. Indeed I have just been told that there is another application in the pipeline; so the number of core participants may increase as we go along. My power to designate a person as a core participant allows me to do this so that I can add people at any stage.

Let me explain the distinction, because I think it is important that it is appreciated, 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 in the Inquiry. While they are not obliged to appoint a lawyer to represent them they may choose to do this. If they do, I may permit that 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 I will regard their lawyer as their 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 is 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 am given power under the Act to require those with a common interest to be represented by one lawyer or legal team. But before I can do this, three requirements 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, when the Inquiry's website went live, we published a notice in the national and local press inviting those who wanted to seek core participant status from the very outset, to apply by 3 October. That was to allow me to consider their applications and respond to them before this morning. We provided notes and application forms to assist people and that would assist me in turn, with the information that they gave, as to whether they should be core participants or not.

In reaching a decision as to whether somebody should be a core participant, I have to have 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 of 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 fact finding and then secondly, making recommendations - it is possible that some of those who will be core participants at the start may cease to be for the second part. But I have not made any decision about this and 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.

I should also add that if you are a core participant it does not mean you have to come to the Inquiry all the time; you come at times that are of particular interest to you or your client if you are representing a core participant.

We have had a number of written applications to be designated as core participants and I have had time to consider these. From the information that I have been given, I am able to announce that the following have been designated to date as core participants, and I want to stress that there are other applications in the pipeline:

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

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

As this is going to be public funding, I feel it is right that I should give some detailed information as to how these public funds 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 awards 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 to people who have lost time and incurred other expenses. However my focus at this time has been on the 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 to make awards for public funding in respect of legal representation of core participants is subject to the Inquiries Rules of 2007 and it is also subject to 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 then further amplified by Rule 18 which requires me to take account of the applicant’s financial resources and the public interest so far as relating to the making of the 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.

Finally on this aspect, the Scottish Ministers made a Determination under section 40(4) of the Act, which was announced by the Cabinet Secretary for Justice in a Written Answer to the Scottish Parliament on 5 June of this year. 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 imposed certain limitations on the costs which may be incurred in the awards that 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 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 also to approve the size and composition of any legal team 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, I want to stress that 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 under the Ministers' Determination.

I have duly considered the applications for funding for legal representation, and the question of joint representation and I have made the following decisions to date as regards funding of legal representation, and joint representation.

I have decided that, having regard to the considerations I have already mentioned, for reasons of efficiency and effectiveness several 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 also 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 and he is Mr Stuart Holmes of Turcan Connell, Solicitors, Edinburgh.

The recognised legal representatives for the following, who will not be 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; and
- for Peter Swann – Mr David Russell of Towells, Solicitors, Wakefield.

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

At the conclusion of this statement, I am going to invite the core participants and recognised legal representatives here today to introduce themselves and once they have done so, I will give anybody who wants to address me an opportunity to do so. But what I will do is have a short adjournment before we turn to that part of the proceedings.

It may be helpful if I try now to say something about the likely programme for the Inquiry. I began work on the Inquiry on 1 September and although we have made considerable progress, I feel at this stage, 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 and that, of course, is going to take time. These will then have to be reviewed and an inquiry bundle prepared which will be made available to the core participants in electronic form. Then they will need time, in turn, to consider the material. Accordingly, at this stage, though I am anxious to get ahead with the Inquiry, I feel I have also to be realistic and I am of the view that the oral hearings cannot commence until early next year and by that I mean not before February. I hope to be able to announce the venue for the Inquiry proper at or before the November hearing.

The November hearing will be a Procedural Hearing and will be held here in the Concert Hall on the morning of Friday 21 November and we will sit at 10.30am.

■ In preparation for 21 November – this is where the work falls on others for a change - 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 cannot, of course, say that just because somebody suggests I should follow a particular course that I am going to do that, but it would be very helpful to me to have this assistance and to know what people feel this Inquiry, within the terms of reference, should deal with.

So I am going to invite the representatives of those who have been designated as core participants - and any others who wish to do so - to provide me before the hearing on 21 November with three things:

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

■ I am sorry about putting time pressure on it but I am going to need time to look at these suggestions if we are going to have a worthwhile sitting on 21 November and I will really need to have the information by 14 November. I hope you will be able to achieve that date. Full details about contacting the Inquiry and so on, as I say again, are on the Inquiry website.

So that concludes my opening statement and thank you all for coming this morning.