

Transcript of the Sheku Bayoh Inquiry

Friday, 19 April 2024

(10.01 am)

LES BROWN (continued)

Examination-in-chief by MS GRAHAME

LORD BRACADALE: Good morning, Mr Brown. Ms Grahame.

MS GRAHAME: Thank you. Yesterday I said to you that we had information available from Ashley Edwards that she didn't remember being told about Dr Karch and the situation which arose with him, but overnight I have been given a copy an email that you sent in -- on 19 January 2018, so in the period towards the end of the third period that we're talking about, after the final report had been obtained and prior to the Crown Counsel making the decision. But it was an email from you to Ashley Edwards saying:

"I suggest that we remove all reference to Dr Karch on the basis that the previous Lord Advocate indicated to Aamar Anwar that we would not be relying on him following his comments to a newspaper."

So although Ms Edwards may not have a recollection, it does appear that you had sent that email to her advising her of the issues and she acknowledged that subsequently on the same day. So at the time you did do that. Thank you.

Q. Yesterday we were looking at period 2 which was the

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1 period between the first PIRC report and the final PIRC
2 report?

3 A. Yes.

4 Q. And we had looked at your letter of 2 September, which
5 gave more detailed instructions. We'd looked through
6 your statement and we had move on into 2015 and you were
7 starting to talk about that.

8 You had explained to me that in your statement you
9 said:

10 "My advice was given against a background where it
11 was accepted that at all times race and racial
12 motivation required to be considered as a continuous
13 process as at the Inquiry progressed and that an absence
14 of overt racial motivation should not be regarded as
15 determinative. Consideration of implicit bias and
16 assumptions based on race and the overall approach
17 required to be assessed as the investigation developed
18 and the evidence was gathered."

19 And that was part of your Inquiry statement and you
20 had explained to me that that was from the beginning of
21 the end of the -- from the beginning of the
22 investigation to the end?

23 A. It should have been, yes.

24 Q. It should have been.

25 At the conclusion of period 2, which we've been

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1 talking about, the final PIRC report was sent to
2 Crown Office?

3 A. Yes.

4 Q. And that was just over a year after the first PIRC
5 report was sent?

6 A. Yes.

7 Q. And so this morning I would like to move on to that
8 third period, which was from 10 August 2016, when
9 Crown Office were sent the final report, up until the
10 point at which the crown precognition was sent to
11 Crown Counsel and we know a decision was made at that
12 stage.

13 A. Yes.

14 Q. And I'm not going to go asking you any questions about
15 the decision or the rationale for that. But that period
16 between August 2016 and 2018, roughly around a couple of
17 years, if we can think of it that way, between '16 and
18 '18.

19 A. Yes.

20 Q. And is it fair to say that to say that it was during
21 this period that the crown investigation in the real
22 sense of the word is being conducted, the crown
23 precognition is being prepared, and the crown are on
24 their own at this time in a sense. There's no
25 involvement of Police Scotland and there's no

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1 involvement really by PIRC at this time, other than some
2 specific --

3 A. Yes.

4 Q. -- points. Really this is where the crown come into
5 their own in a sense?

6 A. Yes.

7 Q. Now, we've talked about your team and the Inquiry is
8 being advised that Alisdair McLeod, and I think you
9 mentioned this the other day, Alisdair McLeod was
10 seconded to your team to deal with -- specifically with
11 the investigation into Mr Bayoh's death?

12 A. Yes.

13 Q. And we have some information that it was in the
14 September of 2016, so the month after the PIRC report
15 was obtained, that he had a meeting I think with you,
16 Lindsey Miller, and Stephen McGowan and Erin Campbell
17 was there and he was told she was going to be working on
18 the investigation as well and a couple of days after
19 that meeting, he was given copies of the PIRC report to
20 start reading into the events and the investigation?

21 A. Yes.

22 Q. Does that all match your recollection?

23 A. Yes.

24 Q. Thank you. So as I understand your evidence,
25 Alisdair McLeod and Erin Campbell were appointed as

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1 precognoscers to this investigation and there was two of
2 them to work jointly?

3 A. Yes, there is. They were appointed. As regards
4 precognoscers, that sometimes means, just for the
5 avoidance of doubt, it means what are known as
6 "precognition officers", who are non-legally qualified
7 within Crown Office, but Erin Campbell and
8 Alisdair McLeod were not precognition officers so were
9 in the traditional sense precognoscers, but were both
10 legally qualified and had considerable experience, as I
11 have explained and I hope in my statement, experienced,
12 but also of I think of more senior grade. I think they
13 were both what were called "senior deputes" in old
14 grading, so senior legal qualified procurators fiscal.

15 Q. Thank you. And you've talked on the first day you gave
16 evidence about some staff being full-time, some
17 part-time, were they both working full-time on this
18 investigation?

19 A. To the best of my recollection, they were appointed on
20 that basis and so they were -- they could be called upon
21 to assist. Whether they worked on it each day depending
22 on what the work that was done is maybe more open to
23 question.

24 Q. Did they continue to carry out an existing workload?

25 A. I understand that they did, particularly

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1 Alisdair McLeod, because I do remember during the course
2 of the investigation being approached by other managers
3 to ask, well, if we had this piece of work, would
4 Alisdair McLeod be able to assist with that and
5 sometimes that happened and sometimes it didn't. So
6 that was the kind of picture in relation to it.

7 Q. All right. Thank you. Now, we have heard evidence
8 about something called the Precognoscer's Handbook and
9 we heard evidence from Fiona Carnan about that and about
10 something called the knowledge bank.

11 A. Yes.

12 Q. As I understand the position, these are sources of
13 guidance available to people taking on this role of
14 precognoscing in relation to crown investigations such
15 as Mr Bayoh's death?

16 A. Yes.

17 Q. Is that correct?

18 A. Yes.

19 Q. And the Precognoscer's Handbook, and I won't go to it
20 unless you want me to, it talks about pre-allocation of
21 a precognition:

22 "Prior to the allocation of the case for
23 preparation, it must be read by the solemn legal
24 manager."

25 And as I understand it, you were in the role of

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1 solemn legal manager in --

2 A. I wouldn't say I wasn't in the traditional sense, yes,
3 I was -- I was to some extent involved in the assistance
4 and the supervision, yes.

5 Q. So you were not only head of CAAPD and running the unit,
6 but you were also taking on the role of solemn legal
7 manager in relation to this particular investigation; is
8 that fair to say?

9 A. I do -- I do consider that this particular investigation
10 within CAAPD had particular challenges and particular
11 differences. I'm aware of the contents of the
12 Precognoscer's Handbook, but whether it was a
13 traditional solemn legal manager arrangement, I question
14 that and I question that to some extent for the reason
15 that both were legally qualified, whereas quite a bit of
16 the Precognoscer's Handbook isn't in my view intended to
17 cover a situation where a known legally qualified
18 precognition officer is dealing with the precognition
19 and also in recognition of the fact that at around about
20 this time, I don't think I'm wrong in saying, that
21 Ashley Edwards became involved. So in fact the crown
22 team was more diverse and a little bit more expansive
23 and unusual than the traditional arrangement between a
24 single precognoscer, who typically was non-legally
25 qualified, and a solemn legal manager, who would be

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1 legally qualified.

2 Q. In a traditional format, there would be one precognition
3 officer, may be not legally qualified, with one
4 dedicated solemn legal manager?

5 A. I would say that's the most common arrangement, yes.

6 Q. But in this particular investigation, Alisdair McLeod
7 and Erin Campbell were taking the role of precognition
8 officer but both were legally qualified and they worked
9 together. And they, as I understand it, prepared the
10 narrative, Fiona Carnan prepared the analysis and other
11 than the work you did, there was no other dedicated
12 solemn legal manager?

13 A. Yes.

14 Q. But in the sense that the solemn legal manager would
15 normally countersign the crown precognition, which
16 contains both the narrative and the analysis, that was
17 your role on -- in this investigation?

18 A. I saw that as well.

19 Q. All right. So you signed it and that is akin to the
20 traditional approach of the solemn legal manager who
21 would normally countersign?

22 A. Yes.

23 Q. And in the sense that you countersigned, does that mean
24 that you had some responsibility in relation to the
25 crown precognition?

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1 A. I saw it as my role to indicate whether I was in
2 agreement with the conclusions of the -- of the
3 precognition in respect of the recommendation that was
4 made.

5 Q. And can you explain to people listening in that role,
6 akin to a solemn legal manager, what is the job of a
7 solemn legal manager? Presumably they have to read the
8 narrative and the analysis?

9 A. Yes.

10 Q. And do they read beyond that? I mean in this
11 investigation did you read beyond the narrative and the
12 analysis or is that generally sufficient to give you a
13 view on whether it meets an acceptable standard?

14 A. What I would say in relation to this, and again I'm
15 coming back to the traditional precognition role, in the
16 traditional precognition role of the solemn legal
17 manager, at the risk of oversimplification, it's a
18 little bit like a conveyor belt where a precognition is
19 produced and then the solemn legal manager will start to
20 read their way through it in essence from page 1;
21 whereas in respect of this case, I do consider that
22 there was a more collegiate approach adopted in relation
23 to the preparation of the case standing that the
24 precognoscers, that's Alisdair McLeod and Erin Campbell
25 and latterly Fiona Carnan, they were very much embedded

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1 from a legal perspective in relation to the
2 investigation and would have a very detailed knowledge,
3 because they were working intensively on it, whereas
4 I had wider responsibilities as head of CAAPD. So I do
5 consider that was a factor.

6 It was also I think a factor in relation to this
7 case, as I said, that dedicated Crown Counsel had been
8 very closely involved in certain aspects of the
9 investigation and had consulted with a number of
10 witnesses and had also been in discussions and meetings,
11 strategy meetings, with the team, so I think I did refer
12 to this in my statement, to some extent it was a more
13 collegiate approach rather than a conveyor belt approach
14 relationship, but, yes, I did see it as my
15 responsibility to indicate whether I agreed with the
16 conclusion that was made.

17 Q. Did that still require you to read through the entire
18 narrative and analysis and determine whether you agreed
19 with the conclusions or was it a more -- was it more of
20 a light touch with this particular investigation where
21 you were simply looking towards the conclusions and
22 recommendations?

23 A. It was a long narrative and it was a detailed analysis
24 and I paid particular attention to that. I had
25 familiarity with other aspects of it and in relation to

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1 my involvement in the case and I factored all that into
2 the end result in relation to this. Crown Counsel had
3 indicated that they wished a precognition. Of course
4 crown -- I was going to say Crown Counsel get what they
5 ask for, but Ashley Edwards was of course entitled to a
6 precognition in relation to this, but the precognition
7 was being produced, as I have said I think at various
8 points in my statement, for a very specific and limited
9 purpose. It was produced for the specific and limited
10 purpose of Crown Counsel being able to reach with
11 confidence a decision in relation to criminality and
12 depending on the result of that decision, there was the
13 possibility of further inquiries being carried out by
14 the crown once that decision was made.

15 So I do want to make that point, that it was created
16 for a very specific and limited purpose and that
17 depending on what further procedures had been adopted,
18 there was the very real likelihood of further
19 investigations by the crown that would have prepared for
20 a subsequent Inquiry phase, if I can put it like that.
21 What I was looking to satisfy myself on was whether the
22 basis for the recommendation was -- made sense, made
23 sense from a legal point of view, whether it accorded
24 with the information that I was aware of in respect of
25 the case, but in recognition also that there may well be

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1 further work that required to be done and in particular
2 that the extent of the further work that had been done
3 since the submission of the final PIRC report that that
4 further work was, I suppose, rigorous enough and
5 detailed enough to enable Crown Counsel to make a
6 properly informed decision, but also to exclude the
7 possibility of something emerging or being discovered
8 later on that could affect that decision when the crown
9 had already made the decision not to take criminal
10 proceedings, if that was the instruction.

11 So that was always in my mind a risk, because there
12 would be significant consequences in relation to
13 embarking on an inquiry phase of the case if a decision
14 had been taken that criminality could be excluded, so
15 the focus was on criminality at that stage.

16 Q. Perhaps you can help us understand, in relation to your
17 normal crown precognition, and you've said that this
18 crown precognition in the investigation of Mr Bayoh was
19 for a specific and limited purpose designed to allow
20 Crown Counsel to with confidence reach a decision on
21 criminality, can you help the Chair understand what the
22 difference was between a normal crown precognition and
23 this particular crown precognition. Are you suggesting
24 that the precognition in Mr Bayoh's investigation, in
25 the investigation into his death, was less detailed in

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1 some way or ...?

2 A. I think the short answer to that is no. Certainly not
3 less detailed. But it was a CAAPD precognition and a
4 CAAPD precognition has got certain additional
5 requirements as regards what should be included in it.
6 It includes such things as an officer's complaints and
7 discipline history, but what I would say in relation to
8 CAAPD precognitions and I --

9 I'm going to use an expression that has been used by
10 others, and I think was referred to in the Inquiry by
11 Dame Eilish Angiolini, that irrespective of the nature
12 of the crime that CAAPD precognitions are expected to be
13 of the highest standard and the most detailed in respect
14 of the inquiries for the purpose that if criminal
15 proceedings are recommended, those are the cases which
16 actually have to go to law officers and that the
17 comparison, which I'm quoting to some extent, but
18 I think it is borne out, that all CAAPD precognitions
19 are prepared to a High Court standard in that they
20 require to reflect the highest standards of
21 investigation and it is also reflective of the fact that
22 there is a constitutional and a very onerous
23 responsibility on the Lord Advocate to ensure that
24 criminal allegations against the police are thoroughly
25 investigated.

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1 Q. Thank you. But in relation to the investigation into
2 Mr Bayoh and the crown precognition that was produced,
3 it simply considered criminal proceedings and not other
4 forms of inquiries such as FAIs, fatal accident
5 inquires?

6 A. No, it didn't and I do consider that having regard to
7 the -- I would describe them as extensive further
8 inquiries that the crown required to make to reach the
9 stage of Crown Counsel having confidence in the ability
10 to make a decision as regards criminality, there would
11 be very likely to be a significant level of further
12 investigation for the different purposes of preparing a
13 case for an inquiry phase and there were certain
14 limitations in the crown in respect of the criminal
15 phase that would not apply to the inquiry phase;
16 typically, that once criminality is excluded, one can
17 conduct wider investigations, including potentially
18 precognition and precognition of police officers who had
19 been involved in the incident.

20 Q. And other than looking -- in this crown precognition,
21 other than looking at criminality, is it fair to say
22 that the crown deferred consideration or investigation
23 into the other areas such as whether there should be an
24 FAI or whether that was appropriate?

25 A. I don't necessarily disagree with that as a generality.

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1 Those issues, as they were considered relevant by
2 Crown Counsel to the issue of criminality, would be
3 considered, but I think it's fair to say that other
4 areas -- if I use the term -- "unfinished business" and
5 that those would have been -- they would have come into
6 sharper focus once that decision was made. It was very
7 specific and the purpose being very specific in relation
8 to criminality.

9 And in relation to the risk that the crown would
10 have, if -- if the decision not to enter criminal
11 proceedings had been taken and then proceeded to an
12 inquiry phase, there would be -- there would have to be
13 confidence that there wasn't going to be information
14 that emerged that could effect that decision and that is
15 why the kind of inquiry that was carried out in relation
16 to reviewing footage by the crown in relation to the
17 return of officers to Kirkcaldy Police Office.

18 At one point in my statement, I have said that there
19 are particular challenges in investigating allegations
20 against the police, particularly of assault, where
21 intention is extremely important and probably more
22 important than in assault cases that don't involve the
23 police and any indication as to the motivation is highly
24 relevant and therefore the focus of those types of quite
25 extensive inquiry was to ascertain whether there was any

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1 potential comment that had been made that could put a
2 different perspective on the actions of the officers,
3 for instance a loss of control, a loss of temper, or
4 whatever, and it was that kind of focused inquiry that
5 the crown was embarking on in relation to criminality,
6 but I do agree in general that the focus of those
7 inquiries at that stage was very much directed to
8 criminality and it was, what I've termed in my statement
9 and was used in briefings to the Lord Advocate, an
10 incremental approach to the investigation and that was
11 approved by the Lord Advocate and "incremental" meaning,
12 obviously, there would be a first stage and the first
13 stage was enabling Crown Counsel to take with confidence
14 a decision in respect of criminality.

15 Q. Thanks. So there was this focus on criminality, but
16 regardless really of whether the focus was to be on
17 potentially whether there were to be criminal
18 proceedings or an FAI or any other type of inquiry that
19 there would be some areas that would be looked at
20 regardless of the ultimate outcome or decision and those
21 would be the circumstances of the events at
22 Hayfield Road. So whether it was a trial or an FAI, you
23 would still want to have a very thorough and careful
24 consideration of the circumstances and that would also
25 include the -- any evidence about motivation or state of

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- 1 mind of the officers?
- 2 A. Yes, as it related to criminality.
- 3 Q. And the other topics that would be consistently looked
- 4 at, regardless of the ultimate proceedings, would be the
- 5 cause of death. That would be a factor that would have
- 6 to be carefully considered, thoroughly considered,
- 7 whether ultimately there was to be a trial or an FAI?
- 8 A. Yes.
- 9 Q. And the other factor would be race?
- 10 A. Race continuously but particularly in relation to this
- 11 as it was relevant to considerations of criminality.
- 12 Q. Thank you. As I understand it, the role of allocating
- 13 the crown precognition and the work to be done on that
- 14 would be ultimately the role of the solemn legal manager
- 15 normally in a normal situation and was that something
- 16 that you had a hand in deciding to appoint
- 17 Alisdair McLeod, Erin Campbell and then laterally
- 18 Fiona Carnan?
- 19 A. The decision to appoint them I'm sorry?
- 20 Q. To get them -- well, Fiona Carnan was in your unit
- 21 already, but to get Alisdair McLeod and Erin Campbell in
- 22 to start working on the precognition, was that something
- 23 that you were party to?
- 24 A. I do think it was largely Lindsey Miller that secured
- 25 their services.

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1 Q. Okay. And the Precognoscer's Handbook, which talks
2 about allocation of a case for preparation for the crown
3 precognition, says:

4 "All witness statements submitted should be
5 carefully considered by the solemn legal manager. If
6 the quality and accuracy of the statements is inadequate
7 [in normal course it would be the police] should be
8 asked at this stage to obtain statements of a
9 satisfactory standard."

10 Obviously, it's PIRC in this particular
11 investigation who have been obtaining statements. And
12 is that the type of work that was being done to appoint
13 Alisdair McLeod, Erin Campbell, latterly Fiona Carnan,
14 but looking at the quality and accuracy of the
15 statements to see whether further statements should be
16 obtained, is that something that was done at the outset?

17 A. I think that the quality of the information that had
18 been provided by PIRC in its entirety, including the
19 statements, would be considered by the team and I'm
20 confident that it was.

21 Q. Whose role was it to read through all the statements
22 that PIRC had sent as part of the final report?

23 A. I had read a number of statements, but at the time that
24 Alisdair McLeod and Erin Campbell were taking over, the
25 focus, first of all, as I think I explained in my

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1 statement, was that we agreed, collectively and with the
2 agreement of senior officials in Crown Office and as
3 part of the investigative strategy approved by law
4 officers, that rather than rely on the statements
5 provided by PIRC in respect of the significant eye
6 witnesses and in the light of the criticisms that
7 Mr Anwar had made as regards the approach to the
8 obtaining of those statements that it was appropriate
9 for the crown to immediately, and as a first course of
10 action, to embark on the precognition of those eye
11 witnesses at the crown's hands. So to that extent, the
12 review of the quality of the statements was, I would
13 suggest, less important, because we were actually going
14 to be doing detailed precognition interview of the
15 witness ourselves as part of the key focus initially.

16 Q. Was there to be a detailed consideration of the
17 statements prior to the precognoscing the witnesses?

18 A. That -- I understand that that would be part of the
19 process and that would be part of the investigation that
20 both of them were carrying out at that time.

21 Q. And when you're talking about "both of them" at this
22 stage, that was Alisdair McLeod and Erin Campbell?

23 A. Yes.

24 Q. And you've said you had read a number of the statements
25 that had been sent by PIRC. By this stage, had you also

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1 read the statements of the attending police officers?

2 A. I think -- it's my recollection that I did read some
3 statements at an earlier stage, but I cannot say today
4 what statements I looked at as part of that and the
5 reason for that was that in having two legally qualified
6 people who were engaged in the process that they
7 would -- they would do that.

8 Q. So Alisdair McLeod and Erin Campbell are legally
9 qualified and your expectation was that they would read
10 the statements thoroughly before precognosing witness?

11 A. Yes.

12 Q. Now, the Precognoscer's Handbook talks about an
13 allocation note?

14 A. Yes.

15 Q. Was there an allocation note prepared?

16 A. There wasn't -- there wasn't a traditional allocation
17 note prepared for the reasons that I've tried to explain
18 to the Inquiry. What there was I have a recollection of
19 was that there was a -- there was a -- I would describe
20 it as a -- an interviewer investigative series of
21 questions that I set out covering the issues that I
22 considered required to be explored with the witnesses
23 having regard to the ultimate purpose. So I did set
24 out, as I recollect it, quite a few bulletpoints as
25 regards an open approach, what issues I considered

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1 were -- had to be explored. I think it covered the
2 comparing, contrasting and sifting of various accounts,
3 the -- in particular, some of the significant elements
4 of the civilian witnesses, including Ashley Wyse, the
5 length, duration, action of officers, those kind of
6 things. So that was intended to cover the kind of
7 issues that an allocation note would cover.

8 Q. Thank you. Well, we have a minute from 2016 which I
9 think matches the description that you're giving us and
10 while we look for that, that's COPFS 03853A, can I say
11 in the Precognoscer's Handbook there's reference to this
12 allocation note and that's a note that where guidance is
13 given to a precognoscer on advice on witnesses and legal
14 principles. Do you understand that that's what the
15 handbook says and that's what an allocation note is?

16 A. Yes.

17 Q. But in this particular case you prepared a minute. Do
18 you see this on the screen? It's from yourself.

19 A. Yes.

20 Q. 15 September 2016, so just slightly over a month after
21 the final PIRC report has been received, and it's to a
22 number of people and it includes Alisdair McLeod,
23 Erin Campbell, and Ashley Edwards?

24 A. Yes.

25 Q. So this is at an early stage in the crown precognition

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1 process and you're preparing a minute for the people who
2 will be working on this part of the investigation?

3 A. Yes.

4 Q. As well as Lindsey Miller, Liam Murphy and
5 Stephen McGowan?

6 A. Yes.

7 Q. Thank you. Well, I would like to look through that with
8 you. If we can move down the page, please. And it
9 says:

10 "Meeting at Crown Office re Sheku Bayoh.

11 "Purpose: to identify key issues to be explored at
12 precognition of relevant eye witnesses to actions of
13 police officers engaged in the restraint of
14 Sheku Bayoh."

15 And so the purpose appears to be in relation to
16 issues to be explored with the eye witnesses at this
17 stage?

18 A. Yes.

19 Q. And it says:

20 "Background.

21 "The final report was submitted in August.

22 Following consideration of its contents, the attached
23 minute was submitted to law officers setting out a
24 framework and timescale for investigations by the
25 crown."

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1 And that remained under consideration at the time
2 you were preparing your minute?

3 A. Yes.

4 Q. And then "Discussion", and this is where it says "an
5 incremental approach to the investigation", which is
6 what you've just said:

7 "A decision-making process has been proposed."

8 Who had proposed it?

9 A. I don't know who first proposed it. It was certainly
10 something that I considered was appropriate and it
11 was -- it was approved as that approach.

12 Q. And who approved it?

13 A. Well, it -- I'm pretty confident that it was shared with
14 everybody and with law officers so it was approved.

15 LORD BRACADALE: Mr Brown, can you just explain this a
16 little more to me, the concept of "incremental
17 approach". You said a little ago that there would be --
18 you agreed with Ms Grahame that there would be a number
19 of core issues that would be looked at in any event.
20 What sort of things would be left for further
21 investigation in the event that no proceedings were
22 taken?

23 A. In essence the -- if we had moved on to post that
24 decision, my Lord, we would be looking at the wider
25 issues that could be explored at a fatal accident

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1 inquiry and I was of the view that that could include
2 factors such as race and exploration with the officers
3 of their -- their considerations so wider than that so
4 anything relevant to a fatal accident inquiry. In
5 essence, what we were doing here was trying to reach as
6 quickly as possible a stage where Crown Counsel were
7 able to exclude, or otherwise, criminality and then
8 allow the wider investigation to move forward in
9 relation to issues that were considered relevant to a
10 fatal accident inquiry.

11 LORD BRACADALE: In relation to precognosing the police
12 officers, if as I understand to be the case the decision
13 was no decision meantime, but reserving the right to
14 prosecute, then you wouldn't be precognosing the police
15 officers, would you?

16 A. Well, that would be a decision that would obviously
17 required to be made at that stage, my Lord. The proper
18 preparation for an inquiry might well involve those
19 types of approaches and it would be pure speculation on
20 my part as regards the extent to which that would be --
21 that would be approved, but in order to make any inquiry
22 effective, I would suggest that those considerations
23 would have to be -- would have to be addressed.

24 LORD BRACADALE: Can you give me any other examples of
25 investigations that you would carry out in the second

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1 stage?

2 A. Well, I think I have indicated that at a second stage
3 the wider issues of race could be considered at an
4 inquiry phase and those -- it would be a balancing act,
5 but those could be explored with the police officers
6 depending on the view that was taken as regards how
7 effective the fatal accident inquiry would be.

8 LORD BRACADALE: No, doubt Ms Grahame will be exploring the
9 issue of race in due course so I'll just leave her to do
10 that.

11 A. Thank you.

12 LORD BRACADALE: Thank you.

13 MS GRAHAME: Thank you. And then moving on in this minute
14 it says:

15 "Before any approach is made to expert witnesses, it
16 has been agreed that the crown should precognosce all
17 civilian eye witnesses who observed the arrival of the
18 police at locus and the restraint process, together with
19 ambulance personnel who were involved in the
20 transportation of Mr Bayoh to hospital in Kirkcaldy.
21 Thereafter, the evidence obtained at precognition will
22 be disclosed to expert witnesses for comment. In my
23 view, it is likely that the precognitions themselves, or
24 at least the relevant parts that are disclosed to the
25 experts, will also be required to be disclosed to

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1 Aamer Anwar in relation to his own expert witness
2 instruction."

3 Can we look -- have that paragraph on the page,
4 please. So does it appear that the initial approach for
5 Mr MacLeod and Ms Campbell was to do a thorough
6 precognition of the eyewitness -- civilian eyewitness --
7 witnesses?

8 A. Yes.

9 Q. And those who had observed the arrival of the police and
10 the restraint process, so that entire moment in time,
11 periods in time when that was happening. And in terms
12 of identifying those eye witnesses and deciding who was
13 to be precognosced, was that a role for Mr MacLeod and
14 Ms Campbell?

15 A. I think it was a role for all of us.

16 Q. Were you involved in any identifying the particular
17 witnesses who were eye witnesses and who were to be
18 precognosced first?

19 A. I think I was aware who was going to be approached and
20 that accorded with those whom I considered were -- fell
21 into that category.

22 Q. There was a witness called Robert Crookshank who had
23 woken up and gone to his window and seen the arrival of
24 the police. He wasn't precognosced. Were there
25 particular reasons why certain witnesses were

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1 precognosced and others were?

2 A. I don't recollect the considerations that might have
3 been applied to that particular witness.

4 Q. And then you were also going to speak to ambulance
5 personnel and then it says:

6 "The evidence obtained at precognition will be
7 disclosed to expert witnesses for comment."

8 Now, I think yesterday in response to some questions
9 from the Chair you were asked about were you simply
10 going to provide precognitions or parts of precognitions
11 to the experts and ask them to sift through and make
12 decisions about what the factual matrix was or at the
13 factual scenarios, yes?

14 A. Yes.

15 Q. Was it considered at all that whether the precognoscers
16 or the precognoscers with you should develop certain
17 hypotheses upon which they could put to all the experts,
18 so that there was a consistent approach in relation to
19 the factual matrix for all the experts when they were
20 giving opinions?

21 A. I don't recollect any discussion about that kind of
22 approach.

23 Q. Is that an approach that you would recognise as being
24 a -- of benefit in certain cases?

25 A. It might with hindsight be of benefit, yes.

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1 Q. And in terms of the approach that was selected, who was
2 to decide which precognitions or which parts of
3 precognitions were to be sent to which experts?

4 A. I apologise for the pause in relation to this. I was
5 going forward in time, because this was an expression of
6 my view as at that point and I don't recollect any
7 detailed consideration being given at a later point in
8 respect of this -- this whole situation, this whole
9 proposition as regards the disclosure, because, as I am
10 sure the Inquiry is aware, there was a particular
11 approach adopted later in this process that it was
12 directed by the Lord Advocate.

13 So I -- that was my -- that certainly was my
14 thinking at that time, but I don't recollect any
15 detailed discussion to progress that.

16 Q. As we will come on later today to look, other experts
17 were instructed and were sent letters of instruction and
18 no doubt papers. How -- what decision was made about
19 the selection of papers that was to be delivered to each
20 individual expert?

21 A. I think in general the team were aware of the importance
22 of consistent disclosure as a matter of principle and
23 that the disclosure of witness statements that had been
24 made in the past that, to my recollection, was continued
25 with in relation to the particular experts.

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1 Q. Where further precognitions had been obtained, were they
2 also to be sent to the experts?

3 A. I consider in general that it would be appropriate to if
4 there were information that contradicted the statements
5 of witnesses, or that that consideration would have to
6 be given at that point. But it is the case that in
7 relation to some statements that had been provided,
8 those were actually fuller and their recollections were
9 fresher of some witnesses. So it was the case that that
10 I think was a factor in relation to the sending of
11 information, but I'm confident that the team were alive
12 to the importance of the effective provision of
13 information to experts and also the consistent provision
14 of information including to Mr Anwar.

15 Q. Were precognitions sent to experts for consideration or
16 was it mainly original statements?

17 A. My recollection is that it was mainly statements.
18 That's the best of my recollection.

19 Q. So here where it says:

20 "Before any approach is made to expert witnesses,
21 it's been agreed that the crown should precognosce all
22 the witness."

23 Was that primarily for the benefit of the crown
24 rather than, you know, a way by which the instruction to
25 the expert could be expanded or made?

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1 A. Yes. Well, as I indicated, one of the main purposes was
2 to ensure that the statements were accurate and that no
3 essential information that could relate to criminality
4 had been omitted so that was the purpose.

5 Q. Was there any reason why the crown couldn't simply move
6 forwards with instructing experts rather than waiting
7 until this first stage of precognition of witnesses has
8 been completed?

9 A. I think the view that was taken was that there was an
10 importance, in the light of the criticisms that had been
11 made by Mr Anwar, that the crown carried out inquiries
12 at their own hand in order to satisfy themselves on the
13 statements and the position of witnesses was full,
14 accurate and had not omitted any essential information.

15 Q. Right. And it then says towards the end:

16 "In my view it is likely that the precognitions
17 themselves, or at least the relevant parts that are
18 disclosed to the experts, will also require to be
19 disclosed to Mr Anwar in relation to his own expert
20 witness instruction."

21 So at least at the point of time at which you were
22 writing this minute, did you envisage that precognitions
23 or at least parts of them would be getting sent to
24 experts?

25 A. It was clearly a consideration at that point.

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1 Q. All right. And how did the crown approach here in
2 relation to the statements and the precognitions being
3 sent to experts, how did that compare with what we heard
4 yesterday about the expert witness package that PIRC had
5 prepared? Was there steps taken to ensure consistency?

6 A. I think one of the main purposes was to ensure that
7 there was no essential information that had been
8 contained within the PIRC package, that that had been
9 omitted and that the PIRC package continued to be a
10 proper basis to proceed on. That was one of the main
11 purposes.

12 Q. So did the crown follow on with the same approach and
13 the same expert witness package as PIRC had prepared.

14 A. I'm not terribly sure of the position in relation to
15 that, but my recollection is that there was continued
16 use of the package.

17 Q. Right. And was that for all the experts that the crown
18 instructed after the final PIRC report had been
19 received?

20 A. I'm sorry I couldn't say for certain in respect of that.

21 Q. Was it any other's role within the team to ensure that
22 the information given to experts was consistent and if
23 there were any variations of significance that say for
24 example someone in the past previously instructed had
25 had something omitted or that that -- the crown would go

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1 back and ensure that they were then provided with that
2 significant material?

3 A. I think there was a level of awareness within the team
4 that those factors were important and that the
5 consistent provision of information with those experts
6 that had already been instructed was a factor in order
7 to obviously ensure that experts were proceeding on the
8 basis of the information that had been provided to
9 others, otherwise the risk was it became a continuous
10 cycle of having to go back repeatedly to experts.

11 Q. Presumably you would also want to avoid a situation
12 where you're looking at the two difference reports about
13 a similar subject, one expert has had one version of the
14 factual matrix provided and the other one has had a
15 different version. Perhaps that could be significant to
16 their ultimate opinions?

17 A. Yes.

18 Q. So you would want to ensure there was consistency at
19 least with the material that they both had?

20 A. Yes.

21 Q. But you were confident that your team would be alive to
22 that possibility and rectify it if the situation
23 existed?

24 A. Yes.

25 Q. Was there any discussion about that, any discussion

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1 about that or did you ask for reassurance in relation to
2 that or were you confident in your team and comfortable
3 with your team?

4 A. I think I recollect some exchanges by email that
5 emphasised the importance of consistent provision of
6 information.

7 Q. Thank you. And then moving on it says:

8 "Mr Anwar has been critical of the investigative
9 approach taken by PIRC in relation to obtaining
10 statements from civilian witnesses, observing that
11 similar distinct phraseology appears to have been
12 adopted by a number of independent witnesses indicating
13 concerns in this regard. Against that background, it is
14 suggested that an old-fashioned approach to precognition
15 should be adopted with the eye witnesses, allowing them
16 to describe events in their own words, which should be
17 noted verbatim, and that the role of the precognoscer
18 should be limited to seeking clarification by the use of
19 open and non-leading questions."

20 Was this something that you or your team had been
21 concerned about, similar distinct phraseology appearing
22 in statements of civilian witnesses?

23 A. Yes. To the best of my recollection that was the nature
24 of some of the criticisms that had been made.

25 Q. And had you seen examples of that within the statements?

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- 1 A. They had been highlighted.
- 2 Q. Do you remember any of the witnesses where there were
3 those similar distinct phraseologies used?
- 4 A. I don't recollect any just now.
- 5 Q. Then it goes on to say:
- 6 "During the precognition of the eye witnesses areas,
7 areas of potential conflict with the statements provided
8 by the police officers in attendance should be fully
9 explored. Clearly one of the main purposes of this
10 initial precognition exercise is to ascertain the extent
11 to which the account given by the civilian observers
12 coincides with the accounts given by the police."
- 13 I think you touched on this yesterday to some extent
14 where you talked about a comparison or an analysis
15 between things said by independent civilian witnesses
16 and things said by police officers who were in
17 attendance?
- 18 A. Yes.
- 19 Q. And was it also -- you say here "to the extent that they
20 were the civilians coincided with the police accounts".
21 Were you also looking for areas where their
22 observations, the civilian observations, did not
23 coincide with police accounts?
- 24 A. What I was trying to get across was the value of
25 conducting an overall comparison from which it might be

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1 possible to draw conclusions. So whilst the approach
2 was not to -- first of all, to uncritically accept the
3 account of the police, there should also be an attempt
4 to ascertain the extent to which the civilian witnesses
5 were supportive of the police as well, because that --
6 it's a twofold approach.

7 Q. So looking at areas of consistency with the police, but
8 also inconsistency with the police to the extent that
9 those inconsistencies should be explored with the
10 civilian witnesses at precognition --

11 A. Yes.

12 Q. -- of your summary. And -- and then you say:

13 "Without wishing to be prescriptive, I would suggest
14 the following critical issues require to be explored
15 during the precognition process."

16 And this is a series of bulletpoints where you
17 identify areas which you've described as "critical
18 issues to be explored during the precognition process
19 with witnesses"?

20 A. Yes.

21 Q. Let's look at the first one. The actings of Sheku Bayoh
22 prior to the arrival of the police, including the
23 question of whether police could see that Mr Bayoh was
24 not holding a weapon. Now, this seems to be restricted
25 to his actions prior to the arrival of the police, but

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1 as you mention what the police could see, was this
2 designed to encapsulate what the police could see at the
3 moment they arrived and what their observations were as
4 well as Mr Bayoh's actions prior to their arrival or was
5 it specifically just designed to restrict it to his
6 actions prior to arrival?

7 A. No, the whole.

8 Q. The whole thing?

9 A. The whole thing, yes.

10 Q. Thank you. And then you talk about discharge of sprays,
11 his reaction to that. The use of batons, the way they
12 were deployed. The actions of Mr Bayoh towards
13 officers, including the circumstances surrounding his
14 interaction with Nicole Short.

15 You have a large bulletpoint regarding the restraint
16 process, the actions of the officers involved, how
17 Mr Bayoh was brought to the ground, his position on the
18 ground, and you say:

19 "There should also be an exploration of whether
20 there was any continued struggle on the ground and
21 whether there were apparent difficulties in controlling
22 him."

23 So you -- is this designed to cover the full
24 circumstances of the restraint?

25 A. Yes.

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- 1 Q. Moving on:
- 2 "An exploration into whether any observed actions of
- 3 the officers involved in the restraint could account for
- 4 the injury to the ribs of Mr Bayoh."
- 5 And you comment on Professor Crane's report and also
- 6 the issue of asphyxia, and we talked about that
- 7 yesterday, that that was a topic of interest?
- 8 A. Yes.
- 9 Q. Explore the evidence from the witness Wyse -- that's
- 10 Ashley Wyse -- that a baton was used across the chest of
- 11 Mr Bayoh near the throat, whether there was any support
- 12 from other witnesses and also that she indicated he was
- 13 struggling and shouting for officers to get off him and
- 14 you asked that this be fully explored with that witness
- 15 and other relevant eye witnesses.
- 16 A. Yes.
- 17 Q. Again, you wanted not just Ashley Wyse precognosced
- 18 about the matters, but the other eye witnesses to the
- 19 restraint to be asked questions?
- 20 A. Yes.
- 21 Q. And then obviously in assessing the potential for the
- 22 criminal proceedings against any officer identification
- 23 would be critical and that's because ID is one of the
- 24 important things for the crown to establish at any
- 25 ultimate criminal proceedings?

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1 A. Yes, it was recognised as a factor and potentially a
2 challenge in respect of this case.

3 Q. There should --

4 "As we continue there should also be precognition of
5 the ambulance personnel who attended [that's at the
6 bottom of the page] including their actions on
7 attendance and the subsequent transportation of Mr Bayoh
8 to hospital."

9 And then:

10 "In addition, during this initial investigative
11 stage, all recordings of airwave broadcasts should be
12 listened to and checked for accuracy with the
13 transcripts provided by PIRC so the crown can be
14 satisfied as to the state of knowledge of the officers
15 attending. Similarly, all video footage should be
16 viewed."

17 So again, here in this passage you are raising the
18 issue of the state of knowledge of the officers,
19 furthering the investigation in relation to their state
20 of mind, what they knew on the day. And you've asked
21 for an analysis or a comparison of the airwave
22 recordings and the video with the different individual
23 accounts that were being given --

24 A. Yes.

25 Q. -- both by officers and civilian witnesses?

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1 A. Yes, and one of them being considerations in respect of
2 that. That was clearly, if I can term it, real
3 evidence, realtime evidence, and that type of
4 comparison, particularly in relation to the timing and
5 the cross-reference to at what point during the
6 restraint process all of those would be relevant factors
7 and, as I say, hopefully could assist in building as
8 accurate as possible an overall picture.

9 Q. We've heard evidence regarding airwaves messages and the
10 timings that are available in relation to those and so
11 in regards to the factual position, you would have the
12 benefit of reasonably accurate timings that could be
13 used as a comparison with the events that were taking
14 place?

15 A. Yes, I know that this proved to be quite an extensive
16 and time consuming exercise, because the team had to
17 explore various technical and hopefully overcome various
18 technical challenges in order to do that but that again
19 was considered important and that assisted in relation
20 to the later stage of compiling the so-called multimedia
21 information that was compiled at a later date.

22 Q. Is it fair to say that those areas you've invited the
23 precognoscers to explore very much focus on the factual
24 events which occurred in Hayfield Road and am I right in
25 thinking that the outcome of this part of the

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- 1 investigation will be used to feed into the narrative
2 that was being prepared by Alisdair McLeod?
- 3 A. It would, but I do want to highlight the fact that --
4 I know we're may be still to come to the conclusion --
5 but it says "the forthcoming meeting will provide all of
6 us". That I'm confident referred to a meeting between
7 the investigative team and Crown Counsel at which this
8 I think was intended to set the framework or the
9 background for further discussion and, to the best of my
10 recollection, that was of assistance and that meeting
11 took place where there was further direction given by
12 Crown Counsel.
- 13 Q. Well, just before we come to the conclusion, let's look
14 at the beginning, you've sent this minute, if we go back
15 to the top of the page, please, you've sent this minute
16 to, as we looked at the earlier, Lindsey Miller,
17 Liam Murphy, Stephen McGowan, Erin Campbell,
18 Alisdair McLeod and Ashley Edwards, the advocate depute?
- 19 A. Yes.
- 20 Q. Was it intended that everyone named there, including
21 yourself, would be at a meeting to discuss the
22 investigation into Mr Bayoh's death?
- 23 A. I couldn't be confident in relation to every name in
24 relation to it, but I am confident that Ashley Edwards
25 was there and, to the best of my recollection, Erin and

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1 Alisdair were there.

2 Q. So at the very least your team were there, the two
3 precognoscers, Alisdair and Erin, and the advocate
4 depute who had dedicated or allocated to this
5 investigation, Ashley Edwards, and yourself who was head
6 of CAAPD?

7 A. Yes, to the best of my recollection.

8 Q. Thank you. And then let's go back to the conclusion,
9 which is towards the bottom, and it says:

10 "The forthcoming meeting will provide all of us with
11 an opportunity to discuss the most effective approach to
12 this initial stage of the precognition process. Once
13 that is finalised, it is likely that members of the team
14 will advise Aamar Anwar of the approach being taken by
15 the crown so that the family of Sheku Bayoh can be
16 engaged in the process. The Lord Advocate has indicated
17 that he intends to meet with the family of Sheku Bayoh
18 and it is likely that this meeting will be arranged in
19 early October."

20 So that would be the following month after this
21 meeting.

22 A. Yes.

23 Q. And the purpose of the meeting is really to discuss this
24 initial stage of the precognition process?

25 A. It would appear so, yes.

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1 Q. Thank you. So let's have the bulletpoints back on the
2 screen please, because there's some elements here that
3 are not mentioned and I would like to ask whether there
4 was discussion subsequently about these.

5 You make no mention of the experience of the
6 officers, their years of service, the type of work
7 they've done, that type of thing, and in particular
8 there's no mention of the previous experience the
9 officers had of attending knife incidents and how they
10 were resolved.

11 Was there any consideration of that aspects when you
12 were looking at the factual matrix?

13 A. The purpose of this particular minute was to offer up
14 areas for discussion at the forthcoming meeting for the
15 exploration of these issues with the civilian witnesses.

16 Q. Right. So these issues were exclusively to do with
17 civilian witnesses?

18 A. To do with the forthcoming precognition process of those
19 witnesses, as I recollect.

20 Q. And in relation to issues to do with the officers or
21 their state of mind, was there to be any consideration
22 given to that?

23 A. The primary purpose of this part of the exercise was to
24 ensure, so far as possible, that no important
25 information had been missed or omitted in the accounts

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1 being given by the civilian witnesses as regards the
2 behaviours and what they were able to observe during the
3 course of the incident.

4 Q. At what moment in time was there to be consideration
5 given and investigation into the officers' state of
6 mind?

7 A. That -- that was part of the overall approach during the
8 course of the investigation so it was, I would say, a
9 continuous consideration of the team.

10 Q. Right. Well, on the one hand, you say it was
11 continuous; on the other hand, you said at this stage
12 you weren't looking at that. So can you explain to
13 me -- sorry. I'm maybe misunderstanding.

14 A. No, not at all. This was intended to assist or at least
15 facilitate discussion in respect of the approach to the
16 civilian witnesses in order to get as clear a picture of
17 what they saw in relation to the incident. As regards
18 the behaviour of the officers, so far as that was
19 relevant to consideration of criminality, that clearly
20 would be part of the overall preparation of the
21 precognition as it addressed potential criminality.

22 Q. So at some point there would be consideration of the
23 state of mind of the officers, what evidence may be
24 available in relation to that?

25 A. Consideration in particular of the actions of the

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1 officers and whether the actions of the officers could
2 amount to the commission of a crime at that stage, the
3 actions of the officers, and so considerations as to
4 their -- their approach, so far as these would be
5 relevant to the consideration of criminality, would be a
6 factor for the team.

7 Q. One of the first bulletpoint mentions the actions of
8 Mr Bayoh prior to the arrival of the police, including
9 the question of whether the police could see that
10 Mr Bayoh was not holding a weapon. To what extent was
11 it significant to the crown whether the police could see
12 that Mr Bayoh was not holding a weapon?

13 A. I think my thinking in relation to that was whether the
14 position and the behaviour and what the witnesses could
15 see could assist in any way as to whether he was -- he
16 was in possession of a weapon, but clearly if a weapon
17 couldn't be seen by anybody, we would proceed on that
18 basis and the potential for the weapon would have to be
19 a relevant factor. It's more designed to cover his
20 whole actions in relation to this as regards what the
21 police could have seen in relation to his -- in relation
22 to his behavior on their arrival.

23 Q. So possession of a weapon would be a relevant factor to
24 the crown's consideration and what the police could have
25 seen and presumably a relevant factor to their state of

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1 mind?

2 A. Yes. As regards that particular aspect, yes.

3 Q. So whether or not he was holding a weapon could be
4 relevant in relation to their state of mind, but I'm not
5 entirely sure I see any other comments there that could
6 be relevant to the police state of mind. Were you
7 leaving out the police state of mind in this exploration
8 of the factual position?

9 A. The focus was on ensuring that the accounts of what the
10 civilian witnesses were able to observe was accurate so
11 that the crown could proceed to explore other areas
12 confident that nothing significant had been missed.

13 Q. Right. So at this stage you also make no mention of the
14 previous experience of the officers with regard
15 particular to attending knife incidents or how those
16 other knife incidents may have resolved. That was --
17 was that specifically something you were going to look
18 at later?

19 A. That would be -- those kind of considerations were for a
20 later time.

21 Q. Right. And there's no mention here of considering
22 whether to use a comparator, how these officers handled
23 this knife incident and whether they would have
24 approached it differently if it had been a white man as
25 opposed to Mr Bayoh. That's not mentioned here. Was

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1 that something also that was going to be looked at at a
2 later stage?

3 A. Essentially there was a specific purpose in these
4 bulletpoints and it was limited to the precognition of
5 eye witnesses as regards what they could see and that
6 was -- that was the main purpose of this particular --

7 Q. And in terms of -- there's no mention of the legal
8 framework here, no mention of justification having to be
9 provided by officers. Was there any consideration given
10 to whether civilian eye witnesses could perhaps provide
11 some useful information to the crown against that
12 background of knowing that the police have to justify
13 every individual use of force?

14 A. Well, that was one of the main purpose of this I would
15 describe it as fairly limited exercise, the start of the
16 investigative process: let's be as confident as we can
17 that nothing significant has been missed during the
18 course of the PIRC investigation.

19 Q. Would it not have been of assistance to set out some of
20 the legal framework and to say, please, explore the
21 issue of justification, because there may be objective
22 evidence that's available to the crown in that regard?

23 A. I have to say that there was a limited purpose in my
24 view in relation to this particular memorandum. It
25 wasn't intended to set out the whole considerations of

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1 the investigation, but rather to focus on the start of
2 the investigation and what we hoped could be achieved in
3 the precognition process and my thinking was rather than
4 say to Alisdair and Erin, who were, I think I can say
5 with confidence, very experienced in relation to this
6 and obviously could use their own investigative skills
7 and bring to the investigation their own considerations,
8 these were the hopefully helpful benefit of my thoughts
9 and were intended to explore areas for discussion along
10 with the advocate depute at the forthcoming meeting.

11 Q. So whereas in terms of the Precognoscer's Handbook and
12 an allocation note, there will be advice and instruction
13 given on which witnesses should be seen and any
14 particular legal principles that may apply, that was not
15 the intention of this minute to set out the legal
16 principles that would apply or gaining evidence that may
17 have a bearing on -- against that background?

18 A. No, I think that's fair to say, and the overall
19 interactions in the team, including regular meetings
20 with Crown Counsel and communications, that informed the
21 approach in relation to this, rather than the
22 traditional precognoscer with legal manager where there
23 was a clear need for specific directions because of
24 the -- because of the known legally qualified nature of
25 the people. Here we were in a different situation with

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1 a dedicated advocate depute and two highly experienced
2 members of the team.

3 Q. So in this minute there's nothing about legal framework
4 and in the investigation in relation to Mr Bayoh, there
5 are two legally qualified precognoscers, if I can call
6 them that, and an allocated advocate depute who's
7 clearly legally qualified?

8 A. Yes.

9 Q. Did you then make the assumption that there would be no
10 need to really address the legal issues in that company?

11 A. I was confident that the composition of the team,
12 including the dedicated advocate depute and having
13 regard to the experience, that that was something
14 that -- that was something that would be addressed
15 having regard to the overall expertise in the team.

16 Q. Right. Thank you.

17 So in relation to the civilian witnesses and looking
18 at what they saw that may -- may or may not have an
19 impact on the state of mind of the officers or any of
20 that, but exploring fully what they saw, you don't
21 specifically mention observations of Mr Bayoh himself so
22 the observations of eye witnesses, civilian eye
23 witnesses, about his appearance. You talk about his
24 actings, but no specific issues about his appearance at
25 that stage.

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1 A. There isn't, although I would have expected if there was
2 something significant about his appearance, his
3 behaviour, his actings, that that would be the kind of
4 thing that the precognoscers would be in a position to
5 record.

6 Q. All right.

7 A. It certainly wasn't intended to say: concentrate in the
8 actings but ignore the appearance.

9 Q. And at this stage you were not considering at all other
10 matters such as the training of the officers had
11 received or anything of that sort. This is all about
12 what the civilians can see happened at Hayfield Road.

13 A. Yes.

14 Q. And you do mention the ambulance personnel. I don't
15 think that's on the screen at the moment. There we are.
16 Precognition of the ambulance personnel who attended,
17 their actions, attendance, that type of thing, but again
18 no mention here about cause of death, anything of that
19 sort?

20 A. There isn't, no.

21 Q. And no mention of race or race motivation or anything of
22 that sort?

23 A. There isn't at this stage, no.

24 Q. And was it the plan that that issue would be raised at a
25 later stage, race?

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1 A. The intention was that all relevant evidence in relation
2 to considerations of criminality would be addressed in
3 the preparation of the ultimate precognition and in the
4 course of the investigation. That was the intention and
5 that, so far as I'm concerned, was part of the reason
6 that two legally qualified and experienced persons had
7 been fortunately selected and given over to explore this
8 case in isolation so far as possible. That was their --
9 that was their role and that was something that, as I
10 said at the start of this session, that Lindsey Miller
11 had facilitated in the light of the fact and that it was
12 recognised that CAAPD had limited resources and that
13 they're required to be a team which would be able to --
14 I suppose the term -- progress investigations having
15 regard to the extent of their skill set rather than
16 require a constant level of instruction and supervision.

17 Q. When you mentioned the words there "in isolation", was
18 that to be in isolation of issues to do with race?

19 A. No, I'm sorry. That was poorly phrased. I meant in
20 relation to the case as itself, the investigation into
21 Mr Bayoh to concentrate on that case rather than other
22 work. That was to be their primary focus, so that's
23 what I meant by "in isolation".

24 Q. Yesterday, and I recapped on that this morning, you
25 talked about the background where:

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1 "It was accepted that at all times race and racial
2 motivation required to be considered as a continuous
3 process as the Inquiry progressed and an absence of
4 overt racial motivation should not be regarded as
5 determinative. Consideration of implicit bias and
6 assumptions based on race and the overall approach
7 required to be assessed as the investigation developed
8 and evidence was gathered."

9 And so I'm wondering why at this stage there's no
10 mention of race, not just in relation to perhaps overt
11 things, actions or words that have been used at
12 Hayfield Road, but why is there no line of questioning
13 being proposed for the civilian witnesses about things
14 that may ultimately impact on this question of race and
15 racial motivation? To give you an example, I'm thinking
16 about the speed at which officers adopted the use of
17 force?

18 A. Yes, I consider that this guidance note would enable the
19 precognoscers to be able to concentrate on relevant
20 factors and all relevant factors, so I would be --
21 although there's no reference to speed, that overall the
22 full picture that would emerge would assist with that,
23 but I do come back to the point that it was clear at
24 this point, by the incremental approach, that the focus
25 was upon criminality and that issues as regards race

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1 were relevant so far as they related to criminality and
2 that to some extent implicit bias was something that
3 would require to be explored at a later stage.

4 Q. Right. You say you talked about all the relevant
5 factors being raised, but was race not one of the
6 relevant factors at this point?

7 A. Race -- obviously race was a relevant factor at all
8 times and I was confident from the discussions and the
9 overall -- the overall approach of the team that they
10 were aware that race was an issue and therefore if
11 they -- if they -- if they -- they were alive to any
12 relevant evidence in relation to race as it would refer
13 to criminality, but it is -- it is true to say that the
14 incremental approach meant that certain considerations
15 of implicit bias, in particular an exploration as to why
16 certain courses of action were adopted on the part of
17 the officers and what considerations they took into
18 account in having those, those would require exploration
19 at a later stage of the process.

20 Q. Yesterday I asked you about the approach taken by PIRC
21 to take cognisance of issues of race if they emerged and
22 PIRC talking about being mindful of issues of race or
23 keeping an open mind?

24 A. Yes.

25 Q. To what extent did your staff being alive to relevant

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1 issues of race differ from that approach that PIRC took?

2 A. I think there was a recognition on the part of the whole
3 crown team, including the advocate depute, that there
4 would -- there would obviously be further proceedings in
5 relation to this matter and further investigations
6 rather, depending on the decision that would be taken,
7 and therefore awareness of the wider issues of race were
8 within the consideration of the team and certainly
9 I would say that I was aware that there would be further
10 work to be done in respect of race once the -- this
11 decision was made, but that was the focus of the
12 investigation and therefore I do say again that
13 considerations of race, so far as they were relevant to
14 issues of criminality, would be considered by the team,
15 but that was not the end of the matter and that,
16 depending on the Inquiry phase, that there would be
17 further consideration of certain areas that would of
18 necessity require exploration as regards the mindset
19 directly.

20 Q. Could we have the bulletpoints back on the screen
21 please, because you have talked about awareness of the
22 wider issues of race and further investigation being
23 required, but at this stage, and please correct me if
24 I'm wrong, it appears there's no actual questions even
25 being suggested that civilian eye witnesses are asked

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1 about whether there were any race-related matters that
2 they had noticed or observed, heard, considered,
3 anything that had struck their -- struck them. So
4 there's no mention of race at all even in a sort of
5 quite a focused small area, not even just looking at the
6 wider area.

7 Do you think looking at that now that there may have
8 been benefit in specifically raising race at this stage
9 to embed it at the very beginning?

10 A. There might have been benefit in looking at the overall
11 note that was created for, as I say, a specific and
12 limited purpose, but this was not the only source of
13 instruction or information or dialogue in respect of the
14 case and I did consider that the team by that stage in
15 the light of all of the further inquiry and instruction
16 that it had been carried out that there was an awareness
17 that race was an important consideration in respect of
18 the investigation.

19 Q. At this stage, the final PIRC report has been obtained
20 in August, this minute is being prepared in the
21 September and there's going to be a meeting of the team
22 after that, but at this stage, at the beginning, was
23 there a specific instruction, not this one, but another
24 one, that the Inquiry could look at where race was
25 addressed with the team specifically by you?

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1 A. I'm not aware of any specific instruction.

2 Q. All right. I'm conscious of the time now, perhaps would
3 that be?

4 LORD BRACADALE: We'll take a 20-minute break at this stage.
5 (11.30 am)

6 (A short break)

7 (11.56 am)

8 LORD BRACADALE: Ms Grahame.

9 MS GRAHAME: Thank you. I would like to ask you some
10 questions about one of the eye witnesses in particular,
11 Kevin Nelson.

12 A. Yes.

13 Q. Now, in your minute that we looked at the earlier, and
14 we can get that back on screen if it helps, but you
15 said:

16 "Areas of potential conflict with the statements
17 provided by the officers should be fully explored."

18 A. Yes.

19 Q. And in the statements of 4 June, 2015, provided by the
20 police officers, primarily Tomlinson and Walker?

21 A. Yes.

22 Q. They spoke of Mr Bayoh stamping on Nicole Short's back.
23 I'm summarising what was said there.

24 A. Yes.

25 Q. But that was during the events as they occurred in

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1 Hayfield Road and, it will be a matter of submission,
2 but that was a significant moment in relation to the
3 events?

4 A. Yes.

5 Q. And it caused PC Tomlinson to strike Mr Bayoh to the
6 head and arms multiple times with his baton?

7 A. Yes.

8 Q. And for PC Walker to shoulder charge -- bear hug,
9 shoulder charge Mr Bayoh to the ground?

10 A. Yes.

11 Q. And for the restraint to commence and to take place.

12 Now, Mr Nelson's statement made no mention of a
13 stamp happening at Hayfield Road. So to that extent he
14 was not consistent with those police officers'
15 statements.

16 A. Yes.

17 Q. And as part of the comparison between civilian eye
18 witnesses that you've helped -- you've described to us
19 and police officers' statements, was it part of your
20 expectation that Mr MacLeod and Ms Campbell would
21 explore that apparent potential conflict between the two
22 as part of the precognition process?

23 A. Yes, and to highlight that and to some extent to examine
24 it and analyse it.

25 Q. And maybe to ask Mr Nelson whether he had seen a stamp

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1 or not. Is that the type of thing you would expect them
2 to explore?

3 A. I would expect them to explore what the eye witnesses
4 saw and then carry out that comparison. Now, I'm aware
5 that Mr Nelson, as far as I can recollect, was one of
6 the witnesses who was precognosced and his account that
7 was given was factored into the very full analysis for
8 Crown Counsel and that discrepancy, if I can put it like
9 that, was not only highlighted, but was analysed in
10 respect of a number of factors, and I think I refer to
11 that in my statement. I can recollect that that was a
12 key consideration and that it was compared with other
13 eye witnesses and also with the realtime evidence in
14 considering the significance of this.

15 Q. Mr Nelson was precognosced by the crown on one occasion,
16 6 October 2016, so this is in the month after your
17 minute where Mr MacLeod and Ms Campbell are starting to
18 precognosce eye witnesses, but he was never asked
19 specifically about the stamp, the baton strikes, or the
20 shoulder charge which brought Mr Bayoh to the ground.
21 Looking back -- taking that from me and looking back, do
22 you come that is an issue that should have been explored
23 more fully are Mr Nelson?

24 A. I think that the full account of somebody who witnessed
25 certainly a significant part of the incident that that

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1 was something that hopefully would be explored and
2 thereafter analysed and resolved.

3 Q. So if it's correct and what I have said is correct that
4 Mr Nelson was not asked during the precognition if he
5 had seen a stamp, baton strikes in relation to the
6 events at Hayfield Road, would you consider that to have
7 been a failure on the part of the precognoscers to carry
8 out this process that you had described, comparison?

9 A. I don't know that I would describe it as a failure.
10 What I would say is that I would be -- the expectation
11 would be that it would explore all of what Mr Nelson saw
12 and if that, in relation to the stamp, if it did not
13 include, if Mr Nelson made no mention of a stamp, then
14 that would have to be compared with the account of the
15 other witnesses, the other evidence, and a consideration
16 as to where that -- what the significance of that was.

17 And from my recollection, I understand that that was
18 the position, that there was a description, quite a full
19 description of what Mr Nelson did, where he was, what he
20 saw, where he went to, how long that might have taken,
21 but certainly there were -- as I recollect there were
22 inconsistencies in the account of the police, not only,
23 as I recollect, in relation to the stamp, but I think in
24 relation to the use of a baton, which was something that
25 the officers indicated.

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1 So to that extent, the whole process would not start
2 and finish with what Mr Nelson said, but inform where
3 that took us with analysis and comparison and possible
4 explanation in relation to the evidence of Mr Nelson.

5 Q. And Mr Nelson described being at his living room window
6 and then moving away from the window and going up to his
7 garden gate up the path out of his house?

8 A. Yes.

9 Q. And again is that, the period of that and the timing of
10 that in relation to the events that were apparent to
11 Mr Nelson, is that something that you would have
12 expected to be explored in some detail?

13 A. I would expect it to be explored in some detail as
14 regards what he saw and what he didn't see and what he
15 did and that that then to inform a consideration as to
16 what the significance or otherwise of that was and, as I
17 say, my recollection is that that discrepancy was not
18 only highlighted but was commented on and analysed for
19 the benefit of Crown Counsel and, clearly, Crown Counsel
20 would have been aware of that in taking a decision.

21 Q. And then when Ashley Wyse was precognosced -- she was
22 precognosced twice, once on 4 October and once on
23 2 November, so dates that span the -- Mr Nelson was
24 precognosced on 6 October.

25 On the second occasion she was precognosced, in the

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1 November, she said to the crown:

2 "My downstairs neighbour Kevin had a better view of
3 this than anybody. He saw it from the start to the
4 finish and I just saw the end."

5 In light of that comment, would you have expected
6 the precognoscers to go back to Mr Nelson or not?

7 A. I think it all -- to say it all depends on the facts and
8 circumstances as regards whether it was considered that
9 there was a necessity to go back to Mr Nelson or whether
10 his observations, as well as where he was at the
11 relevant times and where he went to, whether that --
12 whether that account required a further visit to
13 Mr Nelson in relation to it.

14 Q. We've heard some evidence that there was an attempt to
15 go back to PC Walker to ask some further questions at a
16 later. Stage, this was around about
17 November/December 2016. And so this is in the period
18 where Alisdair McLeod and Erin Campbell are
19 precognoscing witnesses. And PC Walker, as I understand
20 it, declined to provide a further statement or further
21 information. Were you aware of that situation at all?

22 A. I'm thinking. I don't have a clear recollection of
23 that.

24 Q. All right. I won't go into that. I would like to move
25 into 2017. So the final report is August 2016 and then

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1 work is being done by the precognoscers, then moving
2 into 2017 now. And I think a number of experts were
3 instructed by crown at this stage. Was that work being
4 done by Alisdair McLeod and Erin Campbell?

5 A. Quite substantially, yes.

6 Q. Yes. So the Inquiry has information that
7 Professor Anthony Freemont, the osteoarticular
8 pathologist, was instructed in the March of 2017. His
9 reports were finally obtained in the May of 2017. He
10 was the expert who looked at the fractured rib.

11 A. Yes.

12 Q. So it wasn't a matter that related to cause of death as
13 such, but it was in relation to the timing of the
14 fracture, whether it could have been heard as it
15 fractured and potentially, I think you said yesterday or
16 the day before, this could be relevant to the crown in
17 relation to the level of force that was potentially
18 used?

19 A. Yes. And as I recollect, the identification of
20 Professor Freemont was by Ashley Edwards in the light of
21 the fact of involvement that she had had with another
22 entirely unrelated case where the significance of a rib
23 fracture and the timing of a rib fracture that I
24 understand that Professor Freemont had had involvement
25 in that and although I actually don't think Ashley

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1 remembered his name, but there were inquiries with
2 others in Crown Office and his name was disclosed. So
3 that was the -- that was the mechanism whereby that
4 expert was identified and I suppose that's another
5 example of a line of inquiry that was instigated and
6 ultimately seen to a conclusion at the suggestion of the
7 dedicated Crown Counsel.

8 Q. Now, you have explained to us that you had an interest
9 in the fractured rib. It was of significance to
10 the crown. We looked at that in your evidence. I am
11 wondering -- you've talked to us about Dr Payne-James.
12 I think ultimately he was asked to comment on the rib.

13 And I'm wondering why it took so long for the crown
14 to instruct Professor Freemont, which was March 2017,
15 when the issue of the rib had been identified at an
16 early stage and Payne-James had already been asked to
17 comment on that?

18 A. Yes. From my recollection, I think that the
19 identification of Professor Freemont was quite
20 specialist in that it focused on one of the areas that
21 we mentioned which I don't think anybody else had
22 commented on, namely whether it was possible to
23 ascertain or to estimate the timing that the rib
24 fracture had occurred, as to whether it was at a time in
25 relation to the incident or potentially before.

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1 So as I recollect it, that was one of the key
2 considerations in approaching Professor Freemont and it
3 was something that -- I did explain the way that this
4 was discovered. I have no idea when it was that
5 Ashley Edwards made the connection that this might
6 assist and in relation to the case where he had given
7 evidence.

8 Q. We've heard from Professor Freemont and, again
9 summarising, he is a highly specialist osteoarticular
10 pathologist.

11 A. Yes.

12 Q. And in fact I think -- when he retired the Home Office
13 asked him to train up some additional people with
14 skills, because his skills are rare in the UK. So we've
15 heard his evidence, quite complex evidence that he
16 provided to the Inquiry.

17 A. Yes.

18 Q. And then Dr Lawler, William Lawlor, was instructed. We
19 talked about him yesterday briefly. I think he was
20 another forensic pathologist, so the same role as
21 Dr Shearer, Dr Bouhaidar, the same role as Dr Nat Carey
22 and Professor Crane, but I think yesterday you used the
23 word "oversight" and I wonder if you could explain why
24 Dr Lawlor was instructed?

25 A. I think that if I used that term yesterday I'm not

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1 disagreeing with it. I think I've seen in some of the
2 emails the term "reviewing pathologist" and that was --
3 that was a course of action that had been I think
4 suggest by the Lord Advocate at an early stage in the
5 investigation. So it was within the consideration that
6 there would be some advantage in having a pathologist to
7 who would be able to take a view, independently, on all
8 of the pathology evidence that had been obtained, with a
9 view to, I suppose, coming to a conclusion as to what
10 this amounted to and if there were differences, which
11 area they could offer useful comment on and that in
12 particular I obviously recollect, having prepared my
13 statement, that the first mention of Dr Lawler was not
14 long after the incident in Kirkcaldy and that that he
15 had been suggested after some inquiries with other
16 pathologists where the approach was very much focused on
17 trying to identify a pathologist that had a particular
18 experience in relation to crushing or positional
19 asphyxiation and that was a name.

20 That is how Professor Lawlor's name came up and at
21 the time that Crown Counsel were wanting to identify a
22 reviewing pathologist, the full CV of Professor Lawlor
23 was forwarded, as I recollect it, to Ashley Edwards and
24 Ashley Edwards considered that and approved an approach
25 being made to Dr Lawler.

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1 Q. In terms of the normal approach or the standard approach
2 taken by crown, is it common to have a reviewing
3 pathologist instructed to review all the pathology
4 evidence?

5 A. I can only say that I personally have not had experience
6 of that, but, as I indicated, the intention to consider
7 and approach a reviewing pathologist was something that
8 was clearly considered by the Lord Advocate, with a
9 particular focus, as I said, on trying to identify
10 somebody who had that particular experience and I'm sure
11 the Inquiry will be aware that one of the factors was
12 Dr Lawler's experience in relation to the Hillsborough
13 tragedy. He had apparent involvement in relation to
14 that and overall his level of expertise and also, I
15 suspect, the fact that he appeared to have -- and this
16 is a quote from the Lord Advocate -- I think he used the
17 term, you know, "an eminent" or "a heavyweight
18 pathologist," and I think that the consideration in
19 relation to that kind of reviewing pathologist was
20 somebody who had a proven track record in relation to
21 this type of work.

22 Professor Lawlor was independent, he hadn't worked
23 in Scotland, but he was, as I recollect, a retired
24 Home Office pathologist, but was still actively engaged
25 and my recollection is that that was a key consideration

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1 that Ashley Edwards had, not that he was long retired
2 and perhaps was open to the observation that he was out
3 of touch, he seemed to be able to demonstrate that he
4 had kept up-to-date, was still actively engaged and that
5 he had sufficient experience to be able to carry out
6 this role.

7 Q. Now, leaving aside the particular criticisms of Dr Karch
8 which we looked at the yesterday, which he was an
9 outlier or at odds with others, I think you said
10 yesterday there was no criticisms of Dr Shearer or
11 Dr Bouhaidar. So was it considered necessary in the
12 particular circumstances because of any concerns about
13 Dr Shearer or Dr Bouhaidar and their opinion?

14 A. Not at all to my knowledge, but rather it was considered
15 an appropriate way to proceed standing that there were a
16 number of opinions from experts, to use that term
17 generally, that had been obtained that an overview
18 was -- would be of assistance and that seemed to be the
19 view of Crown Counsel and that's the way that
20 Crown Counsel wanted to proceed so -- but to answer your
21 question, not at all, and it is the case that even after
22 the reviewing pathologist had provided input and had
23 been consulted with that the -- there was a further
24 approach made back to Dr Shearer and Dr Bouhaidar in
25 essence, to use the term, to bring things full circle.

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1 Here was -- here was further information that was
2 available to the crown but it was important simply
3 I think from the point of view that they were the ones
4 who carried out the postmortem examination, they were
5 there and they saw Mr Bayoh and therefore to that
6 extent, I think I'm right in saying, they were the only
7 ones that had seen that and, therefore, that full circle
8 consultation was always in contemplation. And as I said
9 yesterday as well, some of the reports, and certainly
10 the reports of Dr Payne-James and Dr Karch, had been
11 shared with the original pathologist at a much earlier
12 stage to keep them to some extent in the loop as to
13 where things were going.

14 Q. So it was the Lord Advocate, that would be
15 Frank Mulholland, who raised the issue of Dr Lawler
16 being instructed to provide this review and then that
17 was supported by Crown Counsel?

18 A. It was -- it was Frank Mulholland, as I recollect it
19 that raised the question of the benefit, if I can put it
20 like that, of having a reviewing pathologist. As
21 regards the identity of the reviewing pathologist,
22 I think there are emails where I have suggested or put
23 forward that it was suggested to me and to others that
24 Dr Lawler was an appropriate person, but that wasn't
25 Frank Mulholland who suggested Dr Lawler. He had

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1 suggested another eminent retired pathologist who was
2 retired and really who wasn't doing consultation work.

3 Q. So the Lord Advocate's suggestion of an eminent
4 heavyweight pathologist wasn't actually Dr Lawler?

5 A. No, that's probably what I -- I think there is a fine
6 distinction in respect of that. The heavy weight
7 pathologist that he suggested was a different
8 pathologist, but I -- he was aware, to my recollection,
9 that I had asked around and I think I described it
10 yesterday that I had first of all gone to one
11 pathologist who approached others, suggested Nat Carey,
12 and then suggested somebody whom he described as
13 "equally good" in regard to this as Bill Lawler and
14 Dr Lawler was -- the Lord Advocate was sighted that
15 Dr Lawler was under contemplation in respect of that.

16 Q. So in principle the concept of a reviewer, although
17 you've not come across this before, came from the
18 Lord Advocate and then Crown Counsel considered it,
19 considered all the issues about identification and
20 Dr Lawler was appointed -- instructed?

21 A. Yes.

22 Q. And that instruction started in March 2017 and he --
23 there were four instructions I think to Dr Lawler about
24 separate matters and his reports came in, four reports,
25 the final one arriving on 21 May 2018. So that process

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1 of Dr Lawler being involved, being instructed and
2 providing all the reports took about 14 months.

3 A. Yes, I couldn't remember the dates of the reports, but
4 it wasn't just the one report, you're absolutely right
5 in saying, and then he was asked to comment on a number
6 of further matters.

7 What I do remember in relation to Dr Lawler and
8 particularly the consultation, and I know you might be
9 coming on to this area, but it was -- as part of the
10 reviewing process, it was Dr Lawler who suggested
11 further inquiries be made in relation to sickle cell
12 trait.

13 Q. Right. Can we look at the first report that Dr Lawler
14 produced, COPFS 000333, and this is a document that --
15 you see it's headed "Dr Lawler, 22 May 2017." This was
16 in relation to his first letter of instruction which had
17 been sent in the March and it was sent to Mr MacLeod,
18 senior procurator fiscal depute?

19 A. Yes.

20 Q. And I would like to go through this. This is a 29-page
21 document and I don't wish to go through every single
22 paragraph, but I would like to quickly go through some
23 of the elements, if I may. So you'll see that he sent
24 this to Mr MacLeod:

25 "Thank you for inviting me to review the various

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1 reports obtained in relation to the above case and
2 particularly those dealing with the cause of death and
3 to comment upon the pathological aspects of this case,
4 including methodology and approach adopted in your very
5 helpful letter of instruction."

6 So he's responding to the instruction to carry out
7 this review.

8 A. Yes.

9 Q. Could we look first at page 9 of 26. He says at the
10 outset:

11 "May I say at the outset that I have no criticisms
12 of either the methodology or the approach adopted by
13 Dr Shearer and Dr Bouhaidar in this case or indeed of
14 anyone else instructed."

15 So he's not criticising Dr Shearer or Dr Bouhaidar.

16 A. He's not criticising the methodology or the approach
17 adopted by them, yes.

18 Q. Yes, thank you. Can we then look at page 11 of 26 and
19 on this page he makes a comment about Dr Lipsedge. Here
20 we are. So he's been sent the report by Dr Lipsedge to
21 also review. Dr Lipsedge was a consultant psychiatrist.

22 A. Yes.

23 Q. Now, that's a -- is it fair to say that's a completely
24 different aware of specialism from a forensic
25 pathologist which is what Dr Lawler was?

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- 1 A. It's a different area of specialism, I have to accept
2 that.
- 3 Q. Different area of specialism. And Dr Lawler, if we can
4 move on to the next section, he -- perhaps we can move
5 further down. He says he's a --:
- 6 "This expert confirms that I as an acknowledged
7 nonexpert in this field had concluded."
- 8 So Dr Lawler acknowledges within the report that he
9 is not an expert in the field of psychiatry?
- 10 A. He does.
- 11 Q. He has no experience or qualifications in the field of
12 psychiatry and, in fact, he's not in any position to
13 comment on the report of Dr Lipsedge, is he?
- 14 A. I'm confident in the first place that if he didn't
15 consider that he could offer anything useful in respect
16 of this he would have had disclosed that, but having
17 said that and reflecting on the question you're asking,
18 it is the case that pathologists can develop experience,
19 if not expertise, in relation to certain areas. I mean
20 typically we have been -- there was comment that
21 you've -- you highlighted yesterday where Dr Shearer and
22 Dr Bouhaidar had commented on excited delirium and
23 certain comments for the assistance of the crown so to
24 some extent --
- 25 Q. I think they had said it wasn't a pathological cause of

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1 death.

2 A. Yes.

3 Q. But they were aware that there were issues in relation
4 to excited delirium --

5 A. Yes.

6 Q. -- in the wider community?

7 A. Yes. But in relation to this, I entirely accept that
8 Dr Lawler is not -- that is not his particular field of
9 expertise. It might be that he was in a position to
10 comment upon the effect of drugs or from his general
11 experience, but that's the only comment I would make in
12 relation to that.

13 Q. What value is there to the crown in asking a nonexpert,
14 albeit a pathologist, to comment on something that a
15 psychiatrist has said?

16 A. It would -- the overall behavioural aspects of this
17 incident were of significance in relation to the
18 deceased, like Mr Bayoh, and to that extent, it appears
19 that in relation to this instruction, which as I
20 recollect it was substantially done through the
21 investigative team that this -- this might be of some
22 assistance in relation to the decision that had to be
23 made.

24 Q. A forensic pathologist, the experience they have relates
25 to performing autopsies and dealing with the deceased

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1 and a psychiatrist will be dealing with human beings and
2 their behaviour during life. What possible value could
3 any of this have given to the crown to have a
4 pathologist who deals with dead people comment on the
5 opinion from a psychiatrist? I'm not questioning the
6 value of Dr Lipsedge's report. I'm just wondering about
7 the value of this review process.

8 A. It may well be in relation to this aspect that it would
9 be of limited assistance, because of course when we see
10 the comments what they -- what Dr Lawler comments upon
11 is that he confirms that the expert had confirmed that
12 the deceased was suffering from some severe acute
13 behavioural disturbance and he doesn't offer any further
14 comment or perspective in relation to that and it would
15 appear he defers to the opinion of that expert.

16 I'm surmising here and perhaps speculating as to why
17 that was included, but perhaps the overall intention was
18 that all of the reports should be forwarded to
19 Dr Lawler, but with hindsight clearly Dr Lawler wasn't
20 in a position to offer any significant assistance,
21 didn't offer any significant assistance, and therefore
22 to that extent didn't really take that aspect much
23 further forward, but perhaps it was for completeness. I
24 accept that he was not of any real assistance and didn't
25 stray into commenting on something that he immediately

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- 1 acknowledged "I am no expert here".
- 2 Q. I don't wish to give the impression I'm criticising
- 3 Dr Lawler here.
- 4 A. Nor do I at all.
- 5 Q. I'm looking at the issue of why this process was entered
- 6 into.
- 7 A. Yes. I don't recollect any specific discussion as
- 8 regards this. I'm speculating here, which perhaps I
- 9 shouldn't, that the decision, once there had been
- 10 discussion between perhaps Alisdair McLeod and
- 11 Ashley Edwards, that the reports should be forwarded for
- 12 comment and that this was included.
- 13 Q. If you had been asked to review the scope of this or to
- 14 contribute to the scope of this review by Dr Lawler,
- 15 what experts would you have limited his review to?
- 16 A. Well, I think the most important thing was in relation
- 17 to -- how can I term it -- principal pathology and the
- 18 cause and mechanism of death and, in particular, in the
- 19 light of area of expertise, the extent to which crushing
- 20 or positional asphyxiation was likely to have played a
- 21 part and the significance of that.
- 22 Q. When you talk about principal pathology, we've heard
- 23 that Dr Lawler was a forensic pathologist?
- 24 A. Yes.
- 25 Q. And obviously had experience in the forensic field in

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1 relation to pathology which would be looking at the
2 deceased persons and preparing postmortems and that type
3 of work.

4 A. Yes.

5 Q. When you're talking about principal pathology are you
6 talking about forensic pathology or something else?

7 A. I think that's probably what I meant when I used that
8 term.

9 Q. Right.

10 A. I mean forensic pathology and, in particular, the cause
11 and mechanism of death.

12 Q. Thank you.

13 A. With a particular focus on asphyxiation.

14 Q. Right. Thank you. So if you had been asked about the
15 value of this review process and the benefit that could
16 be obtained from Dr Lawler, would you have restricted
17 his review to the reports of other forensic pathologists
18 who were of the same field, same expertise as him?

19 A. I might have. We may come on to there was a
20 consultation, but this was the first time I had seen a
21 reviewing pathologist comment and, to that extent, it
22 did move on later on, as the Inquiry will be aware, to a
23 consultation where certain areas were further explored
24 with Dr Lawler.

25 Q. Thank you. And then just for completeness, can we look

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1 at page 14 of 26, we have it here, Dr Bleetman, who's a
2 consultant in emergency medicine and, again, would you
3 agree that's not forensic pathology?

4 A. It's not forensic pathology.

5 Q. And I think Dr Lawler recognises that he is not an
6 expert in this field. He says he's -- if we can move
7 down. I think his comment appears down at the --
8 further down, sorry, at the end of this section. There
9 we are:

10 "Dr Bleetman provides what I, as a nonexpert,
11 consider to be a good review of the entity."

12 But he's a nonexpert.

13 A. He's a nonexpert in relation to that. He does obviously
14 comment upon certain conclusions that Dr Bleetman
15 reached about pneumatic chest compression, agree with
16 comments about possible causes of the deceased's
17 petechial hemorrhaging, which, as I recollect, was a
18 specific area that Dr Lawler was in a position to
19 comment on.

20 Q. So Dr Lawler, whose career and expertise is focused on
21 the deceased, is commenting to some extent on the
22 opinion of Dr Bleetman who's a consultant in emergency
23 medicine, which is practiced in relation to those who
24 are alive.

25 A. Yes. He is -- they're obviously both in the field of

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1 medicine and it's -- to my recollection and in looking
2 at the comment he did consider that he was in a position
3 to comment upon the hemorrhages, as he indicates there.

4 Q. At page 16 there's comment in relation to Dr Sheppard.
5 You mentioned her yesterday. She's a cardiopulmonary
6 pathologist.

7 A. Yes.

8 Q. And Dr Lawler says:

9 "I can't argue when Dr Sheppard states the heart is
10 "morphologically normal."

11 That phrase "I can't argue" were you satisfied that
12 Dr Lawler had the necessary expertise to comment on
13 anything that Dr Shepherd was doing, given her
14 speciality is cardiopulmonary pathology?

15 A. I recognise that's her speciality. As to whether, as a
16 long-established forensic pathologist with considerable
17 experience, it might be that they were in a position to
18 make comment if they felt it was appropriate in relation
19 to any conclusion drawn by another medical expert or to
20 say I defer to them or cannot take issue with it, but
21 clearly at certain points in the report here, he is --
22 he's indicating, as he puts it, "I cannot argue", which
23 is quite a colloquial way of putting it, but doesn't
24 take issue with the conclusions of somebody who was
25 approached who had a particular expertise in relation to

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1 this.

2 Q. All right. And then on page 18 he looks at
3 Professor Crane's views and Professor Crane is also a
4 forensic pathologist, so at least we now see that he's
5 commenting on the work of another forensic pathologist?

6 A. Yes.

7 Q. But he says:

8 "There's nothing in any of Professor Crane's
9 comments or opinions with which I can disagree."

10 A. Yes.

11 Q. And in fact he goes on to say he very strongly agrees
12 with Professor Crane's opinion in relation to one
13 aspect?

14 A. Yes.

15 Q. And then we come on to Dr Nat Carey. He's also a
16 forensic pathologist, so the same speciality as
17 Dr Lawler, and if we can look at the comments in
18 relation to Dr Carey. He says:

19 "I agree almost totally with Dr Carey in his
20 interpretations, comments and opinions."

21 And there's further exploration there, but at least
22 he's talking about other experts with the same
23 speciality as he has, same experience.

24 A. Yes.

25 Q. I won't go back to Dr Karch, but we've heard evidence

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1 that Dr Karch is not a forensic pathologist. I think we
2 discussed this yesterday. So again, in relation to
3 that, he is not matched with the speciality of
4 Dr Lawler.

5 A. Yes.

6 Q. And then on pages 23 and 24, you will see that he moves
7 on to Professor Freemont. Now, Professor Freemont was
8 the osteoarticular pathologist we spoke about a few
9 moments ago in relation to the rib, so not in relation
10 to that cause of death but in relation to the fracture
11 of the rib.

12 A. Yes.

13 Q. And if we can look at his comments in relation to that.
14 So Dr Freemont is a pathologist but not a forensic
15 pathologist in the same sense as Dr Lawler.

16 A. Yes.

17 Q. He's got a very particular speciality in relation to
18 osteoarticular pathology, which as I understand it
19 relates to bones.

20 A. Yes.

21 Q. And Dr Lawler says here -- he's commenting on the
22 reviews -- sorry can we go back up just slightly. He's
23 dealt with Professor Freemont there. If we can just go
24 down, and he says in his overview:

25 "Although admittedly not within my field of

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1 expertise, I am sure... "

2 And he goes on to comment about acute behavioural
3 disturbance and different aspects of that?

4 A. Yes.

5 Q. Again, recognising at the outset that none of those are
6 within his field of expertise.

7 A. Yes.

8 Q. And his conclusion is given on page 28, 29, and he talks
9 about his opinion as to cause of death having reviewed
10 all of these reports and it's:

11 "Sudden death in a man intoxicated by MDMA (ecstasy)
12 and alpha-PVP in association with struggling and
13 restraint."

14 So apart from the inclusion of struggling, which I
15 think was first suggested by Dr Carey --

16 A. Yes.

17 Q. -- in fact, the cause of death remains the same, subject
18 to the struggling element?

19 A. Yes.

20 Q. And then there was a supplementary report, just for
21 completeness, that Dr Lawler prepared, COPFS 00034 and
22 this is August 2017 and if we could look at page 2 of 6
23 first of all. And again this relates to
24 Professor Freemont, if we can look at the comments at
25 the bottom and I think -- I don't see it on the page.

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1 Perhaps we can look down.

2 He says:

3 "I readily accept I'm not a specialised
4 osteoarticular pathologist."

5 Perhaps it's on there. Oh, sorry, it was at the top
6 of the previous page. The very top. Here we are.

7 Sorry I missed that when it first came on the screen:

8 "Although I readily accept that I am not a
9 specialised osteoarticular pathologist, I do have a
10 career background of diagnostic histopathology, albeit a
11 long time ago."

12 So is that the sort of expertise that the crown were
13 looking for in reviewing the position of
14 Professor Freemont, a non-specialised pathologist in
15 osteoarticular pathology and someone who'd had a
16 background of diagnostic histopathology a long time ago?

17 A. I do come back to some of the observations that I made
18 in respect of the purposes of a reviewing pathologist,
19 which wasn't my own suggestions. To some extent, I
20 recognise all of that, but in looking back to the time,
21 I do consider that the purpose of having a review
22 pathologist was to provide them with all of the
23 information that had been obtained, not to get them
24 to -- to -- to analyse and to take the place of any
25 other experts, but to take an overview having regard to

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1 the wide medical and pathological -- sorry -- wide
2 experience of being a pathologist in relation to the
3 information that had been obtained, but with a
4 particular focus, as I recollect as I have said, on
5 whether Dr Lawler could comment upon any aspect of that
6 within his own field of experience and expertise, but
7 particularly in relation to the significant area of
8 concern throughout the case as to the extent to which
9 restraint and asphyxiation, in particular, appear to
10 have played in the light of all of the findings and that
11 is, just now, the overview that I would take of the
12 purpose of instructing him.

13 Q. All right. Thank you. We'll look at page 4 of 6 just
14 before we complete, this is the final point in his
15 report, regarding Professor Michael Eddleston as a
16 consultant clinical toxicologist, so he was also sent
17 his report. And then on page 5 of 6 we see his
18 comments, the comments from Dr Lawler:

19 "Although Professor Eddleston's area of expertise is
20 significantly different from mine I find his report very
21 interesting."

22 So again, limited ability to review methodology,
23 practice, comments in relation to the report of
24 Professor Eddleston, which was significantly different
25 in experience from Dr Lawler?

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1 A. There was and I'll not reiterate what I said in relation
2 to what I consider was probably the value, but in
3 relation to that, I do again mention the fact that in
4 carrying out this exercise and providing Dr Lawler with
5 all of the information, it was Dr Lawler as the
6 reviewing pathologist who suggested further inquiries to
7 be carried out in relation to sickle cell and the
8 inquiry will be aware now -- I know that you might be
9 exploring this, but certainly the Inquiry will be aware
10 that those inquiries did -- they did reveal information
11 that was potentially relevant to the overall
12 circumstances.

13 So to that extent the value in having a reviewing
14 pathologist, he was the only one who suggested this
15 requires some further exploration, which was dully
16 carried out and revealing information that was, if I can
17 put it this way, was considered of significance and was
18 an additional area in relation to the cause and
19 mechanism of death that did require exploration and
20 analysis.

21 Q. So we've heard that this -- you've taken from me that
22 this process took approximately 14 months with
23 Dr Lawler.

24 Was there anything to stop the crown going to
25 Dr Lawler, as a very senior eminent forensic

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1 pathologist, and saying "please look at the information
2 we have from other pathologists and tell us are there
3 any other further inquiries that we could possibly be
4 carrying out?"

5 A. I think the answer to that is there wouldn't be anything
6 to stop them. The point was that Crown Counsel, to my
7 recollection, considered that the most useful time to
8 consult with a reviewing pathologist was towards the end
9 of the whole process.

10 Q. Right. So this now takes us on to -- we can take that
11 off the screen.

12 I would like to move into December 2017, so the end
13 of 2017. We've heard evidence that Fiona Carnan came on
14 to the team at the end of 2017 and that the team that
15 existed, Mr MacLeod and Ms Campbell, were working on the
16 investigation at that time.

17 A. Yes.

18 Q. As I understand it, Mr MacLeod had started preparing the
19 narrative at that time and they continued to work on
20 that and also in relation to medical issues that were to
21 be explored?

22 A. Yes.

23 Q. So at that stage, I think the crown, moving into 2018,
24 also instructed a Professor David Rees, who was a
25 hematologist and Elizabeth Soilleux, who was the

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1 histopathologist we spoke about and Dr Sebastian Lucas,
2 who was another histopathologist and there were aspects
3 there in relation to the matter of sickle cell that were
4 explored?

5 A. There was. I don't know that I recollect that
6 Professor Rees was ever instructed, but certainly he was
7 a name who subsequently referred us to other experts.
8 There was a chain of communications that ultimately
9 ended up with Sebastian Lucas.

10 Q. I have a note that a letter, undated unfortunately, was
11 sent to him and then a report dated 8 May, but it's not
12 significant for my purposes.

13 A. That may well be correct.

14 Q. So I would like to look at 2018 and the consultations
15 with the experts that were going on during that period
16 of time. I think your statement you say that you did
17 accompany Ashley Edwards in relation to certain
18 consultations.

19 A. Yes, I did.

20 Q. And you mentioned Dr Lawler that we've just spoken
21 about?

22 A. Yes.

23 Q. Dr Bleetman; is that correct?

24 A. Yes.

25 Q. Dr Rees?

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1 A. Yes. There was a consultation -- there was a meeting
2 with Dr Rees that was very short when he referred us to
3 somebody else but, yes, that would be right, there was.

4 Q. Dr Soilleux?

5 A. I consulted with her because of the unavailability of
6 Ashley Edwards.

7 Q. So you did that alone or with a precognoscer?

8 A. I did that -- I did that on my own, but with input from,
9 as I recollect it, from Ashley Edwards.

10 Q. Right. And then I think you also consulted with
11 Martin Graves who was in relation to use of force and
12 the police officers' actions separately?

13 A. Yes.

14 Q. With regard to these consultations, just in terms of
15 what guidance is given in the Precognoscer's Handbook,
16 and I won't take you to this, but it says there's a
17 presumption that crown experts will be consulted with in
18 High Court cases; is that your understanding?

19 A. It's my understanding that the approaches for
20 consultation in this case were the decision
21 substantially of Crown Counsel, so they I think assessed
22 which experts they wished to consult with in order to
23 assist them in the decision-making process.

24 Q. Right. So where the Precognoscer's Handbook in chapter
25 8 talks about a presumption that a consultation should

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1 be conducted with all crown expert witnesses, including
2 expert medical witnesses, unless it's routine or the
3 defence have confirmed that it's subject agreement or
4 that type of thing, was it your understanding that there
5 would -- the precognoscers would proceed on the basis
6 that there was to be a consultation with all medical
7 witnesses for the crown or that the decision would be
8 exclusively left to the hands of Crown Counsel?

9 A. My recollection is that the decision, as regards the
10 timing they approach for the consultation, was taken by
11 dedicated Crown Counsel.

12 Q. Right. So you consulted with Dr Lawler. The Inquiry
13 information is that was on 30 January 2018.

14 A. Yes.

15 Q. Now, we only have the opportunity to look at the notes.
16 We obviously weren't present there at that time. When
17 you consulted with Dr Lawler, did you cover issues about
18 his qualifications and experience insofar as -- both
19 from the perspective of having some value in any
20 comments that he's made about areas that you've asked
21 him to look at, but also in terms of a knowledge about
22 exactly where his specialism was?

23 Now, there's nothing in the consultation notes, but
24 I wonder if you did discuss that with Dr Lawler.

25 A. I -- I have no clear recollection of -- of that

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1 particular aspect. I think that is my position that I
2 don't recollect that being explored explicitly, that's
3 not to say that it didn't happen or there was some
4 exploration in relation to it. Thinking back, there
5 must have been some exploration of his experience and
6 where his expertise came from.

7 Q. Do you remember discussion about his experience and
8 qualifications in any area of the consultation?

9 A. I have no recollection specifically in that regard, but,
10 as I have indicated, his CV and his experience were
11 highlighted to Crown Counsel, so Crown Counsel were
12 aware of that at the time of his instruction and,
13 obviously, prior to the consultation.

14 Q. Was it explored with Dr Lawler how comfortable or
15 otherwise he felt about commenting on medical reports
16 where he was not apparently working in the same field,
17 psychiatry, emergency medicine, that type of thing?

18 A. What I do recollect about the consultation with
19 Dr Lawler was that he was -- he was very open and he was
20 quick to indicate if he was -- if he wasn't confident in
21 what he was commenting on. He was in a position to look
22 and to explain in much more detail from his report about
23 the -- about the conclusions that had been drawn, but,
24 as I indicated and looking back, I do recollect that a
25 particular focus was on the asphyxiation, what his

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1 experience of that was, and the hemorrhaging.

2 Q. Did Dr Lawler express any lack of confidence talking
3 about issues to do with psychiatry, such as ABD, excited
4 delirium; do you remember any part?

5 A. I don't recollect any specific comment, I'm afraid.

6 Q. As I understand it, there was a consultation with
7 Dr Soilleux on 16 March 2018. Now, the consultation
8 notes don't indicate who attended, but I understand it
9 was yourself -- you were one of the attendees; is that
10 right?

11 A. I think I was the only one.

12 Q. You were the only one with her?

13 A. With Dr Soilleux, yes.

14 Q. Right. And was there any discussion then between you
15 and Dr Soilleux in relation to her qualifications and
16 experience?

17 A. There may well have been. I reviewed her qualifications
18 and experience, but I regret I don't have any
19 specific -- specific knowledge or rather recollection in
20 relation to that.

21 Q. Is your --

22 A. In respect --

23 Q. Sorry.

24 A. Sorry. I was going to say, and you may be coming on to
25 this, in respect of the contents of that consultation

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1 and the views expressed by Dr Soilleux, there was a
2 formal request for a supplementary report, of course,
3 which she set out in detail where her expertise was
4 obtained and that was factored into her report, as I
5 recollect.

6 Q. I think there may have been some issue regarding the
7 fact she is a general pathologist, not a forensic
8 pathologist and that may have been an aspect of required
9 to know in terms of understanding her perspective. Was
10 that explored at all by you at that consultation?

11 A. I'm sorry, I don't recollect exploring that.

12 Q. Right. You consulted with Dr Bleetman. Do you remember
13 if there was discussion of his experience and
14 qualifications?

15 A. I'm sorry, I have no specific recollection as to the
16 detail of that.

17 Q. Right. The consultation notes don't disclose whether
18 there was any discussion of Mr Bayoh's injuries and
19 their mechanism, apart from the rib injury. Was there
20 any general discussion about injuries on Mr Bayoh's
21 body?

22 A. Who's that with, I'm sorry?

23 Q. Mr Bleetman, the emergency medicine expert.

24 A. I've got a limited recollection beyond what's
25 recorded --

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1 Q. Right.

2 A. -- in relation to that. I'm sorry.

3 Q. Right. In relation to a number of experts, the Inquiry
4 doesn't have any consultation notes available and it
5 would appear that there weren't consultations conducted
6 with these experts, but I would like to check with you
7 whether we're missing anything. We have no record of
8 consultation with Dr John Parkes. Do you remember any
9 consultation with him?

10 A. No.

11 Q. Nothing with Maurice Lipsedge; do you remember a
12 consultation with him?

13 A. No.

14 Q. We understand he's --

15 A. No consultation, although I think I recollect a lot of
16 dialogue and exchange of emails with Alisdair McLeod,
17 but no consultation. I wasn't involved in that, no.

18 Q. No. And was that between Alisdair McLeod and
19 Dr Lipsedge?

20 A. Yes.

21 Q. All right. We have no record of a consultation with
22 Dr Sebastian Lucas; do you remember a consultation with
23 him?

24 A. There was no consultation involving Crown Counsel and
25 Sebastian Lucas, no.

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- 1 Q. With anybody else and Sebastian Lucas?
- 2 A. Not a formal -- no consultation in that sense, no.
- 3 Q. In a different sense?
- 4 A. No.
- 5 Q. Dr Jason Payne-James, no record of any consultation
6 occurring with him?
- 7 A. No.
- 8 Q. Dr Mary Sheppard?
- 9 A. There was an attempt to have a consultation with
10 Dr Mary Sheppard, but she was unavailable so that was
11 postponed and wasn't pursued, so that's right, there
12 wasn't.
- 13 Q. Professor Jack Crane?
- 14 A. No.
- 15 Q. Dr Steven Karch?
- 16 A. No.
- 17 Q. Presumably that would not have taken place after the
18 views of the Lord Advocate were expressed?
- 19 A. There was no consultation with Steven Karch.
- 20 Q. Professor Anthony Freemont, the osteoarticular
21 pathologist, no record of a consultation with him?
- 22 A. I have no recollection of a consultation with him.
- 23 Q. And Professor Michael Eddleston, no record of a
24 consultation with him?
- 25 A. No.

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1 Q. Now, you have explained the attempts that were made with
2 Dr Mary Sheppard and you have explained the position
3 regarding Dr Karch, but in relation to the other
4 experts, seven in total, why did you not consult with
5 them?

6 A. I think all that I can say is that Crown Counsel made
7 the decision as to who to consult and it was a
8 continuous process and it would appear that
9 Crown Counsel did not consider that a consultation with
10 those others would've assisted them in their
11 decision-making process.

12 Q. And in relation to the Precognoscer's Handbook, which
13 says there will be a presumption that there will be a
14 consultation and there are often many benefits to be
15 gained from consultation with experts, was that not
16 something that you were concerned about, that there were
17 the consultations being conducted?

18 A. Well, it might be the case that in the light of the fact
19 that there was a reviewing pathologist that that
20 assisted Crown Counsel in their decision-making and
21 didn't require any further consultation. Beyond that,
22 I couldn't say.

23 Q. And I'm particularly interested in Professor Freemont.
24 We've heard evidence, as I said, from Professor Freemont
25 and he is an osteoarticular pathologist, which is a rare

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1 find, as we understand it. Also very complex issues
2 raised by him in his report. Was there any concern that
3 perhaps one would need a consultation with someone like
4 Professor Freemont in order to truly understand his
5 opinion or was there a view taken that that wasn't
6 necessary?

7 A. My recollection is that Crown Counsel did not explore
8 nor discuss the possibility of a consultation with
9 Professor Freemont.

10 Q. And finally, because I'm conscious of the time, we've
11 heard evidence that Fiona Carnan did not consult with
12 any experts herself. Are you aware of anyone in your
13 team precognoscing experts, instead of having
14 consultations with them?

15 A. No, I don't recollect the answer to that specific
16 question, no.

17 Q. Thank you very much.

18 Would that be an appropriate moment?

19 LORD BRACADALE: We'll stop for lunch and sit at 2 o'clock.

20 (1.02 pm)

21 (luncheon adjournment)

22 (2.03pm)

23 MS GRAHAME: Could we go back to your Inquiry statement,
24 please, and look at SBPI 00419, paragraph 102, page 60.
25 And I think we've already addressed this, but at some

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1 point you say "the team at COPFS", so if we can find
2 that. There we are:

3 "The team at COPFS would have been aware that PIRC
4 had been specifically directed to investigate
5 allegations of past racist behaviour by officers. These
6 investigations were instructed to provide potential
7 context and background to the behaviour of officers
8 during the incident and were not confined to whether a
9 separate crime could be proved."

10 So you acknowledge there that there was to be an
11 investigation into past racist behaviour and that's in
12 itself was to provide context regarding the behaviour of
13 the officers?

14 A. Yes.

15 Q. Right. And in relation to the team that you were
16 dealing with, you have described them as experienced and
17 I think in your statement you say at times "highly
18 experienced".

19 We've heard evidence from Fiona Carnan on Tuesday
20 that prior to becoming involved in the investigation
21 into Sheku Bayoh's death, she had no previous
22 involvement in the investigation of deaths in police
23 custody or deaths following police contact, and she
24 didn't recall -- specifically recall any deaths wherein
25 race was a factor.

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- 1 Was that something you were aware of, there were
2 limitations on the experience of your team, in
3 particular Fiona Carnan?
- 4 A. I certainly was unaware that that that was the position
5 in relation to Fiona, yes.
- 6 Q. She said in evidence that she had not had any training
7 on investigating deaths in custody and I wondered if you
8 could help us with understanding what type of training
9 was given to those in CAAPD in relation to deaths in
10 custody and investigations in deaths in custody or
11 deaths following police contact?
- 12 A. I don't -- I'm not aware, I have to say, of any specific
13 training that would be delivered in relation
14 specifically to CAAPD. It is the case that when people
15 come to CAAPD they may be coming from a variety of
16 backgrounds and they may have come from specifically a
17 deaths background, that is a possibility, but in
18 relation to CAAPD itself, I'm not aware of any training
19 programme or requirement in relation to training in
20 respect of deaths.
- 21 Q. Is there any training in relation to Article 2 and
22 Article 14 given to members of the team in CAAPD?
- 23 A. There's a general training. There's a general training
24 delivery in respect of obligations under ECHR that
25 applies across the organisation.

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- 1 Q. And does that general training cover Articles 2 and
2 Article 14?
- 3 A. I think perhaps others would have to comment in relation
4 to the current module.
- 5 Q. As far as you're aware, the members of the team that
6 were working on this investigation, had they had
7 training in relation to Article 2 obligations,
8 Article 14 obligations in the work they were doing?
- 9 A. As I say, I'm aware that there's a national training
10 programme. Others are probably best to comment upon
11 that.
- 12 Q. Right. Had your team been -- participated in that
13 national training programme?
- 14 A. There would have been at some point, yes.
- 15 Q. Right, thank you. We've talked about investigations
16 into deaths in custody and the requirement to be
17 Article 2 and Article 14 compliant, and I think we have
18 discussed at a number of points during the course of the
19 past couple of days that part of the procedural
20 obligation or one of the procedural obligations under
21 Article 2 is to have an investigation into the death
22 that is effective and adequate?
- 23 A. Yes.
- 24 Q. And I think, as I understand your evidence, you accept
25 that in relation to the precognition process, insofar as

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1 that is part of the crown investigation, that that must
2 also be Article 2 and Article 14 compliant?

3 A. The overall investigative process would have to be
4 Article 2 compliant.

5 Q. And that would include this part where the crown
6 precognition is being worked on?

7 A. I think that -- I would -- I would accept that from a
8 personal point of view, yes, but one would have to
9 looked at the whole investigative process, I would
10 suggest, in relation to this.

11 Q. And I think yesterday we looked at the requirements in
12 relation to Article 14 where the state authorities, such
13 as Crown Office, have duties to take all reasonable
14 steps to unmask any racist motive.

15 A. Yes.

16 Q. And that that investigation should be pursued with
17 vigour?

18 A. Yes.

19 Q. On Tuesday this week, we heard the evidence of
20 Fiona Carnan?

21 A. Yes.

22 Q. She came in to your team late 2017 and we understand her
23 evidence she focused largely on the analysis section?

24 A. Yes.

25 Q. You said that -- would it normally be one precognoscer

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1 or one person that would do both the narrative and the
2 analysis, rather than separate members of staff?

3 A. I would have to say it would depend on the particular
4 circumstances.

5 Q. Right. Do you think there are any issues that can be
6 created between one person preparing the narrative,
7 precognosing the witnesses, dealing with the experts,
8 and the other simply preparing the analysis, the legal
9 framework and looking at the evidence available to the
10 crown?

11 A. Well, there's the obvious point that it's more than one
12 person being involved in -- in the process. It's maybe
13 of assistance to point that out Fiona was brought in to
14 the -- was brought into the investigative team because
15 she obviously had considerable experience of preparing
16 CAAPD precognitions and I think I said in my inquiry
17 statement with a particular perspective on excessive
18 force of police officers who were accused of assault.

19 Q. Right. Thank you. Ms Carnan was asked about the
20 approach that she took to analysing the officer's
21 accounts, so the officers who attended at Hayfield Road.
22 You had their statements from 4 June and she described
23 proceeding on what she called "a cautious basis" and she
24 left each officer's statement out of account when
25 analysing the evidence against him or her.

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1 If we look at the analysis, I can show you an
2 example of what she said. So it's COPFS 06361, and I'm
3 looking at page 7 and I'm looking at a paragraph that
4 begins "PIRC investigators who interviewed the police
5 officers". I think you've passed it. There we are:

6 "The police officers only provided their statements
7 to PIRC investigators"

8 Oh, sorry, it's the paragraph above, sorry. There
9 we are. There it is at the bottom of the screen:

10 "PIRC investigators who interviewed the police
11 officers on 4 June asked them in detail about their own
12 actions (which evidence is not admissible against them)
13 but were less focused in their questioning about what
14 others around them was doing."

15 Do you see that? So they took the view there in the
16 analysis that the evidence from the statements was not
17 admissible against the officers. Do you see that?

18 A. Yes, I do.

19 Q. And she has also in evidence said:

20 "In light of their assurances that the officers were
21 being treated as witnesses, it's considered that their
22 own statements could be inadmissible in evidence against
23 themselves on the ground of fairness."

24 So she says both, as you can see on the screen, it's
25 not admissible, but she also later recognised that it

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1 could be inadmissible evidence against the officers.
2 And in evidence she agreed that that was the extent of
3 her exploration in the analysis about admissibility.
4 She agreed she had not explored the extensive case law
5 on admissibility in the analysis and she said she
6 couldn't remember reading up on it particularly.

7 She accepted there was no discussion in the analysis
8 as to whether suspicion had crystallised on any of the
9 nine officers. There was no discussion as to any
10 circumstances that would point towards fairness or
11 unfairness and, as I say, no reference to any case law.
12 There was no analysis of the likelihood of a court
13 ruling the statements to be admissible or inadmissible.

14 A. Yes.

15 Q. So no assessment by her of whether a suspicion had
16 crystallised in relation to each individual officer and
17 the officers had been considered as a group. So that,
18 if I may summarise, is the position of Fiona Carnan in
19 relation to whether statements of the officers were
20 available as evidence against them and she had taken the
21 view they were inadmissible.

22 Now, does that approach fit with your expectations
23 of a precognoscer who's carrying out an analysis to
24 simply leave out of account the officers' statements?

25 A. I was unaware of the contents of Fiona Carnan's

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1 evidence, but if she says that she took a cautious
2 approach, that would tend to accord with that in the
3 sense that she carried out the analysis on the basis of
4 that cautious approach that if one left out the account
5 of the officers, what was one left with?

6 Now, I am aware that Crown Counsel didn't agree with
7 that and that there was an alternative approach that was
8 not the cautious approach, but rather, as the officers
9 were at all times treated as witnesses, that their
10 statements would be -- would have to be a debate and of
11 course it is the case that there would have to be, if
12 there were proceedings, perhaps some debate in respect
13 of that, but Crown Counsel proceeded on the basis that
14 the statements were admissible and I'm confident that
15 that was included in Ashley Edwards analysis and,
16 therefore, to that extent that material was available
17 for Crown Counsel's consideration.

18 Q. That's very helpful. When you read the analysis,
19 assuming you did read the analysis, did it strike you
20 that the approach taken by Fiona Carnan was as helpful
21 as it might have been to Crown Counsel or that it should
22 require to be revised in any way or were you happy to
23 proceed on the basis of the approach she had taken?

24 A. I considered that the issue in respect of the officers'
25 accounts was before Crown Counsel and I was, as I say,

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1 made aware that Crown Counsel were proceeding on the
2 basis that they considered that their statements were
3 admissible in the light of the status of the officers.

4 So I was content to that extent, if there had been
5 further debate in respect of it then I was -- I could
6 have contributed in relation to that but that's --

7 Q. Fiona Carnan was also asked in her evidence about her
8 approach to the officers' statements when it came to the
9 analysis of justification for the use of force?

10 A. Yes.

11 Q. And she said she did take into account any explanation
12 or justification they gave in their statement and she
13 was asked about whether -- really about whether that was
14 an internally inconsistent approach to be taking
15 regarding the analysis and could statements be -- by the
16 officers be inadmissible for one purpose and looking at
17 the evidence against them, but admissible for the
18 purpose of looking at their justification for use of
19 force that may ultimately be of assistance to them.

20 Did you have any views about that inconsistency in
21 the approach being taken?

22 A. I think back, my approach to all of this was that I
23 considered that the statements could be considered and
24 were admissible and in the light of the fact that
25 Crown Counsel were in agreement with that, I was content

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1 to agree on that basis.

2 Q. So although when you looked at the analysis and
3 countersigned it, Fiona Carnan was saying, as we can see
4 on the screen, "this evidence is not admissible against
5 them", you were happy in the round to allow that
6 analysis to be sent to Crown Counsel?

7 A. Potentially inadmissible I think was --

8 Q. No. You'll see on the screen she says "which evidence
9 is not admissible against them."

10 A. Well, apologise. I was prepared to proceed on the basis
11 that knowing Crown Counsel's approach that the
12 information was before Crown Counsel in respect of the
13 decision.

14 LORD BRACADALE: Can I just clarify the sequence of events
15 hear. There's the precognition and this analysis and
16 it's signed and countersigned by you on 16 May 2018, and
17 then I would understand it would go to Crown Counsel; is
18 that correct?

19 A. It did go to Crown Counsel, yes, my Lord.

20 LORD BRACADALE: But should I understand what you have just
21 been saying that you were aware of Crown Counsel's
22 position before you signed it?

23 A. My Lord, I understood that Crown Counsel had that
24 approach. I'm trying to think how I knew that, but
25 certainly once it was submitted there was a clear

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1 assessment that the statements were admissible and, to
2 that extent, because the statements were obviously
3 included and all the relevant material as regards the
4 precognitions and the statements in the document that
5 was submitted to Crown Counsel, that didn't cause me a
6 particular concern.

7 LORD BRACADALE: I'm just trying to understand the practical
8 sequence of it, whether Crown Counsel had some
9 involvement in it before receiving it as Crown Counsel.

10 A. Well, they did throughout, my Lord. And the reason that
11 I was -- I was indicating was that Crown Counsel took
12 the view at the time that the PIRC report was submitted
13 that it would be preferable from an evidential point of
14 view not to seek any information directly from the
15 officers, but they were aware that during the
16 preparation of the PIRC report my recollection is that
17 they considered that at that time the officers were
18 always witnesses and in fact were witnesses throughout,
19 so there was to my recollection no issue about the
20 admissibility of statements provided by officers at any
21 time in the light of the fact that repeated assurances
22 had been given that they were witnesses and in the light
23 of the fact that they gave witnesses according to that
24 status.

25 LORD BRACADALE: I'm just a little puzzled that if there was

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1 that level of discussion before the signing of the
2 analysis, how Fiona Carnan wasn't aware of that.

3 A. My Lord, I can only go back to what Fiona had said in
4 her evidence that she was taking a cautious approach and
5 and in a cautious approach was looking to see what
6 evidence was -- that was available in the event that
7 the -- the statements were considered inadmissible.

8 LORD BRACADALE: Thank you.

9 MS GRAHAME: So at the time that the analysis was completed
10 and signed by Fiona Carnan there was this statement
11 which we still see on the screen that the evidence is
12 not admissible against them, but you were happy for that
13 statement to remain in the analysis on the basis of
14 other discussions you had had at that time or that you
15 had subsequently.

16 A. It would perhaps have been better to have clarified
17 that, but essentially I was content that the
18 precognition be submitted for Crown Counsel's
19 consideration at that stage.

20 Q. Would it have been open to you to say to Fiona Carnan
21 "I would like you to expand on the issue of
22 admissibility of the officers' statements before we sign
23 and send it to Crown Counsel"?

24 A. It would have been open to me to do that. I was clear
25 in my own view that the statements would be admissible

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1 and I think crown counsel were aware that that was my
2 view and it was the view that I think of others. It was
3 certainly my view.

4 Q. Where there's a situation where the precognoscer has
5 said in the analysis that evidence is not admissible
6 against them, so it can't be used by the crown, and you
7 have taken a view that is directly contradictory --

8 A. Yes.

9 Q. -- is there no mechanism whereby that can be flush --
10 fleshed out and explained as part of the crown
11 precognition?

12 A. There is that mechanism. Yes, there would be and as I
13 say, it might have been preferable to have added in some
14 comment in relation to that.

15 Having said that, I was still satisfied as to the
16 recommendation that was made in respect of the
17 precognition.

18 Q. So was it open to you to maybe add a note to ourself
19 when you countersigned or to draw something to
20 Crown Counsel's attention that there is this difference
21 of view between you and the precognoscer?

22 A. That would have been a course of action open in the
23 countersigning process, but obviously it wasn't taken in
24 this case.

25 Q. Right. So I'm being reminded of what you said earlier

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1 today and I asked in this about you countersigning.
2 Does that mean you had some responsibility in relation
3 to the crown precognition, and you say:

4 "I saw it as my role to indicate whether I was in
5 agreement with the conclusions of the precognition in
6 respect of the recommendation that was made."

7 A. Yes.

8 Q. So did you consider your role to be limited to
9 expressing agreement with the ultimate conclusion only,
10 even if you disagreed with the route by which the
11 precognoscer had reached that recommendation?

12 A. Well, I think that I saw that the conclusion and the
13 recommendation was of the utmost importance and I saw
14 that as a primary responsibility.

15 Q. Thank you. And then looking at Fiona -- she was asked
16 about the use of force and her approach to use of force
17 and she --

18 Well, first of all I should say Fiona Carnan
19 indicated in evidence that she didn't recall being given
20 any guidance primarily by you or anyone else about how
21 to treat at the officers' statements. She said, in
22 hindsight, it might have been helpful to have had a
23 discussion about this before she embarked on drafting
24 the analysis?

25 A. Yes.

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1 Q. And would you agree with that comment that in hindsight
2 that might have been of assistance and benefit?

3 A. Yes, I would.

4 Q. And as part of that discussion, if there had been one,
5 would you have raised this issue about admissibility of
6 the police officers' statement and how they were to be
7 approached?

8 A. I think I may well have.

9 Q. Moving on to use of force. We've talked a number of
10 times about how an officer must be able to justify his
11 or her use of force. And we've heard that that is a
12 justification for every single use of force that is
13 adopted by the officer.

14 A. Yes.

15 Q. So where an officer may have struck someone a number of
16 times, it is incumbent upon that officer to justify each
17 individual occasion --

18 A. Yes.

19 Q. -- in order for that to be lawful use of force?

20 A. Yes.

21 Q. And also for an officer to explain why they chose not to
22 adopt a less forceful method or use of force. This is
23 called preclusion. They either try it and fail or they
24 explain why they didn't try it in the first place.

25 A. Yes.

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1 Q. And that's required if the use of force is to be lawful.
2 It is part of justification.

3 A. Yes, it must relate to -- yes, justification, yes.

4 Q. Now, Fiona Carnan accepted that she had not set out in
5 her analysis this sort of test or the requirements of
6 justification?

7 A. Yes.

8 Q. She had not set out in summary at the outset the type of
9 things that are required by an officer in order to
10 justify the use of force?

11 A. Yes.

12 Q. Is that the type of thing in CAAPD precognition that you
13 would normally expect to see?

14 A. In relation to this type of precognition, which is in
15 essence, as I have explained, a criminal precognition,
16 the normal and expected course of action is that there
17 will be some reference to the potential crimes and
18 whether there's obviously evidence to support that. So
19 the typical approach that would be taken in respect of a
20 case of assault, which is what the crime that was under
21 consideration at this point and I think Fiona listed in
22 the precognition what crimes were being considered and
23 then there was some legal analysis in respect of the
24 crime. That is what would normally occur in a
25 precognition of this type and that happened. So there

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1 was analysis and reference to the relevant crime which
2 in this case was, as I recollect and looking to the
3 incident, assault or culpable homicide.

4 Q. Is it not an integral part of consideration that of the
5 justification, because we're aware and we have heard
6 evidence that it is lawful for officers to use force,
7 but in turn the must justify that?

8 A. Yes.

9 Q. So it is something they can adopt in their normal
10 duties, but there must be a justification. If there is
11 no justification, that is not lawful.

12 A. Yes.

13 Q. So in consideration, would you not expect some
14 explanation in the analysis some tests set out with
15 regard to justification or do you not consider that
16 necessary?

17 A. Well, I consider it necessary for there to be reference
18 to the crime and the crime was of assault. Now, I don't
19 particularly want to get excessively legalistic in
20 respect of this, but what the crime has to prove is an
21 attack upon someone and intent is crucial to that. So
22 some of the case law that Fiona did quote that indicates
23 that there has to be some element of intent, intention
24 to do harm, and that an inference must be drawn from all
25 the circumstances in relation to proving that crime.

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1 So whilst the courts -- there is authority for the
2 courts to look at whether, for instance, the behaviour
3 of officers fell outwith their training, that is of --
4 as I understand it, that of itself is not determinative
5 as to whether there's evidence of a crime. It's
6 relevant to considerations of whether there's -- there
7 are any consequences for the officer and perhaps for --
8 in the wider sense of a liability, but in respect of --

9 LORD BRACADALE: I think we are perhaps straying into
10 excluded territory here given the limitations of the
11 terms of reference.

12 A. I apologise, my Lord.

13 LORD BRACADALE: I think I understand the point you're
14 making and I think that's sufficient for my purposes.

15 A. Thank you, my Lord. I apologise.

16 MS GRAHAME: No, not at all. I'll move on from this part of
17 the evidence, but looking at -- we ever heard evidence
18 about Walker and Paton, PCs Walker and Paton who were
19 first on the scene.

20 A. Yes.

21 Q. And Fiona Carnan gave evidence that there was no
22 analysis or no part of the analysis set out in detail
23 whether there were other tactical options open to them
24 and I'm interested in whether you would have expected
25 that to have formed part of the analysis that was

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1 carried out?

2 A. The analysis that I have seen in CAAPD addresses its
3 mind to the constituents of the crime and in the light
4 of the analysis in respect of the crimes, I was content
5 with the contents of the analysis having regard to that
6 and having regard also to the opinions which were
7 referred to and which Crown Counsel had consulted
8 extensively on.

9 Q. Fiona Carnan was also asked about something that
10 PC Tomlinson had mentioned in his police statement from
11 4 June and he had given a statement saying that he
12 observed Mr Bayoh stamping or stomping on the back of
13 Nicole Short when she's on the ground, that he had
14 struck him to the head, PC Tomlinson had struck Mr Bayoh
15 to the head with his baton, that after he did so he --
16 Mr Bayoh stopped stomping on Nicole Short. After which,
17 PC Tomlinson struck him on the head again. He had
18 struck a total of two to three strikes to the head and
19 he also struck thereafter two or three times with his
20 baton to the arms.

21 A. Yes.

22 Q. Now, Fiona Carnan had carefully analysed the lawfulness
23 of the first strike in relation to the analysis, but in
24 relation to the subsequent strikes, she said in
25 evidence:

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1 "It would appear my analysis is a cumulative
2 analysis of the baton strikes. I haven't gone through
3 each one."

4 A. Yes.

5 Q. Now, as part of a CAAPD precognition that Fiona Carnan
6 was preparing, did that match your expectations that she
7 would not go through each individual use of force, each
8 individual strike with the baton, but only deal with the
9 first one?

10 A. I do consider that the totality of that -- those actions
11 that were described that those would be factored into
12 the overall analysis for Crown Counsel in relation to
13 the crime that was to be established and that the
14 breaking down was -- I was going to say unnecessary.
15 I think that the breaking down can be of assistance, but
16 in the particular circumstances of this case, having
17 regard to what would require to be proved in respect of
18 the crime under consideration, I was satisfied that the
19 analysis was adequate.

20 Q. And we also heard from Fiona Carnan in relation to the
21 analysis that she said the test of establishing
22 criminality would have been to show that Tomlinson went
23 far beyond the limit of the force which the police
24 officer was entitled to apply.

25 Now, we've heard about justification and minimum

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1 force being necessary, not that the force used doesn't
2 go far beyond that which is lawful, but the focus in
3 relation to justification is more akin to using minimum
4 force, the absolute minimum necessary.

5 A. Yes.

6 Q. Were you concerned when you looked at the analysis in
7 relation to the approach Fiona Carnan was taking to the
8 test in that regard?

9 A. I wasn't concerned in relation to the proof of
10 criminality in that there are a variety of
11 considerations that can be taken into account, including
12 whether the actions of the officers is in accordance
13 with their training, also whether there's any evidence
14 with a loss of control in respect of the overall
15 justification and, in particular in this case, because
16 there had been expert evidence that had been provided
17 and the essence of that was that the actions were
18 considered within the reasonable range of options open
19 to the police throughout the incident that that was --
20 that that was adequate for the purposes of assisting
21 Crown Counsel to reach a decision.

22 Q. Were you satisfied that Fiona Carnan had covered the
23 issue of training, the OST Manual and the SOPs
24 sufficiently, given your views about training --

25 A. Yes.

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- 1 Q. -- being relevant?
- 2 A. Yes, on the basis that those elements had been
3 considered by the restraint expert.
- 4 Q. Right. And then we've talked yesterday at some length
5 about causation. We looked at the legal framework in
6 relation to causation. We looked at the contribution to
7 harm that is more than de minimis, is a material
8 contribution.
- 9 A. Yes.
- 10 Q. We looked at Johnstone, which held that "significant"
11 conveys the necessary substance of a contribution to the
12 death which is more than negligible and that a
13 contribution that is more than de minimis is material.
- 14 You mentioned yesterday that in relation to the
15 issue of causation -- well, first of all, I think
16 Fiona Carnan gave evidence that she had not set out in
17 the analysis any of the legal test on causation. Was
18 that something you would have expected to see in the
19 analysis?
- 20 A. I think that there should be information and analysis in
21 respect of that type of issue as it relates to
22 potential -- any potential crime.
- 23 Q. Would you expect there to be a summary of the case law
24 or the legal position and then a comparison with the
25 medical evidence -- expert evidence that was available?

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1 A. That can sometimes be of assistance. Whether it was --
2 its absence in this case affected the case because
3 Crown Counsel were well aware of the general case law in
4 respect of causation. What I do, I think, recollect in
5 respect of Fiona Carnan's analysis was that there was
6 specific mention of all the various factors from the
7 experts in relation to the question as to cause of death
8 and I suppose by implication the causation.

9 Q. You said yesterday, or perhaps the day before, that
10 Crown Counsel had given you a copy of the case of
11 Johnstone I asked you to look at during evidence.

12 A. Yes.

13 Q. And I think at that stage we were looking at period 1
14 and I said I would come back to that in period 3.

15 A. Yes.

16 Q. Now, can you help us understand when it was that
17 Crown Counsel gave you a copy of Johnstone?

18 A. I'm very sorry, I don't know that I can assist with
19 that. I -- I've maybe expressed myself poorly or
20 been -- but I don't recollect Crown Counsel giving me a
21 copy of Johnstone, but I can recollect at some point
22 that Johnson was referred to.

23 Q. Sorry. I have maybe misremembered. I thought you said
24 she had given you a copy.

25 A. I might -- when I'm being asked specifically about it,

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- 1 I don't know that I do recollect that.
- 2 Q. If there was a discussion between you and Crown Counsel
3 about Johnstone, do you remember when it was in relation
4 to the precognition? Was it after Crown Counsel were
5 sent the precognition or was it at an earlier stage?
- 6 A. I think my awareness of Johnstone and the test that was
7 being applied by Crown Counsel was at the time of the
8 consideration of the precognition.
- 9 Q. When you were considering it or when Fiona Carnan was
10 considering it or when Crown Counsel were considering
11 it?
- 12 A. When Crown Counsel were considering it, I think,
13 although there is the possibility that I was aware that
14 Crown Counsel were. I think -- I'm doing my best to
15 recollect what I knew in respect of Johnstone. I think
16 that Crown Counsel did indicate that they were going to
17 proceed on the basis that causation was established for
18 the purposes of their decision-making.
- 19 Q. Was Fiona Carnan aware that Crown Counsel were
20 proceeding on the basis that causation was established?
- 21 A. I don't -- I don't think that -- I don't think I knew
22 that. I suspect Fiona Carnan didn't know that. That
23 would be my best recollection.
- 24 Q. And do you think that it would have been beneficial if
25 Fiona Carnan had known that causation was established or

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1 that was the approach that was being taken to the
2 medical evidence?

3 A. Yes, that might be -- have been of assistance, yes.

4 Q. We've -- we heard evidence from Fiona Carnan that she in
5 her role did not precognosce or consult with any of the
6 medical experts.

7 Looking back, do you think there would have been
8 benefit in having Fiona Carnan consult with some of the
9 medical experts, given she was to prepare the analysis?

10 A. I think the short answer to that is, yes, in an ideal
11 world, but it's I think probably from my perspective did
12 I -- did I consider that she wasn't able to do a proper
13 analysis, I was obviously satisfied at that time that
14 she was, having regard to her experience, having regard
15 to all of the information that she -- that she had,
16 including the summaries of the consultations.

17 Q. Did you take the view that she would also come to the
18 conclusion that causation was established?

19 A. I don't know the answer to that question.

20 Q. Did you address your mind to perhaps having a discussion
21 with Fiona Carnan about cause of death or addressing the
22 issue of causation with her, given that you had
23 consulted with a number of the experts and she hadn't?

24 A. That might have been -- that might have been beneficial,
25 but I'm still of the view that because Crown Counsel

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1 were embedded in the process that Crown Counsel could
2 bring their knowledge to the decision that they were
3 being asked to make. It's not the case that
4 Crown Counsel were solely reliant upon the precognition.
5 The precognition was to assist the Crown Counsel in the
6 particular circumstances of this investigation.

7 Q. Are you aware of any discussions between Crown Counsel
8 and Fiona Carnan about the issue of causation, given
9 that Crown Counsel had spent time consulting with
10 experts being part of that process but Fiona Carnan had
11 not been?

12 A. I'm not aware of any specification discussions with
13 Fiona Carnan on that basis, no.

14 Q. Looking at things now in hindsight, do you think that
15 there would be benefit in having some sort of discussion
16 or engagement with the precognoscer who's preparing and
17 working on the precognition, particularly the analysis,
18 to have some discussion or further explanation of the
19 issue of causation with them?

20 A. I think in a case like this it can always be of benefit
21 the more consultation and exchange there is with the
22 team and, in particular, with Crown Counsel, but I do
23 consider that overall in respect of the question of the
24 overall analysis, because of the embedded involvement of
25 Crown Counsel, that they considered that they were in a

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1 position to make a decision in respect of this matter
2 and in respect of the analysis having, regard to the
3 fact that they had been involved throughout the process
4 but --

5 Q. Were there any other discussions with Alisdair McLeod or
6 Erin Campbell about causation?

7 A. I don't recollect any discussions with Erin Campbell.
8 As regards Alisdair McLeod, I think it's the same
9 position. I cannot today recollect any specific
10 discussions with him.

11 Q. Because as I understand the position, it was
12 Alisdair McLeod and Erin Campbell who were precognosing
13 eye witnesses, they were instructing -- drafting letters
14 of instruction for the experts, medical experts,
15 obtaining -- the report we saw from Dr Lawler was
16 returned to and addressed to Mr MacLeod, and so they
17 were considering all of that evidence in relation to the
18 facts of the death of Mr Bayoh, and Fiona Carnan was
19 analysing that for the purpose of the crown precognition
20 and the analysis.

21 Would it not have saved some time if they had all
22 known that Crown Counsel and yourself took the view that
23 causation had been established?

24 A. It may well have. It could have saved -- it could have
25 saved time, but, as I say, I was aware of the extent to

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1 which Crown Counsel had been involved in the
2 consultation and the view and the overall to some extent
3 consensus of views in respect of the role of restraint
4 that it had played in relation to the cause of death.

5 Q. So at that point did you feel there was a consensus
6 amongst your team, as far as you were aware, that cause
7 of death and the causation had been established and that
8 was the approach that was going to be taken?

9 A. I was of the view that there was a basis for considering
10 that causation was established for the purposes of the
11 decision. There is the obvious point that causation
12 would have to be established to a legal satisfaction in
13 the event of any trial.

14 Q. I would like to move on to the issue of race and
15 Article 14. Now, I have obviously addressed this in
16 relation to period 1 and period 2, so this relates to
17 the crown precognition period 3.

18 I'm interested in looking at -- perhaps we can begin
19 by looking at the Fiona Carnan's statement to the
20 Inquiry, which is SBPI 00379, and I'm interested, first
21 of all, in paragraph 45. While we wait for that to come
22 on the screen, Fiona Carnan was asked in her statement
23 by the team to what extent was race a factor in her
24 analysis of the actions of the police officers.

25 A. Yes.

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1 Q. And I'm interested in looking at her response to that.
2 So that's SBPI 00739. While we wait on that, perhaps
3 I could ask you some other questions. We'll leave that
4 for the moment. We can come back to that.

5 Can I ask you some questions about another aspect of
6 Article 2. We've talked about delay or reasonably
7 prompt as an aspect.

8 A. Yes.

9 Q. I would like to look at a minute that was prepared,
10 COPFS 05119B. So that's COPFS 05119B and this was a
11 minute prepared by Stephen McGowan and you'll see it's
12 29 August 2016. This is after the final report has been
13 prepared from PIRC and sent and I wonder if we could
14 look at this. If we can look down the page, please, and
15 there's an update, a background position. It says:

16 "The final report by PIRC was submitted to the
17 fiscal on 10 August 2016. Since then, officials have
18 been considering the report and considering what further
19 work is required by the fiscal before Crown Counsel can
20 make a decision in relation to criminal proceedings
21 against any individual."

22 So this is the period of time we're looking at and
23 it talks about the work required, that this is factually
24 and legally complex in relation to at the cause of
25 Mr Bayoh's death and whether any force used by police

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1 officers in arresting the deceased was justified. And
2 there's some exploration about the number of witnesses
3 of fact that are to be seen by the crown and no doubt
4 precognosced by your precognition officers.

5 And then if we move down, there's a note there to
6 expect to assess nine experts. Went past there. So
7 it's a consideration of the level and volume of work
8 that's required or anticipated. And it indicates that
9 two senior fiscals, with experience of large and complex
10 cases, have been allocated to work on the case under the
11 supervision of the head of CAAPD. Assistant principal
12 Crown Counsel has been nominated as the allocated AD and
13 there's an intention to keep her up-to-date and then
14 there's the timescale given:

15 "In light of the foregoing work that is required [if
16 we could move up the page] we would anticipate being in
17 a position to make a decision on criminal proceedings
18 against any individual by the end of the calendar year."

19 Now, this is August 2016.

20 A. Yes.

21 Q. Not long after the final PIRC report has been sent to
22 crown. A decision wasn't ultimately taken for around
23 two years.

24 A. Yes.

25 Q. And this obviously anticipated, in light of the number

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1 of witnesses to be precognosced and experts to be spoken
2 to, that it would be done by the end of December 2016
3 and there's quite a difference in timescale there.

4 A. Yes.

5 Q. In -- I wonder if we could now turn to one of your first
6 Inquiry statement response, relate response, and answer
7 186. So it's answer 186. It's page 109 of the PDF and
8 I'm interested in the first paragraph of that page:

9 "I do consider that the overall time taken to get to
10 the stage of excluding criminality in this case was
11 significant and lengthy. However, I also consider that
12 the extent of further work and analysis that was
13 undertaken by the crown was necessary to ensure that
14 Crown Counsel could make this decision with the
15 necessary degree of confidence. The considerations of
16 criminality were not limited to the actions of the
17 officers directly involved, but also the potential
18 offences of perjury, attempt to pervert the course of
19 justification, contraventions of data protection
20 legislation and potential corporate liability in respect
21 of Police Scotland.

22 "I consider the investigation as a whole was
23 particularly challenging and to any extent it involved
24 circumstances that had not been addressed before,
25 particularly in relation to post-incident management

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1 procedures. I do consider that the failure of police to
2 provide accounts immediately following the incident
3 frustrated the progress of the inquiry and potentially
4 delayed the critical decision on criminality."

5 I'm interested in your comments here, primarily
6 about the period between the PIRC report -- final PIRC
7 report being received in August 2016.

8 A. Yes.

9 Q. Against that background, that it was anticipated that a
10 decision could be made by the end of that year, but
11 ultimately a decision not being taken until almost two
12 years after the PIRC -- final PIRC report was received.

13 Now, you mention a number of factors there. You
14 mention the failure of the police to provide accounts,
15 but I'm interested in the period from when you had the
16 final PIRC report?

17 A. Yes.

18 Q. Can you explain to the Chair why that took two years,
19 given it was anticipated it was going to be done by the
20 end of 2016?

21 A. Yes. What I would say initially in respect of this
22 minute that was an assessment or an estimate that was
23 happening very shortly after the submission of the final
24 PIRC report, and I would describe that as, with
25 hindsight, an optimistic -- an optimistic estimate, in

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1 the light of really what further work was carried out
2 and what was necessary in respect of reaching that
3 decision in respect of all of these offences that are
4 set out here. But in particular in looking back, I know
5 that the Inquiry has got the account from
6 Alisdair McLeod of the extent of the further work that
7 was undertaken. That included the preparation of the
8 matrix, the analysis of the airways, the checking of the
9 timings. All of that took considerable time and that
10 only became apparent once we were underway.

11 There was also the preparation of the multimedia
12 disc that I don't think was in contemplation at that
13 point and that was something that couldn't be progressed
14 until we were in a position to clarify much of the
15 technical material so I would make reference to the
16 extensive further work that was carried out by the team,
17 but I do appreciate there's a difference between a hope
18 that things would be concluded by the end of that
19 calendar year to the time that it ultimately took,
20 bearing in mind all of the consultations and the
21 additional information, including the information about
22 the rib fracture, the information about sickle cell and
23 the preparation of further materials. It's all of that
24 from my recollection, but the note should detail what
25 was happening in that period.

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- 1 Q. You specifically mention the investigations into, for
2 example, potential corporate liability in respect of
3 Police Scotland. Would that have had any impact on
4 taking a decision about the actions of the individual
5 officers?
- 6 A. It was -- it was part of the overall investigations and
7 they were taking place to a significant extent
8 contemporaneously, although the ultimate decision-making
9 process in the preparation of further precognitions was
10 separated out, but that work was going on at the same
11 time.
- 12 Q. And the data protection legislation investigation, what
13 impact did that have on the actions of the officers in
14 the assessment that was being made in relation to them?
- 15 A. Well, it was potentially criminality arising out of --
16 arising out of the incident, so all of that, all of
17 the -- all of these offences were being -- were being
18 investigated with a view to enabling Crown Counsel to
19 take a decision in totality to allow the matter to
20 proceed on to the next stage, whatever that might be.
- 21 Q. When you say "data protection matters were arising out
22 of the incident", in what way do you mean arising out of
23 the incident?
- 24 A. I mean in relation to the allegations that there was
25 inappropriate accessing of the material.

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- 1 Q. Subsequent to the incident?
- 2 A. Subsequent to the incident. The evidence in relation to
3 the texting and whether there was any connection with
4 the officers by way of background, and also the
5 intelligence circumstances that was being progressed
6 through the Information Commissioner's office.
- 7 Q. You've talked about an incremental approach and to what
8 extent could that approach have been taken with these
9 other investigations, so delay them or separate them out
10 from the core assessment that was going on in relation
11 to the individual officers, could that have speeded
12 things up?
- 13 A. I think the view taken by the investigative team as a
14 whole and by Crown Counsel was that the allegations of
15 criminality should be progressed in order to enable
16 Crown Counsel to take a decision in respect of them at
17 the one time.
- 18 Q. So not to take an incremental approach in that regard?
- 19 A. Well, by "incremental" I was meaning a decision, first
20 of all, in respect of the overall question of
21 criminality and then further investigations for any
22 potential inquiry phase.
- 23 Q. Right. I'm conscious it's just after 3 now.
- 24 LORD BRACADALE: We'll take a 15-minute break now.
- 25 (3.01 pm)

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1 (A short break)

2 (3.20 pm)

3 LORD BRACADALE: Ms Grahame.

4 MS GRAHAME: Thank you. I would like to turn now to

5 Fiona Carnan's statement to the Inquiry. There's two
6 paragraphs I'm interested in. This is SBPI 000379 and I
7 would like to begin by looking at paragraph 45 or answer
8 45. There we are. Fiona Carnan was asked to what
9 extent was race a factor in her analysis of the actions
10 of the police officers and her answer was:

11 "I was concerned with considering whether the
12 actions of any of the officers either individually or
13 collectively amounted to criminality. My focus was on
14 the actions of the officers during the period of an
15 engagement with the deceased and the evidence of how
16 they conducted themselves thereafter. I did not
17 identify criminality on the part of any of the officers
18 involved. Had I identified criminality, it would then
19 have been part of my analysis in respect of criminality
20 to consider whether the conduct was racially aggravated
21 under section 50A(1) (b) of the 1995 Act or whether race
22 was a motivating factor that would amount to an
23 aggravation of the conduct of the accused officer in
24 terms of that Act."

25 And then if we can look to the next paragraph I'm

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1 interested in, which is 38 which is above this
2 paragraph, and this is a section where Ms Carnan is
3 asked to explain her involvement in gathering and
4 analysing evidence in relation to the extent to which
5 race was a factor in the actions of the police officers
6 engaging Mr Bayoh. And she says:

7 "I was not involved in gathering evidence about
8 race. If my analysis of evidence had established that
9 there was sufficient evidence to support criminal
10 charges against any of the officers, the question of any
11 racial motivation or intention would have been addressed
12 at that stage. Since the analysis of evidence did not
13 identify criminality by any officer, the question of
14 racial aggravation did not arise since no offence had
15 been identified."

16 And so it appears that Fiona Carnan took an approach
17 which was not to consider issues of race. She wasn't
18 involved in the -- in gathering of the evidence about
19 race. She did not consider race as part of the
20 analysis. She looked forward criminality, first and
21 foremost, took the view there was none and then, as a
22 result, did not then go on to consider race because she
23 would have been looking at the an aggravation then, but
24 there was nothing to which an aggravation could be
25 applied.

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1 And is that the approach that you anticipated that
2 Fiona Carnan could take when you've told us earlier
3 about this incremental approach that was being adopted
4 by Crown Office?

5 A. Yes, I think so.

6 Q. Right. And can we look at your statement now, 419,
7 SBPI 419, and if we could look at page 60. We've looked
8 this already. This is part of paragraph 102, but it's
9 page 60:

10 " My advice was given against a background where it
11 was accepted that at all times race and racial
12 motivation required to be considered as a continuous
13 process as the inquiry progressed and that an absence of
14 overt racial motivation should not be regarded as
15 determinative. Consideration of implicit bias and
16 assumptions based on race in the overall approach
17 required to be assessed as the investigation developed
18 and the evidence was gathered."

19 So this -- your description of the investigation was
20 as a continuous process and yesterday you talked about
21 the Lord Advocate saying race was a factor and race was
22 critical to the Crown Office investigation.

23 In light of that, Fiona Carnan's approach and in
24 light of your own comments and the comments you say the
25 Lord Advocate made, can you see that it would appear

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1 that there is a -- can I put it as a tension between
2 the -- what's being said by you and perhaps the
3 Lord Advocate about the importance of race and the
4 importance of race and racial motivation being
5 considered at the beginning continuously right through
6 and the actions of Fiona Carnan where she says in her
7 statement she wasn't considering race?

8 A. Yes. My comment in relation to that is that one has to
9 bear in mind that this precognition was created for a
10 specific and limited purpose, namely the assessment of
11 criminality.

12 Now, if race were a factor in relation to the
13 analysis, in respect of criminality, then that would be
14 relevant, but it would have -- it would only be relevant
15 where it impacted on the assessment of evidence for that
16 specific and limited purpose and I think that's why
17 Fiona indicates that it would have been relevant for an
18 aggravation and her basic position is that the evidence
19 as a whole did not meet the test or did not establish
20 criminality that those considerations did not apply.

21 When I was referring in my answer, I meant to the
22 investigation as a whole and, as I have said earlier on,
23 the investigation was not complete. The criminal
24 investigation was complete to that extent and thereafter
25 a lengthy right to review, but I was referring to the

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1 consideration of race during the course of the inquiry
2 and the investigation as a whole and my position is that
3 the investigation was only partially completed at the
4 time that Crown Counsel made the decision and that's why
5 I come back to the incremental approach.

6 Q. Right.

7 A. It is that.

8 Q. So if we leave out of account Fiona Carnan's specific
9 role, in what way was race and racial motivation being
10 considered by the crown in a continual -- in a
11 continuous process as the Inquiry progressed during the
12 period between 2017 when Fiona Carnan became involved
13 and matters going to Crown Counsel?

14 A. It was being considered as part of the assessment of
15 criminality for that purpose, but in relation to
16 whatever inquiry stage there was, there was, as I
17 indicated this morning, considerations of race and,
18 particularly, implicit bias or the thinking of officers,
19 that could have been explored at a later time. So I do
20 accept there was a particular focus at this point on
21 establishing criminality, issues of race would have
22 become more sharply focused once that decision had been
23 taken.

24 Q. When you say race was being considered as part of an
25 assessment of criminality, how could that -- how was

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1 that being done when Fiona Carnan has said she was not
2 considering race as part of an assessment of
3 criminality?

4 A. Well, it would be considering race where it was relevant
5 to the issue of criminality, typically overt racism
6 where that would indicate at criminal mind or some
7 aggravating factor, but that was the focus of the
8 inquiry at that stage.

9 Q. And when you've said here that it's not just race, but
10 it's racial motivation, are you only then talking about
11 overt examples of racism?

12 A. I think in my assessment overt racism would be much more
13 applicable to considerations of criminality whereas race
14 in the widest sense, including how it might have
15 affected behaviours either in an unconscious way or by
16 way of bias, that would be something that could in my
17 assessment be effectively explored only once you could
18 carry out some inquiry with those who were engaged in
19 the incident itself.

20 Q. Just to be clear, you don't think racial motivation of
21 itself would be relevant or evidence about racial
22 motivation would be relevant to a consideration of
23 criminality?

24 A. Racial motivation could be relevant if it were a
25 criminal -- if all of the evidence amounted to a

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1 criminal act and then one could consider an aggravation
2 in respect of that. But --

3 Q. If racial motivation could be relevant to a criminal act
4 and could amount to something akin to criminal act, can
5 you explain why you would not as part of an assessment
6 of criminality incorporate within that investigation
7 consideration of racial motivation?

8 A. One would -- one would consider it as indicating a
9 criminal mind with particular application to the
10 offences which were under consideration.

11 Q. And so if racial motivation can be an indicator of a
12 criminal mind, which could be relevant in relation to
13 criminality, why would you exclude from the
14 investigation into criminality considerations of race at
15 the outset?

16 A. I think maybe one way of putting it is that very much
17 the focus in an assessment of criminality is an
18 assessment of what the officers did and that was -- that
19 was a focus of the investigation at that stage.
20 Anything that did not amount to criminality but may have
21 affected their behaviours but fell short of criminality
22 would be for consideration after criminality had been
23 excluded.

24 Q. And again, if racial motivation could amount to
25 behaviour or give rise to behaviour that constitutes

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- 1 criminality, why would you leave that out of account
2 when you are considering criminality?
- 3 A. I'm not saying you would -- I'm sorry. I'm not saying
4 you would leave it out. You would have to consider it
5 where it was relevant to the test that was being applied
6 to the particular crimes that were under consideration.
- 7 Q. But we've heard from Fiona Carnan that she did not take
8 race into account when she was considering criminality,
9 race or race motivation. Do you think that was -- that
10 was an issue in relation to the obligations on the crown
11 under Article 14 to vigorously investigate issues of
12 race and race motivation discrimination where they may
13 apply?
- 14 A. I consider that the obligations upon the crown were
15 towards the investigation as a whole and that the
16 investigation was not complete at this point.
- 17 Q. Okay. Is there any reason why investigation into race
18 and racial motivation could not have been run in
19 parallel to the investigation into criminality?
- 20 A. In relation to racial motivation where it falls short of
21 criminality, one -- in my view the effect of
22 investigation in that must involve some approach to
23 those to explore whether there was evidence of racial
24 motivation and, in particular, what the state of mind
25 and the thinking was of those who are being investigated

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1 and where those kind of considerations are being
2 explored.

3 So I think the best way that I can put it is that if
4 criminality was excluded, as it was here, then if there
5 was a subsequent inquiry phase, where the crown had been
6 responsible for the preparation of that inquiry phase,
7 that significant further investigation I consider would
8 have had to have been carried out in respect of that and
9 that would likely have explored with -- directly with
10 those involved in the incident what their thinking was
11 and the extent to which they considered race in relation
12 to those various elements.

13 Q. So obviously an incremental approach was taken,
14 initially looking at criminality, but is there a reason
15 why in parallel with that aspect of the investigation
16 there could not also have been a parallel investigation
17 into issues to do with race?

18 A. I consider that for the reasons that I've given that in
19 the absence of an ability to approach the officers, such
20 analysis would be, I consider, speculative or
21 incomplete.

22 Q. When I --

23 LORD BRACADALE: Mr Brown, could I just clarify a difficulty
24 here. If you're going to make an assessment that racial
25 motivation is relevant to criminality, you would surely

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1 have to marshal the evidence that was indicative of
2 racism in order to judge whether it was relevant to
3 criminality, would you not? Would you not have to carry
4 out the exercise of looking at the evidence in order to
5 make that judgment.

6 A. I consider that the way that it was approached in this
7 case, which the team and Crown Counsel were content
8 with, was looking at the actions of the officers and
9 assessing whether their actions and behaviour fell
10 outwith the range of reasonable options that were open
11 to the officers, taking into account all of the relevant
12 circumstances, including in particular the apparent
13 threat or danger that could be posed by somebody who
14 might have been still in possession of a knife and that
15 was the focus of the obtaining of the expert opinion.

16 So that involved consideration of all of the
17 circumstances and, as I recollect it, the restraint
18 expert considered that he was unable to separate out
19 some of the elements that would have a potential racial
20 motivation, such as the terrorist threat, but that the
21 most important factor that was under consideration was
22 the degree of threat posed by somebody who could have
23 been in possession of a knife and in the light of all of
24 the information that was conveyed to the officers in the
25 broadcast and therefore in relation to that, that was

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1 the key consideration in respect of whether a crime
2 could be established and the assessment in relation to
3 the behaviour of the officers in the light of all of
4 that was that no crime could be established and to that
5 extent that was the basis of the decision that could be
6 made and things like whether the officers were entitled
7 to make a connection as to -- or rather why they made a
8 connection to something like a terrorist incident could
9 only be effectively explored with them if criminality
10 was excluded.

11 LORD BRACADALE: Thank you.

12 MS GRAHAME: In the situation where, as we know, no
13 proceedings were taken in relation to these officers and
14 on the basis of the incremental approach that was
15 adopted, there could then have been further
16 investigation by the crown considering whether perhaps
17 an FAI should have been -- should be started, commenced?

18 A. Yes, and I think that I have said in my statement that
19 there was no doubt that at the very least a fatal
20 accident inquiry would be held and that undertaking had
21 been given.

22 Q. And if that part of the process was commenced by the
23 crown to complete their investigations, you've talked
24 about speaking to the officers to see what was in their
25 mind and considering things like their racial motivation

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1 and why they perhaps made connections with terrorism or
2 why certain actions were adopted and when.

3 But if criminal proceedings were still possible, it
4 may be that the officers wouldn't speak to the crown at
5 all or to the police or whoever was instructed to
6 approach them. So you may never have had the
7 opportunity to consider what the officers said was in
8 their minds or otherwise. But what about the
9 possibility of drawing inferences from facts and
10 circumstances and whether those gave rise to any
11 inferences of race, racial motivation, discrimination,
12 because there was nothing to stop the crown
13 investigating those aspects without having any regard to
14 what the officers said?

15 A. Yes.

16 Q. So yesterday I asked you a whole series of questions
17 about other possible avenues of investigation that were
18 open to be pursued?

19 A. Yes.

20 Q. Analysing the police statements and the language used by
21 the officers?

22 A. Yes.

23 Q. Analysing the connection that apparently had been made
24 with the colour of Mr Bayoh's skin and terrorism. The
25 speed at which the officers adopted the use of force.

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1 Analysing other options and why they hadn't been chosen
2 in the circumstances.

3 No investigation into the surrounding circumstances
4 of the events at Hayfield Road. No investigation into
5 questions of whether Mr Bayoh was treated with dignity
6 and compassion. The use of the handcuffs or leg
7 restraints after he had been rendered unconscious.

8 There are other elements of evidence that we've
9 heard about which could have been considered by the
10 crown, not having regard to the officers themselves at
11 all, but from which it may have been possible to draw
12 inferences regarding racial motivation and race and why
13 could those aspects of the investigation not have been
14 pursued at the outset, regardless of waiting until after
15 the criminal matter had been considered?

16 A. By consideration in respect of that I have been asked is
17 that in order to reach a properly-informed view with the
18 potential of presenting that at some form of judicial
19 inquiry, there has to be some exploration as to why the
20 officers considered certain elements, things like the --
21 the use of discriminatory language at any point. That
22 is a clear example of something that would require to be
23 explored, but whether it's relevant to a consideration
24 of criminality is a slightly different question and
25 whilst hypothetically some of these issues could be

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1 addressed in some opinion provided, that wasn't the
2 focus of the precognition and that was coming back to
3 the strategy that had been approved that the
4 precognition was created for the specific and limited
5 purpose of considering -- considering the question of
6 criminal proceedings and that the questions on the wider
7 aspect of race and the treatment, for instance, of the
8 family, the provision of information which clearly was
9 not correct and whether there was criminality in respect
10 of that, the crown directed the focus in relation to
11 questions such as that, as to whether criminality could
12 be established and thereafter assessed that as part of
13 this present precognition.

14 It would have been for another form of inquiry to
15 have addressed that, you know, things like why was it
16 that you did provide false information to the family,
17 misleading information? Why was it that you acted in a
18 certain way in engaging with the family? Those are the
19 kind of considerations that were, I would say, not
20 considered appropriate to explore in the light of the
21 fact that the precognition was created for a very
22 specific and limited purpose of the assessment of those
23 particular crimes that are specified in the
24 precognition.

25 Q. All right. So is it fair to say that during period 3,

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1 which is the one we're looking at, when with the crown
2 precognition was being prepared and work being done on
3 that, that there were -- there was an incremental
4 approach being taken and there were no positive steps
5 taken to investigate race during that period, but the
6 intention was that race would have been investigated at
7 a later stage?

8 A. I think the view taken was that the most effective way
9 of investigating those kind of elements were after the
10 decision in relation to criminality.

11 Q. Okay. And that took two years after the final PIRC
12 report was received and were there any concerns
13 expressed about the duration of that period and the
14 impact it was having on the fact the crown had decided
15 not to investigate race at that stage?

16 A. I don't -- I don't recollect any specific concerns being
17 expressed in relation to that. There was an
18 understanding across -- across the team and the
19 organisation and law officers about what was happening
20 in relation to the investigation and the various steps
21 that had been taken, an account of the progress that had
22 been made and what was still to happen, but what I would
23 say in relation to that period was that the period did
24 become longer than was anticipated very clearly.
25 I think the focus was on ensuring that all relevant

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1 lines of inquiry that could relate to criminality
2 required to be explored at that stage and that was --
3 that was pretty intensive work that was being carried
4 out by the team, so there was a capacity issue or
5 I think there was a capacity issue in respect of that.

6 So there was a focus on what is relevant here to the
7 issue of criminality and I did indicate earlier on in my
8 evidence the kind of areas whereby the crown I think had
9 to be very careful not to allow a premature decision to
10 be made in respect of criminality and to proceed to
11 the inquiry phase prematurely.

12 Q. Although ultimately the decision was taken to keep those
13 that possibility alive.

14 Now, can I ask you, are you aware of any other
15 examples of this incremental approach being taken by the
16 crown?

17 A. I think this was something that I had -- I did not have
18 experience of and limited experience of this type of
19 investigation having regard to all of the -- all of the
20 elements that the crown and others had to explore.

21 Q. Right. And in relation to something you said earlier
22 about your team being alive to the possibility of racial
23 issues, was the plan that your team would be alive to
24 that -- I mean Fiona Carnan gave evidence that one
25 aspect she was asked about could have been possibly

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1 indicative of racial stereotyping. Were they to then be
2 held in abeyance until these later were to be
3 considered?

4 A. Well, I think my position in respect of that is that the
5 best and most effective way to be able to explore that
6 was once criminality had been dealt with and thereafter
7 a very different investigative approach could
8 potentially have been adopted in relation to the inquiry
9 phase.

10 It is the case, and I did say this in my statement,
11 that it is clear that the overall period taken to reach
12 a conclusion on criminal proceedings was lengthy and
13 that was a consequence of various factors, including the
14 time that the report was with the other investigative
15 agency, the PIRC, and thereafter the amount of work that
16 required to be carried out by the crown on receipt of
17 that report in order to deal with that what I would
18 describe as necessary and essential first step with
19 confidence, because, again, and at the risk of repeating
20 myself, the consequence of proceeding prematurely to an
21 inquiry phase where something emerges that changes the
22 perspective in relation to criminal proceedings would be
23 very significant.

24 And in addition to that, there is the question, the
25 difficult question, of securing the provision of

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1 evidence at an inquiry phase where there has been a
2 criminal investigation and that's something that is a
3 systemic situation and it can arise where there has been
4 some form of criminal consideration or some, more
5 importantly, inadequate criminal consideration that then
6 proceeds to an inquiry phase where there have to be such
7 things as warnings given to witnesses, rights of
8 immunity. Those kind of things are undesirable, if I
9 can put it like that, and that is why there was a clear
10 focus on dealing with it in this order and bearing in
11 mind that as that progressed, things emerged that did
12 require in the assessment of the whole team and the
13 officers to be properly investigated.

14 Q. All right. I'm going to move on now, away from the
15 question of race and look at the relationship that the
16 crown had with the family and in particular the
17 Lord Advocate.

18 Now, up until now, as we've gone through period 1
19 and 2, we were talking about Frank Mulholland.

20 A. Yes.

21 Q. And at some point during this process he left Crown
22 Office, left the role of Lord Advocate, and James Wolffe
23 came in as Lord Advocate?

24 A. Yes.

25 Q. And I would like to ask you just for your thoughts on

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1 some evidence that we've heard from the family to see if
2 you have any recollection of things being said or done
3 or whether you had any impressions at the time.

4 Now, the first thing is in relation to
5 Collette Bell?

6 A. Yes.

7 Q. And she gave evidence to the Inquiry where she talked
8 about remembering a meeting. She didn't know the date
9 of that meeting, but she thought it was with the newer
10 Lord Advocate so and she recalled him saying something
11 like:

12 "He's done it to himself. [This was about Mr Bayoh]
13 If he was responding to the arrest, he wouldn't have
14 sustained his injuries or I'm sure he used words like
15 that. If he wasn't flailing around or fighting against
16 it, then this wouldn't have happened and I remember
17 thinking are you kidding me on? There's like nine
18 officers or six officers on top of him. How do you want
19 him to react? And I just remember thinking you're not
20 having any more of my time if that's your opinion and I
21 certainly don't think you're going to be doing anything
22 in our best interests to help us."

23 Now, from your involvement with the family and the
24 Lord Advocate in relation to this investigation, do you
25 remember the Lord Advocate, described as the newer one,

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1 so probably James Wolffe, saying anything along those
2 lines to Collette Bell at a meeting?

3 A. No, I don't.

4 Q. You don't. You don't have any recollection of anything
5 like that being said?

6 A. No. And in the light of the terms, I suspect I would
7 have remembered if that had been said, especially by the
8 Lord Advocate and James Wolffe in particular.

9 Q. Were you at the meetings? I think earlier in your
10 evidence you said you were at meetings with the
11 Lord Advocate?

12 A. Yes.

13 Q. And then we've heard evidence from Kadi Johnston, who is
14 the sister of Mr Bayoh, and she was talking about
15 Frank Mulholland, the Lord Advocate:

16 "When we met the other Lord Advocate [so this was
17 not Frank Mulholland but James Wolffe], we felt like he
18 was not interested at all. He didn't give us much
19 information. We had to hear things from the media, you
20 know. So it wasn't -- we didn't feel any engagement
21 with him."

22 And she then went on to say:

23 "Apart from meetings with Frank, whatever he was
24 going to do or whatever he was going to do his
25 investigation, he was keeping us informed and, you know,

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1 we will have a discussion about it and he will listen to
2 our concerns and follow that up, but we didn't have that
3 with the other Lord Advocate."

4 And from your own perspective of having been in
5 meetings with the family with, first of all,
6 Frank Mulholland and latterly James Wolffe, was there a
7 difference in approach taken by the advocates in
8 relation to engagement with the family?

9 A. I think what I would comment in general is that it was
10 very clear that, probably right the outset, that a very
11 good relationship was built up with the family and
12 Frank Mullholland. I don't really want to speculate as
13 to why that was beyond that he was engaging. His style
14 of engaging clearly resonated with the family.

15 I do recollect an occasion where I had assisted in
16 facilitating showing a footage to the Bayoh family and I
17 remember that Frank Mulholland -- I was going to say
18 "popped in", but I would use that expression, popped in,
19 said he wanted to pop in and just to see the family and
20 did come in and exchange -- exchange some words with
21 them.

22 So all of that, it was clear that the style,
23 personal style, was of assistance in building up the
24 relationship with the family. I don't know that I can
25 say anything that will particularly assist the Inquiry

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1 in relation to the family's perception of the other
2 Lord Advocate. He clearly is a different man and -- but
3 what I would say, and I think I have said this in my
4 statement, that at the time of James Wolffe's
5 appointment that pretty closely coincided with the
6 arrival of the second PIRC report and the approach that
7 we've just been talking about in relation to potential
8 criminality and I know that James Wolffe was acutely --
9 acutely aware that the Inquiry or he considered that
10 the Inquiry had moved on to a slightly different phase
11 and that the amount of information he considered that it
12 was appropriate to share was different for procedural
13 reasons. So that might have been an influence, but
14 those are the kind of observations that I would make in
15 relation to them.

16 What I could say is that from my engagement there
17 was -- this still was a commitment on behalf of both
18 Lord Advocates.

19 Q. Looking back now, do you consider that there was
20 sufficient information given to the family at that time,
21 a sufficiently detailed explanation, that things were in
22 a different phase and the approach would have to change
23 in line with that different phase?

24 A. I think I did allude to that in my statement and I do
25 consider that with hindsight there probably was an

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1 opportunity to explain the various phases. Having said
2 all of that, there was -- after the appointment of
3 James Wolffe, we had dedicated Crown Counsel,
4 Ashley Edwards, appointed and she met with the family.
5 There were also some meetings between -- I recollect at
6 least one between myself and Lindsey, Lindsey Miller,
7 and Mr Anwar, but without the family present whereas I
8 recollect there was some explanation as to the stage
9 that the Inquiry had reached and what was still to
10 happen, but there wasn't the same direct contact with
11 the Lord Advocate I suppose I would say from that point
12 on in recognition of the fact that Ashley Edwards had
13 taken on the role of dedicated Crown Counsel.

14 Q. I have a note of meetings that took place during this
15 period, 5 December, 2016, so that would have been at the
16 end of the year when the final PIRC report was obtained.

17 During 2017, three meetings, February, October, and
18 then another date I don't have an exact note of. And
19 then two further meetings in March 2018 and
20 October 2018.

21 Does that accord with your recollection of the type
22 of contact that the family had with Crown Office during
23 that period?

24 A. It might very well. If that's the information that's
25 been provided, I'm not taking any issue with it.

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1 Q. And there's another aspect that we've heard evidence
2 about from Kadi Johnston -- yes, Kadi Johnson on Day 34
3 of the Inquiry and this was -- related to the final
4 meeting with James Wolffe, the one in October 2018.

5 This related to the leak to the newspaper or part of
6 the element of her evidence related to the leak of the
7 newspapers of the ultimate -- the decision that was
8 taken by Crown Counsel and Kadi Johnson explained that
9 this meeting was with Mr Wolffe and the
10 Solicitor General and she was asked about what
11 explanation she had been given as to why the media had
12 the information about the decision before the family
13 did. And her answer was:

14 "He said he didn't know [that's James Wolffe] but he
15 would investigate it, but I don't know what the outcome
16 is with that. He will investigate how the media got to
17 us before him, you know."

18 And:

19 "What did you hear about the outcome of that
20 investigation."

21 And her reply was:

22 "I haven't heard anything about that."

23 And I asked:

24 "Have you ever been given an explanation?"

25 And she said, "no".

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1 And I'm interested in your view, because it would
2 appear from the evidence of Kadi Johnson that they
3 sought an explanation as to how there was a media leak
4 prior to the family being made aware. I think the
5 former Lord Advocate had said that he would let them
6 know before anyone else.

7 In terms of the investigation that was carried out
8 after that leak, was there any attempt to speak to the
9 family and explain to them and provide them with an
10 explanation that they had sought at this meeting?

11 A. In relation to that inquiry or investigation, that was
12 conducted at a very high level to my recollection within
13 Crown Office and I don't recollect personally being
14 aware of any follow up or request for information in
15 respect of that, but that's just looking at my own
16 involvement in relation to it.

17 Q. So you weren't asked to be involved in that aspect or to
18 share any information with the family?

19 A. No, I directly was not, no. It was conducted elsewhere
20 really.

21 Q. Can I ask you, in relation to engagement with the
22 family, obviously there were a number of queries and
23 comments brought in by their lawyer, Mr Anwar?

24 A. Yes.

25 Q. And there were meetings where the family were there in

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1 person?

2 A. Yes.

3 Q. What process was in place that allowed Crown Office to
4 keep track of the family concerns or queries or issues
5 they wanted the Crown Office to come back to them on?

6 A. I think from recollection one of the main -- the main
7 ways of doing that was that I think those meetings were
8 followed up in correspondence and there was confirmation
9 as to what -- what was to be undertaken and I --

10 I was -- sometimes it would say, you know, "Mr Brown or
11 Les Brown will arrange for this" or that kind of thing.

12 I do recollect correspondence going on at that time.

13 Q. All right.

14 A. I think I did say again in my statement these meetings
15 were -- I would term them, I don't know if everybody
16 would share this, but they were essentially private
17 meetings where the Lord Advocate wanted to provide
18 reassurance and the provision of information and they
19 were -- although I was present at them, there wasn't a
20 note-taker or anything like that. It was a dialogue,
21 which obviously had some benefits, but, as I say, in
22 respect of formal follow-up, there was correspondence in
23 respect of that.

24 Q. Right. Could we finally look at your Inquiry statement
25 again and one particular paragraph which is an answer to

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1 question 175, which is page 105 of the PDF:

2 "I consider that the overall approach of COPFS to
3 investigations of deaths in custody or following police
4 restraint is now more focused, particularly in relation
5 to the creation of a specialist unit within COPFS to
6 investigate deaths in custody and that it is recognition
7 that these types of cases require a significant degree
8 of expertise."

9 A. Yes.

10 Q. Can you tell us a little more about the creation of the
11 specialist unit, please?

12 A. I think I can tell you a little more. I do think it
13 probably is the case that from an organisational point
14 of view that there might be more information that could
15 be made available in respect of that. I will talk only
16 from a personal perspective and a personal perspective
17 whereby I have not worked in that unit and I have a very
18 limited contact with it.

19 Having said that, my understanding is the unit was
20 created with a specific focus of deaths in custody.
21 Prior to that, deaths in custody were dealt with by the
22 general Scottish Fatalities Investigation Unit headed up
23 by David Green. So they weren't separated out and there
24 are a significant number of people that work within that
25 general unit and I think that the creation of this

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1 specialist unit was intended to have a more limited
2 number of people involved in it who could concentrate
3 exclusively and build up a level of expertise to deal
4 with the particular challenges of dealing with deaths in
5 custody.

6 Q. So at the beginning of your evidence we talked about the
7 Scottish Fatalities Investigation Unit and David Green
8 at the head. We talked about you as the head of CAAPD,
9 criminal allegations against the police.

10 A. Yes.

11 Q. And we talked about David Green's initial involvement,
12 but then you having oversight as head of CAAPD.

13 Is it now the case that deaths in custody are dealt
14 with by the specialist unit and not CAAPD?

15 A. That's my understanding. And just for the -- in
16 relation to CAAPD, I don't recollect that CAAPD had ever
17 dealt with a deaths case, prior to the case of Mr Bayoh.
18 They were dealt with within SFIU, but in relation to
19 this case, for the first time to my knowledge, it was --
20 it was to be CAAPD involvement and CAAPD oversight in
21 respect of this particular matter, but CAAPD was -- as I
22 have explained, CAAPD was created to investigate on-duty
23 criminal allegations and whilst there would be some
24 potentially road traffic fatalities, that was the extent
25 of the involvement. This was very much a, I think I'm

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1 reasonable and right in saying, a first.

2 Q. Thank you. Could you give me one moment, please. Thank
3 you very much. I have no further questions.

4 LORD BRACADALE: Thank you. Are there any Rule 9
5 applications. Ms Mitchell.

6 Mr Brown, would you make withdrawing to the witness
7 room, please.

8 (Mr Brown withdrew)

9 Yes, Ms Mitchell.

10 MS MITCHELL: The first issue, number 1, that I would like
11 to ask this witness is in relation to procedures in
12 place for the crown's tempering of Article 2 and
13 Article 14 duties. This witness' evidence was
14 effectively that everybody knew about these articles,
15 but what I would like to know was were there any
16 processes, practices or procedures in place to identify
17 and assess whether Crown Office was meeting its
18 standards in this regard and whether or not there was
19 anybody overseeing that duty.

20 And I say that in the context, as the Inquiry will
21 perhaps understand at this stage, that as my learned
22 friend has carefully brought out, it does not appear
23 that assessment was done particularly in relation to
24 race, unless and until the solicitor for the Bayoh
25 family prompted it. So I was wanting to see whether or

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1 not there was any independent part of the Crown Office
2 that might have dealt with any of those matters.

3 The second matter is about correspondence I think we
4 heard about in Day 1 or Day 2 that Mr Anwar sent dated
5 31 July and that was a letter direct to PIRC that he
6 sent in relation to racial issues and Mr Brown was asked
7 about this and he recollected that the day before that
8 letter had been sent that there had been a meeting in
9 which racial issues had been discussed and he said that
10 he recalled that there had been a meeting the day before
11 that letter had been sent about Baltimore and he said:

12 "So it would have been present in people's minds
13 that hadn't resulted I think in considerable -- sorry --
14 in considerable unrest because of the actions of police
15 which had an apparent racial motivation."

16 So there was a discussion with a law office at that
17 stage and that was prior to 31 July and really it's to
18 check with him that as a result of that particular
19 conversation there wasn't actually any action posed or
20 taken with regards to Article 2 or 14 and rather the
21 context about race was solely in relation to the unrest
22 that might occur if a black man had died in police
23 custody and that they didn't want another Baltimore,
24 rather than the tempering of those duties.

25 The third matter was -- is in relation to the

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1 assessment of Fiona Carnan's crown analysis and my
2 learned friend asked various questions in relation, for
3 example, to whether or not this witness was satisfied
4 about that Fiona Carnan had covered various trainings,
5 the OST, SOPs, et cetera.

6 What I would like to ask about in that regard was
7 whether or not there was sufficient consideration given
8 to Mr Bayoh's mental health in the context of how the
9 officers dealt with him at the outset and I say that
10 with particular reference, my Lord, to page 8 of the
11 crown analysis that's COPFS-06361, because it does not
12 appear, unless I am wrong, that in the analysis done
13 there is any consideration given to the fact that
14 Mr Bayoh was suffering a mental health crisis, despite
15 there being evidence from both civilian officers and
16 police officers that they suspected that that could be
17 the case. So I would wish to ask him about the
18 sufficiency of the analysis on that basis.

19 Further, this witness asked, as the Inquiry will
20 recall, in his minute about the airwaves and radio in
21 relation to the state of knowledge of the police
22 officers when they intercepted Mr Bayoh. From that
23 piece of work it would be understood and acknowledged
24 that there was a known failure to follow a direct order
25 to pause and report back to base before -- before

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1 dealing with Mr Bayoh and what I would like to ask him
2 is under that understanding was he satisfied that there
3 was sufficient consideration given to the effect that a
4 failure to follow these orders had on the following
5 police behaviour.

6 Question number 4 is a specific question. This
7 witness indicates that he didn't have any
8 recollection --

9 LORD BRACADALE: Ms Mitchell, I had that down as number 4.

10 MS MITCHELL: I'm sorry.

11 LORD BRACADALE: I don't want to get into trouble with the
12 numbers.

13 MS MITCHELL: That's perhaps -- sorry. 4 is the airwaves.

14 LORD BRACADALE: The first one related to processes and
15 practices.

16 MS MITCHELL: Indeed.

17 LORD BRACADALE: The second one a meeting before the -- at a
18 meeting --

19 MS MITCHELL: Indeed, 31 July.

20 LORD BRACADALE: -- where they talked about Baltimore.

21 The third one was related to the question of a
22 mental health crisis and the fourth one was related to
23 airwaves and so forth.

24 MS MITCHELL: Sorry. I had that as A and G, my Lord. The
25 next one is number 5. I will reassess.

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1 This being question number 5, it's a specific
2 question in relation to his memory about whether or not
3 there was a connection between excited delirium and
4 racism and what I want to ask him is does he recall when
5 he consulted with Deborah Coles of Inquest and the
6 Lord Advocate whether or not there was any discussion at
7 that time as to whether or not there were any racial
8 links to excited delirium and so that's a specific
9 question.

10 Moving on to number 6, what I would like to ask the
11 witness was who told him about Mr Karch newspaper
12 article. It's understood that Mr Bayoh -- sorry -- that
13 Mr Anwar flagged up directly with the Lord Advocate the
14 newspaper article, but it's to assess whether or not
15 independently Crown Office came to -- come to know of
16 this matter or, again, was it simply Mr Anwar on behalf
17 of the family getting in contact and advising of this.

18 Number 7 is in relation to the line of questioning
19 towards the end of my learned friend's evidence --
20 question today in the evidence of the witness. This
21 witness gave evidence that when they were looking at
22 criminality, they looked at the actions and behaviours
23 of the police officers and whether it fell outwith the
24 range of reasonable options. And he said that in that
25 they took into consideration circumstances, including in

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1 particular the apparent threat or danger that could be
2 posed. And he then said:

3 "The most important factor that was under
4 consideration was the degree of threat posed by someone
5 who could have been in possession of a knife."

6 Now, what I would like to ask with this witness was
7 whether or not he considers that the question of threat,
8 mens rea and race was properly analysed. This Inquiry,
9 of course, has heard repeatedly "Would you have done
10 anything different if this person was black?" put to a
11 number of witnesses and we hear time again that they
12 wouldn't have done anything differently. But we've also
13 heard that knife crime and attending knife crime was
14 common, yet it was this case in which someone was dealt
15 with in this particular way that led finally to the loss
16 of their life.

17 And I would respectfully submit that it ought to be
18 asked of this witness whether or not the crown should
19 have posed the following questions. What if the
20 perception of the officers, their perception of threat
21 and danger, was specifically related to the colour of
22 Mr Bayoh's skin? What if the perception of threat and
23 danger affected the way in which the police officers
24 dealt with him on arrival? And there are examples in
25 the statements from which the issue of their perception

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1 could be analysed, for example, the use of the term
2 "coloured", considerations of terrorism, "he was the
3 largest man I've ever seen", super human strength
4 slapping someone -- slapping Mr Bayoh to the face to see
5 if he was actually unconscious. So to ask whether or
6 not those should have been analysed and, in those
7 circumstances, if you're analysing what people's
8 perception is, what their perception of threat and
9 danger and how this affected the way in which they
10 acted, whether or not that should have been a factor
11 that was considered in relation to mens rea. So that's
12 a cumulative question as it were.

13 And moving on to 8, it's a specific and narrow
14 question, it relates to COPFS 03242A, and it is a letter
15 to Crown Office asking that Mr Anwar carry out a COPFS
16 audit of queries raised by the family and to ask whether
17 or not that audit was in fact carried out.

18 And those are my questions.

19 LORD BRACADALE: Thank you. Given the time, I'm going to
20 adjourn in order to assess how best to go forward.

21 (4.20 pm)

22 (The hearing was adjourned to 10.00 am on Tuesday, 23 April

23 2024)

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