

Transcript of the Sheku Bayoh Inquiry

Thursday, 18 April 2024

(10.03 am)

LES BROWN (continued)

Examination-in-chief by MS GRAHAME

LORD BRACADALE: Good morning Mr Brown, Ms Grahame.

MS GRAHAME: Thank you. Good morning again, Mr Brown.

A. Good morning, Ms Grahame.

Q. Just to recap where we got to yesterday, I had explained that we would deal with three periods of time. We were still on first period of time, which from 3rd May 2015 up to August 2015, but we were heading towards the end of that period. And I think by the stage we got to yesterday afternoon, we were aware that the Lord Advocate had wanted further investigation into the causes and mechanism of death, that PIRC were engaged in a process whereby they were identifying medical experts and experts to suggest to crown and then to instruct?

A. Yes.

Q. And they were also obtaining CVs and they were going to prepare letters of instruction in draft and then send them to crown for review?

A. Yes, they were going to prepare that once the crown had assessed the information and ultimately, as I said yesterday, approved the instruction of the experts.

Q. And that was a process that was entered into between

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1 the crown and PIRC, but it wasn't something that had
2 been a long-established protocol or anything of that
3 sort?

4 A. I think -- that's I think a very good way of putting it
5 that to some extent this was -- this was exploring or
6 progressing something that was relatively untested and
7 novel, yes.

8 Q. Right. And we've heard evidence from the lead
9 investigator at that time, that was a Mr McSporran, and
10 he took us through his policy log wherein significant
11 decisions and such like were noted and he referred to
12 one -- in fact, we could look at it briefly, PIRC 04153,
13 and if we look at decision 59, and you'll see in the
14 final column on the right-hand side the dates are given
15 when Mr McSporran noted these entries, and you can see
16 there for 7 July it says in the middle column:

17 "To obtain expert medical opinion on cause of death
18 and/or potential contributory causes."

19 And it says "provide expert witness packages."

20 And there's various items listed that were to be
21 prepared within that?

22 A. Yes.

23 Q. So by early July, 7 July, these discussions about
24 instructions had begun.

25 A. Yes, and that does accord with my recollection in

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1 relation to the timeline and I'm pretty confident that
2 meetings had already taken place involving the
3 Lord Advocate where the Lord Advocate had indicated that
4 he considered that this required exploration and that it
5 was around about this time that he was indicating that
6 he wanted experts, to some extent from the international
7 community if possible, to look at this.

8 Q. And Mr McSporrán noted that this was to obtain
9 medical -- expert medical opinion on cause of death
10 and/or potential contributory causes. That seems to be
11 his understanding. That's what he has noted?

12 A. Yes, I see that, yes.

13 Q. All right. And then if we look at 62, decision 62, see
14 it says:

15 "Narrative instruction of experts."

16 This is another entry by Mr McSporrán but towards
17 the end of July, 29th:

18 "Following presentation of CVs to Crown Office they
19 have instructed PIRC to engage the services of
20 Dr John Payne-James and Dr Steven Karch to provide
21 expert opinion on cause of death."

22 So by 29 July it would appear that CVs had been sent
23 to Crown Office, they had been reviewed and PIRC were
24 now at the stage of instructing the services of two
25 experts, Dr John Payne-James and Dr Steven Karch?

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1 A. Yes.

2 Q. And it would appear that Mr McSporran had written this
3 down as "providing expert opinion on cause of death".

4 Now, I think in your own statement you have
5 explained that it was you who was reviewing the CVs of
6 the experts?

7 A. I -- I did have involvement in that, yes, but I'm
8 confident that others did as well.

9 Q. Right.

10 A. Yes.

11 Q. Was that someone from your team that you spoke about
12 yesterday or colleagues such as Mr McGowan?

13 A. I'm very confident it involved Mr McGowan because I know
14 that Stephen McGowan was in agreement that those --
15 those experts, in particular Steven Karch, that it was
16 appropriate to instruct -- I'm consider that it likely
17 that others were cited as well, perhaps including the
18 Lord Advocate, because of the interest and because of
19 this particular interest that the Lord Advocate took,
20 but certainly Stephen McGowan.

21 Q. Right. Thank you. Do you remember now the expertise
22 that Dr John Payne-James had, what field of expertise he
23 worked in?

24 A. Yes, I -- I know that he was I think the description a
25 forensic physician. I recollect that he had experience

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1 and direct experience and a particular interest in
2 restraint within a variety of settings, including law
3 enforcement or a police setting. As I recollect he had
4 contributed to a number of publications in respect of
5 that and that he had been involved in building up a high
6 degree of knowledge in relation to those and he was
7 I think in a position whereby he contributed in an
8 advisory capacity to restraint and I think safe methods
9 of restraint.

10 Q. Thank you. And Dr Karch, what was your understanding of
11 his expertise?

12 A. Dr Karch was put forward in relation to, as I recollect,
13 his knowledge and his experience of the effects of drugs
14 on the person who had taken want the drugs and the
15 possible -- the possible physical effects upon a person
16 who had taken those drugs. As I understand it or
17 recollect it, he was being approached to comment on the
18 role of the drugs that had been taken and had been
19 detected in this case and what effect those might have
20 in all the circumstances.

21 Q. Right. We've heard from Kate Frame, her understanding,
22 it was PIRC that put his CV to the crown, that he was a
23 cardiac pathologist and a toxicologist; would that
24 accord with your recollection or does that go beyond
25 your memory of ...?

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1 A. It probably does go beyond my memory to some extent, but
2 I do remember that it was a long CV.

3 Q. Were you aware at that stage that Dr Karch was an
4 advocate of Excited Delirium?

5 A. No.

6 Q. Were you aware of any of the controversy at that time
7 around Excited Delirium?

8 A. No, but I do remember Mr Anwar talking about Excited
9 Delirium, it may well have been around about that time,
10 and highlighting that Excited Delirium was something
11 that any investigation should be -- I am not quoting him
12 directly -- wary of and careful about, if I can put it
13 like that.

14 Q. And you would have been aware from the final postmortem
15 report that Dr Shearer and Dr Bouhaidar had said they
16 had considered the possibility of Excited Delirium, but
17 they didn't consider that to be a pathological
18 diagnosis?

19 A. Yes.

20 Q. It may have been a psychiatric diagnosis?

21 A. Yes. And more particularly, my recollection is that it
22 couldn't be a cause of death in itself, but might be a
23 factor to be considered.

24 Q. Right. Thank you. I think we've heard evidence, and I
25 summarise here, that in the UK at least Excited Delirium

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1 would not be a cause of death and certainly not one that
2 a pathologist would put forward.

3 A. Yes.

4 Q. Before I move on to the experts, as I understand it, and
5 as we noted in the policy log, PIRC were also instructed
6 to prepare an expert witness package, and I think you
7 have said in your statement you were satisfied it was
8 appropriate for PIRC to compile an expert witness
9 package. I'm interested in this element of the
10 instruction of the experts.

11 Mr McSporran said that he and Billy Little
12 personally prepared that package, but we have also heard
13 that there were some issues. In particular, there was
14 an issue with the statement from Ashley Wyse where a
15 significant section of her statement had been omitted
16 and it was having been omitted her statement --
17 incomplete statement was sent to experts to consider and
18 then that matter had to be -- attempts had to be made to
19 rectify that?

20 A. Yes, I do recollect that that was something I think that
21 go the crown had identified and explored and then
22 pointed out and taken steps to address.

23 Q. In hindsight, do you have any views on whether it would
24 have been better for the crown to prepare that package?

25 A. My recollection is that their -- that the expert pack

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1 was shared with the crown team and I, at the time, as I
2 think I indicated yesterday, I don't recollect, and in
3 my preparation for this inquiry I haven't come across,
4 any indication by PIRC that they were having
5 difficulties or struggling or considered they weren't in
6 a position to progress this. As I indicated, I'm
7 confident that there were meetings, perhaps not every
8 one of which I attended, between the Commissioner and
9 the Lord Advocate and perhaps some other senior
10 officials.

11 But with hindsight, clearly, the method of
12 instruction of experts and the material that is provided
13 does require careful consideration and, to that extent,
14 if the Inquiry considered that it would have been
15 appropriate to have a different approach, then clearly
16 with hindsight that's something that would have to be
17 recognised. But I say at the time and bearing in mind
18 that there was consultation with the crown and in the
19 light of the fact that I don't recollect any expression
20 of difficulty and that the Commissioner herself seemed
21 confident that they could progress that, that was the
22 way that matters proceeded, and that -- I don't want to
23 speak for everybody in the team obviously, including the
24 law officers, but there was an awareness that this was
25 the approach that was being adopted and everyone seemed

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1 content with that approach at that stage.

2 Q. Right, thank you. But in hindsight do you think that
3 perhaps the crown would have been better placed to take
4 the care required to prepare an expert witness package?

5 A. I -- just give me a moment to think about that. I think
6 the more expert -- the more input you have in relation
7 to this kind of instruction, probably the better,
8 provided it's well informed. But as I say, there was a
9 sharing of all of the information, there was a sharing
10 of the CVs, there was then an expert witness part to be
11 prepared that was referred to by the Commissioner, quite
12 how much input the Commissioner had, I obviously don't
13 know, but it was put through the Commissioner and in the
14 light of all of that experience, one -- that was
15 relevant experience in the selection of experts, I
16 consider. But as I say, I think that go there could be
17 some benefit in having a wide input in relation to all
18 of that.

19 Q. Thank you. You mention a discussion with Mr Anwar
20 regarding Dr Karch and an expression to be wary about
21 his instruction. When did you become aware about, if I
22 can put it, a slight concern or a wariness about
23 Dr Karch's instruction?

24 A. I think that the first time was after -- after Dr Karch
25 had been instructed and the Inquiry may be aware of

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1 this. There was an indication from PIRC that during a
2 conversation with Nat Carey that Nat Carey had expressed
3 a view that Dr Karch was -- I think the phrase used was
4 "world renowned" and that was conveyed and I was aware
5 of that and I conveyed that to the team and to a law
6 officer and that was conveyed to Mr Anwar who refuted
7 that assessment and indicated an entirely different
8 perspective in relation to Dr Karch.

9 So it was following his instruction and that
10 certainly sticks in my mind because it was direct.
11 I was there when Mr Anwar said that at a meeting at
12 Crown Office. Whether he had expressed some opinion in
13 writing before that, I'm not entirely -- I'm not
14 entirely sure and I don't recollect that here but --

15 Q. With Mr Anwar being so direct in expressing those views
16 in relation to Dr Karch, did you take any steps at that
17 point in relation to the instruction to Dr Karch? You
18 said it had already gone out.

19 A. Yes, and it may well have been that he had reported at
20 that stage as well. What was done in any event was that
21 the report of Dr Karch and the report of Dr Payne-James
22 was disclosed to the original pathologist for their
23 assessment and review and that was done at that stage,
24 around about that stage, and that was not driven by the
25 comments that Mr Anwar had made. That was part of the

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1 overall process that the crown was embarking on at that
2 time.

3 There was also -- I think that was pretty much
4 contemporaneous with certain comments that Dr Karch had
5 been reported as making in the press and that attracted
6 some comment and a view taken that the opinion of
7 Dr Karch should be treated with extreme caution and care
8 and in fact the Lord Advocate was very clear, I think I
9 said in my statement, that the opinion of Dr Karch was
10 not really to be given much weight.

11 Q. I think if we -- if we focus on period 1, which ends
12 with the first report, I think we'll come on to Dr Karch
13 in more detail in period 2, but in relation to those
14 comments, they were after Dr Karch had been instructed?

15 A. Yes.

16 Q. Thank you. Can I move on to another aspect of Article 2
17 in relation to this first period that we're looking at?

18 A. Yes.

19 Q. Yesterday I referred to that first report from PIRC as
20 an interim report and I referred to that and it was on
21 7 August 2015 it was sent to crown and you very rightly
22 picked me up on that and said it wasn't designed to be
23 an interim report I think. So was it your understanding
24 that that first report from PIRC, at the time you got it
25 in August 2015, that was to be the PIRC report?

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- 1 A. That was my understanding, yes.
- 2 Q. It wasn't designed as an interim report?
- 3 A. It wasn't titled an interim report and I don't have any
4 recollection of it being advised and trailed as an
5 interim report.
- 6 Q. And although there were still investigations ongoing at
7 that point, you've -- we've talked about the
8 instructions for the experts and such like, and PIRC
9 obviously had a hand in the instruction of Karch and
10 Payne-James at that time, did that have any impact on
11 your view that it was supposed to be the only report
12 rather than simply an interim report?
- 13 A. No, it didn't.
- 14 Q. And so would the crown have been happy with those
15 ongoing investigations and actions by PIRC to simply
16 rest on one PIRC report received in August, had that
17 been satisfactory, which we'll come on to?
- 18 A. Essentially, yes.
- 19 Q. And in terms of timescale, because if we look at
20 Article 2 and delay or things being prompt, this was
21 between May and August was roughly about three months?
- 22 A. Yes.
- 23 Q. And in terms of timescale, from your experience of PIRC
24 reports being received, is a three-month period quite
25 common, quite reasonable?

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1 A. I have to say that I don't recollect any previous
2 experience so at that time I wouldn't have been in a
3 position to assess that. What I can remember is that
4 there was obviously -- there was a degree of attention
5 and there was a degree of interest in when the PIRC were
6 going to submit the report and that is when it arrived.

7 So looking back in relation to my overall time in
8 CAAPD, I know that there were various PIRC reports that
9 came in and they varied in time according to the
10 complexity of the report. I am aware that PIRC have
11 internal targets for reporting but I couldn't --
12 I couldn't assess at that time as to whether this was
13 either quick or within normal experience, but that -- at
14 that time, I wasn't in a position to do that.

15 Q. Did it meet your expectations in terms of arriving
16 within a three-month period?

17 A. I think I personally would say that and I think that
18 there was an awareness generally in the team that that's
19 round about when it was going to be expected and nobody
20 raised any concerns about that.

21 Q. There's one comment that you make in your statement, if
22 we could look perhaps at that, this is another matter
23 where you comment on a delay or a period of time, answer
24 120 at page 74, paragraph 3. So it's page 74. It may
25 be 75 of the PDF, but it's certainly answer 120. There

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1 we are:

2 "I consider that the failure of officers... "

3 Do you see that at the bottom of the page?

4 A. Yes.

5 Q. "I consider that the failure of officers to provide
6 statements at an early stage of the investigation into
7 Mr Bayoh's death was a significant issue that caused
8 difficulties to PIRC investigators, and with hindsight
9 could have prevented the investigation from progressing
10 expeditiously, particularly in relation to the question
11 of potential criminality. The refusal to provide
12 statements took place following clarification of their
13 status as witnesses and apparently following advice."

14 Were you concerned about the period that it took to
15 get these statements and the impact on the PIRC
16 investigation?

17 A. Yes, I was. And I recollect I think that PIRC referred
18 to this in their report but I was -- I was concerned in
19 relation to this aspect and I think that my concern was
20 very largely based on the impact that that would have,
21 not just in the overall time, although it would have
22 clearly delayed the preparation of the report, the fact
23 that the statements which were central to the
24 investigation were provided in whatever it was the early
25 June --

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1 Q. 4 June.

2 A. -- early June, but rather that period of time
3 contributed to, in my view a number of factors. It
4 contributed to a breakdown in trust and confidence on
5 the part of the family of Mr Bayoh, and in general
6 public confidence was something that was a live issue at
7 that time. And in my own view, the effectiveness of an
8 investigation is affected or potentially affected where
9 there is a gap in time between the incident and the
10 provision of statements because, amongst other things,
11 what can be affected is that the officers -- their
12 recollection or the contents of their statement rather,
13 the contents of their statements could potentially be
14 coloured by information that came to them subsequently
15 so that's included in the statement and, therefore, the
16 earlier the provision of information, in my view, makes
17 it -- the investigation more effective because one is
18 getting information very close to the event and then can
19 start a process of comparing, contrasting and
20 progressing the investigation.

21 Q. Okay. Looking back now at that period during which PIRC
22 were waiting to obtain statements from the officers, and
23 the consequences of that, you've obviously reflected on
24 events and I'm wondering if there's anything you can
25 think of that could make that period of time more

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1 efficient and faster and avoid the delay that was
2 caused? Is there anything that could be done, do you
3 think?

4 A. I very much appreciate that this will be probably a
5 matter for the Inquiry, but what is it that can secure
6 the early provision of information to allow an
7 investigation to progress, obviously bearing in mind the
8 right to a fair trial, but also recognising the
9 particular position that police officers are in in the
10 light of the fact that they have the right to use -- to
11 use force in certain circumstances and whether that --
12 they having that, that right, also attaches an
13 obligation to account for that at an early stage.

14 Q. And is that something that you would find would be of
15 assistance to the crown if there was something in place
16 that would require statements or information or basic
17 information to be provided by officers?

18 A. Well, I'm aware generally that that is something that
19 Dame Eilish Angiolini did comment on in her report on
20 police complaints and involvement of the crown and the
21 PIRC and I know that there is legislation in
22 contemplation and enactment in relation to that.

23 I think I do say in my Inquiry statement that that would
24 have the advantage, in my view, of putting the situation
25 beyond doubt in relation to that. I do think that it

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1 does involve quite delicate issues of balancing out
2 various rights, but I do come back to that point that I
3 made, because I did give input into that review to
4 Dame Eilish and I did comment that the right to use
5 force does attach in general terms an obligation to
6 account for that and that if there is an absence of
7 accounting for it, then the investigative structure can
8 be compromised.

9 Q. Thank you. I think in relation to issues of public
10 scrutiny and in particular media engagement, I think you
11 have said in your statement that you had very limited
12 prior experience of media engagement. At this period of
13 time, we've looked at a number of issues regarding the
14 media. In particular, we looked at an article in May
15 that was reported in The Herald. We can maybe look at
16 that briefly, AAC 00379, and this is an example of one
17 of the articles. It's page 7 of the PDF, if we could go
18 to that. And we can see it says:

19 "Custody death family 'tell us the truth and let us
20 grieve'. Lawyer tells of grave concerns over events
21 surrounding tragedy."

22 If we can move up the page, please, there is a
23 section, it's in the second column, there's a -- you see
24 at the top of that page a quote from Brian Docherty,
25 Chairman of the Scottish Police Federation, and then

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1 there's a subsequent -- further down a subsequent quote
2 from Peter Watson of PBW Law:

3 "While it is deeply regrettable that Mr Bayoh lost
4 his life, I would ask the media and public to remember
5 that a petite female police officer was chased and then
6 subject to a violent and unprovoked attack by a very
7 large man who punched, kicked and stamped on her. The
8 officer believed she was about to be murdered and I can
9 see that, but for the intervention of the other
10 officers, that was the likely outcome. We all seek the
11 truth and part of that truth will lie in part in the
12 postmortem and toxicology reports which will follow in
13 due course. Calls for the suspension of the officers
14 serve no purpose and do nothing but add unhelpful
15 rhetoric in a difficult situation for all."

16 So this appeared -- this is just an example of one
17 article that appeared in 15 May. You didn't have the
18 final postmortem report by then.

19 We have had heard evidence that there was -- there
20 were comments made by Mr Anwar on behalf of the family,
21 there were comments made by Peter Watson on behalf of
22 his clients and the SPF, comments made by the SPF
23 direct, and we have heard that matters became quite
24 tense at times as a result of this.

25 From the crown perspective, at this stage, in May,

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1 at an early stage in the Inquiry, can you tell us what
2 involvement, if any, you had in relation to managing the
3 media or handling that or trying to calm the situation
4 down?

5 A. I didn't have any direct involvement in that, but it was
6 something that law officers -- the Lord Advocate was
7 aware of and the Inquiry will be aware that at a later
8 stage there was -- there was a release from the
9 Lord Advocate calling for -- I can't remember the
10 precise terms of it -- but restraint in respect of any
11 comment that was being made. That was the -- that was
12 the approach that was taken by the crown. I don't think
13 it was for me to try to manage this and I appreciate
14 that in looking at this article it is -- it is quoting
15 organisations that have, I suppose, a particular purpose
16 and a particular purpose in representing, but this -- it
17 wouldn't be for me to assess -- to assess that and I
18 wasn't directly involved. I was sighted, however, on
19 the fact that the Lord Advocate took the -- I was going
20 to say somewhat unusual step of actually issuing a
21 statement.

22 Q. As head of CAAPD with oversight for the investigation
23 into Mr Bayoh's death, did you have any concerns about
24 matters that were appearing in the media?

25 A. Yes, I did, and I think that that was generally shared

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1 amongst the crown team and that concern was that -- we
2 were at a stage of a very sensitive investigation where
3 we had a bereaved family who had suffered a very acute
4 loss and everyone in the crown team were aware of that,
5 even by this stage, because we were meeting with the
6 family around about that time. It's difficult to
7 separate out the timings, but certainly Mr Anwar had
8 particular concerns about information being put into the
9 public domain and to some extent being potentially
10 commented upon where at this stage, and the Inquiry will
11 be aware of the significance of this, there were no live
12 proceedings so to that extent any information that was
13 put out in respect of the incident could be published
14 and could be commented upon and it was those kind of
15 concerns I think that there were generally.

16 Q. Did these public comments have an impact on the
17 relationship between the crown and the family?

18 A. I don't know that I was aware of anything like that, but
19 obviously the family may have a view in relation to
20 that. I do think that the family would have been aware
21 that crown were not supportive of any kind of comment
22 being made and there being speculation and use of
23 descriptions at that time. I do think the family would
24 have been aware of that, that this wasn't coming from
25 the crown and that it wasn't something that the crown

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1 were either seeking to encourage and in fact, quite the
2 opposite, were of the view that it was unhelpful, if I
3 can put it like that, to the investigation and also,
4 more than unhelpful, upsetting for the family.

5 Q. Looking back at this period now, do you think the crown
6 could have done more at that stage to try and shut down
7 comments in the media by those involved?

8 A. I don't know of any further steps that the crown could
9 have taken and, as I say, there was a statement from the
10 Lord Advocate in relation to this that set out the
11 crown's perspective on that, I thought pretty clearly,
12 and so to that extent there is -- there was action
13 taken, there was recognition and there was action taken.
14 I'm not -- I'm not -- I'm not aware of anything more
15 that the crown can do to stop comment being made.

16 Q. Thank you. And then in relation to the family, so the
17 fifth procedural obligation under Article 2 is in
18 relation to the victim or the next of kin, and I just
19 want to ask you a very briefly, we know that the family
20 had meetings with the then Lord Advocate,
21 Frank Mulholland?

22 A. Yes.

23 Q. During that period the meetings took place on 14 May and
24 24 July?

25 A. Yes.

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1 Q. Now, we've heard evidence from members of the family and
2 his -- Mr Bayoh's partner Collette Bell and we also have
3 Inquiry statements. It would appear that during that
4 time crown engagement with the family appeared to be --
5 appeared to be positive. Does that accord with your
6 recollection of the family's engagement with crown at
7 that period of time?

8 A. Yes, it does. I have a -- I have a clear recollection
9 of the impact that the attendance of the family had.
10 I think I do refer to that in my statement, in
11 particular the fact that Sheku Bayoh's mother was in
12 attendance having travelled up. That is very impactful
13 in sitting around. I think that was shared by everybody
14 who was present at the meeting, including the
15 Lord Advocate. Here was a family that were deeply
16 grieving and were looking -- were looking for -- I know
17 it sounds like a cliché, but at that stage they were
18 looking for answers and they were also concerned about
19 the provision of information. I do recollect that that
20 was -- that was a concern, the provision of information
21 at the time of the incident. That was a clear concern
22 at an early stage.

23 Q. You have said that the meeting with the family -- the
24 impression I get from what you said is that that was a
25 benefit to the general engagement with the family?

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1 A. Yes, I think I'm confident in relation to that. That
2 was my impression, but clearly the Inquiry will have
3 impressions from the family as well. It's a difficult
4 thing for a family to be coming to Crown Office to meet
5 with law officers, to meet with so-called Crown Office
6 officials, but that was my impression and I know that
7 Mr Anwar did reflect that positivity in relation to that
8 round about that time.

9 Q. And that was of benefit to the crown also --

10 A. Yes.

11 Q. -- that the family did come and speak?

12 A. Absolutely, yes.

13 Q. Is it common for the Lord Advocate to meet with bereaved
14 families?

15 A. I was asked about this in my statement and I can only
16 speak from my perspective. It's not uncommon. That's
17 maybe an unhelpful answer. It depends on the particular
18 circumstances, but if the investigation and the progress
19 of the investigation is -- is -- is -- is at an early
20 stage, I think there's recognition that early engagement
21 from -- it demonstrates that from the top of the
22 organisation that there is -- there is attention being
23 paid and that the obligations are being taken seriously
24 and I think that that was one of the main purposes of
25 the Lord Advocate meeting with the family to listen to

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1 them and also to put on record that the crown would --
2 this wouldn't be a one-off meeting, but there would be
3 further engagements, so it was that kind of perspective
4 that I think assisted.

5 Q. Now, the other aspect that we've heard -- as well a
6 meeting, the other aspect we've heard evidence about is
7 that there was significant disclosure given to the
8 family?

9 A. Yes.

10 Q. And I think when we looked at Alisdair McLeod's briefing
11 note yesterday, the one that was prepared in 2022, there
12 was mention of the fact that from the outset
13 Anwar & Company were on an exceptional basis provided
14 with significant disclosure, and I'm interested to what
15 extent you think that exceptional or significant
16 disclosure assisted in the crown's engagement with the
17 family?

18 A. I think it probably contributed to confidence and
19 confidence I suppose in openness and allowed the family
20 in particular Mr Anwar, to be engaged in that process
21 and I obviously recollect that information was disclosed
22 to allow them to assess that and also I think to
23 instruct their own expert or experts, but the provision
24 of information at that stage I think did assist in
25 building up a degree of confidence with the family.

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1 Q. And as the provision of information assisted in
2 increasing confidence with the family, did that
3 provision of information cause crown any concern at that
4 stage? Was there any --

5 A. No.

6 Q. -- detrimental effect providing information to the
7 family --

8 A. No.

9 Q. -- insofar as the crown were concerned?

10 A. Not from my perspective and it was something that -- it
11 was something that the Lord Advocate was clear about as
12 a matter of course at that stage, yes.

13 Q. Thank you. We have also heard some concerns from PIRC
14 and this -- these concerns arose more than once, so it
15 was throughout a longer period, but they had concerns
16 that the family on occasions knew things before PIRC
17 did. So PIRC would contact the family to share some
18 information and they would say we have already been told
19 by the crown and that caused them some disquiet and we
20 heard evidence that they contacted the crown to raise
21 this issue. Do you remember being involved in any of
22 those issues being raised by PIRC?

23 A. I think I was asked that in my statement. As of today,
24 I don't have a clear recollection of that, although
25 obviously I don't dispute if the PIRC recollect that

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1 that was a concern them raising that.

2 What I would say is that I know the Inquiry is
3 particularly interested in Article 2 and the obligation
4 and the extent of that obligation to keep the -- to have
5 the family involved in the investigation. I'm not aware
6 of the provision of any specific information that was
7 brought to my attention, because I think that probably
8 would have stuck in my mind.

9 These meetings were to some extent private meetings
10 in that they were attended by law officers and I don't
11 think any formal minutes -- certainly no formal minutes
12 were taken in respect of them. So on occasions the
13 Lord Advocate would in the dialogue with the family or
14 with Mr Anwar provide certain information in relation to
15 that. That didn't cause me any -- any disquiet.
16 I wasn't thinking to myself at any point, oh, that's
17 more -- that's crossed a line here and this will cause
18 difficulties in the investigation.

19 And as I said in relation to the answer earlier on,
20 there wasn't any consideration on the part of myself,
21 nor I understand in respect of the Lord Advocate or any
22 of the crown team, that the provision of some of the
23 information at that time was anything other than of
24 assistance and to allow the family to assess that and to
25 take appropriate action according to their own

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1 investigations and enquiries.

2 Q. Thank you. I would like to move on. We have been
3 talking about Article 2, but I would also like to
4 consider Article 14, which is also of interest to the
5 Inquiry and we've heard -- we've heard -- we've asked
6 other witness about article 15, about rights that have
7 to be protected and applied without discrimination.

8 A. Yes.

9 Q. And we've also spoke to other witness about a case
10 called Nachova, which sets out that the authorities have
11 a duty to investigate the existence of a possible link
12 between racist attitudes and an act of violence and that
13 is an aspect of their Article 2 obligations, but it may
14 also be seen as implicit in the responsibilities under
15 Article 14, taken in conjunction with Article 2, to
16 secure the enjoyment of the right to life without
17 discrimination.

18 A. Yes.

19 Q. Were you satisfied that the members of your team were
20 aware of their obligations under Article 14 as well as
21 Article 2?

22 A. I consider that the team were well aware of the
23 importance of assessing race and discrimination as it
24 related to the Inquiry, yes.

25 Q. And were they aware that where there is a suspicion that

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1 racial attitudes induced a violent act, it is
2 particularly important that the official investigation
3 is pursued with vigour and impartiality?

4 A. I think in relation to an effective and a fair and
5 impartial investigation that the team would have been
6 aware of the acute importance of progressing those types
7 of consideration as they related to the Inquiry at hand.

8 Q. Thank you. And during the investigation any deaths at
9 the hands of state agents the authorities have the duty
10 to take all reasonable steps to unmask any racist motive
11 and to establish whether or not ethnic hatred or
12 prejudice may have played a role in the events. Are you
13 satisfied that your team would have been aware of those
14 obligations?

15 A. I'm satisfied that they would have been relevant
16 considerations in the Inquiry overall.

17 Q. Thank you. And failing to do so would be to turn a
18 blind eye to the specific nature of the acts?

19 A. Yes.

20 Q. Now, yesterday you did speak and again today you spoke
21 about the importance of race in relation to this
22 investigation into Mr Bayoh's death?

23 A. Yes.

24 Q. Could we -- I think in your second Inquiry statement you
25 say from an early stage the Lord Advocate was clear that

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1 considerations of race would have to be a focus of the
2 investigation. I think you mentioned that yesterday.

3 A. Yes.

4 Q. We don't need to go to that paragraph. But let's look
5 at your statement SBPI 00419, and I'm interested in
6 paragraph answer 102. This is on page 58. Now, this is
7 a lengthy section of your statement. You talk about
8 race and I would like to go through the bulk of this
9 with you to ask you for some further comments. So if we
10 start at the beginning:

11 "The issue of race was central to the ongoing
12 investigation... "

13 Was that your impression from the early stages?

14 A. It was my impression that race was an element from the
15 early stages that required consideration.

16 Q. Right:

17 "We had a black man who died after being strained by
18 police, an immediate instruction to PIRC to investigate
19 involvement and interactions with senior Crown Office
20 officials and the Lord Advocate taking a personal and
21 close interest in the case, all against the background
22 of the officers involved refusing or declining to
23 provide statements on their actions. There had been
24 meetings with family and their solicitor. There was a
25 clear understanding that race had to be a focus of the

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1 Inquiry and whether it had influenced the approach of
2 police to whole circumstances."

3 And that's a reference again to -- you said the
4 Lord Advocate was clear that considerations of race
5 would have to be a focus of the investigation?

6 A. Yes.

7 Q. And that was in particular, as you mention there,
8 whether race had influenced the approach of the police
9 to the whole circumstances?

10 A. Yes.

11 Q. So that's not just simply the events in Hayfield Road.
12 It's broader than that it would appear from what you're
13 saying.

14 A. Yes.

15 Q. And then you say:

16 "PIRC provided assurance prior to submission of the
17 first report."

18 And we know that was 7 August 2015:

19 "... that if racial motivation was identified in the
20 course of the investigation, this would immediately be
21 referred to the Lord Advocate and race was clearly
22 within the scope of their considerations during the
23 first part of their investigations."

24 This is prior to submission of the first report?

25 A. It is prior to the submission of the first report.

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1 That's what I'm referring to, because there was an
2 exchange, as I recollect it, with Mr Anwar where race
3 was highlighted and there was an assurance from PIRC in
4 those terms.

5 Q. We've heard about some correspondence that Mr Anwar sent
6 dated 31 July --

7 A. Yes.

8 Q. -- 2015?

9 A. Yes.

10 Q. There was a letter direct that he sent to PIRC that
11 detailed racial issues --

12 A. Yes.

13 Q. -- that he was expressing were of concern to the family?

14 A. Yes. And I read that letter in preparation for my
15 statement, but of course, as the Inquiry were aware from
16 yesterday, there had been a meeting at Crown Office
17 where the Lord Advocate had been present, where I was
18 there and where the Commissioner and I think other PIRC
19 officials were there, where there was mention of a
20 racial background and reference to Baltimore was, as I
21 said yesterday, referring to I think an incident in
22 Baltimore that had occurred shortly before that. So it
23 would have been present in people's minds that it had
24 resulted in I think considerable unrace -- sorry -- a
25 considerable unrest because of the actions of police

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1 which had an apparent racial motivation. So there was
2 discussion with a law officer at that stage and that was
3 prior to the 31 July.

4 Q. That was the minutes we looked at yesterday of the
5 meeting on 14 May attended by Kate Frame and
6 John Mitchell?

7 A. Yes.

8 Q. And as you say, by the Lord Advocate and yourself?

9 A. Yes.

10 Q. Can we move on, please:

11 "Following my meeting with Inquest and the
12 interaction with the family, following submission of the
13 first PIRC report I submitted a full analysis and a
14 briefing to the Lord Advocate and referred to the
15 Sean Rigg investigation. It also identified areas of
16 further Inquiry that required to be undertaken by PIRC
17 before a decision could be taken on whether there was
18 evidence of criminality."

19 This relates to the period after the first report
20 had been obtained. Can we see the top of it? No.

21 "Following my meeting with Inquest and the
22 interaction with the family following submission of the
23 first PIRC report."

24 So this refers to the period after the first PIRC
25 report?

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- 1 A. I'm sorry -- can I just take a minute and read this?
- 2 Q. Yes.
- 3 A. -- as to whether I have expressed that poorly. I'm very
4 confident that the meeting with Inquest -- that my
5 meeting with Inquest -- I had maybe better be precise
6 about dates. It was around about the time of the
7 submission of the first PIRC report.
- 8 Q. Right.
- 9 A. Because I seem to recollect some emails that I sent to
10 refer to the meeting with Inquest and reference to
11 Sean Rigg and talking about either the PIRC report had
12 just been received or was about to be received and that
13 this could inform some of the analysis that I carry
14 out -- I carried out. So I'm not entirely confidence
15 that the meeting with Inquest was after the submission
16 of the first PIRC report. I am very confident that it
17 was before the further instructions that were issued to
18 PIRC and certainly was before, as I recollect it, the
19 analysis of the first PIRC report that I was involved
20 in.
- 21 Q. Well, we've heard evidence that Mr Anwar's letter to
22 PIRC raising race as an issue was 31 July. We've then
23 got the first PIRC report on 7 August.
- 24 A. Yes.
- 25 Q. And then we will later come on to your full letter of

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1 instruction of 2 September --

2 A. Yes.

3 Q. -- which postdated the first report and gave more
4 detailed instructions to PIRC?

5 A. Yes, I do recollect very clearly that Mr Anwar's letter
6 was indeed 31 July so I know the letter that you're
7 referring to. It was a long letter to the PIRC. I
8 obviously don't have it in front of me, but what I do
9 I think recollect was that there was clear reference to
10 race and that it -- I would describe it as
11 contextualising some concerns that the family had in
12 consultation with Inquest and Inquest as, I recollect
13 it, was specifically mentioned in some of the paragraphs
14 of that letter of 31 July to PIRC and it talked about,
15 as I recollect, issues such as the use of discriminatory
16 language and the association of -- with a terrorist
17 threat.

18 As I say, I don't have it in front of me and I
19 haven't read it very recently, but there was that
20 reference and what I do remember is that that coincided
21 with the meeting that we had, Lindsey Miller and myself,
22 with Inquest.

23 Now, as I recollect it, the catalyst for that
24 meeting with Inquest was an invitation to the
25 Lord Advocate and I think the Lord Advocate was unable

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1 to attend but Lindsey Miller and I went along to
2 Mr Anwar's offices and we met with Deborah Coles from
3 Inquest and that was all occurring at round about the
4 same time, I think very close to 31 July, and the reason
5 I mention that is, if it's of assistance to the Inquiry,
6 is that the concerns of Inquest were being highlighted
7 to PIRC by Mr Anwar and by I suppose, I would say by
8 association, the concerns of the family as expressed
9 through the consultation with Inquest.

10 So all of that was occurring at the same time. It
11 was the same stage of the Inquiry broadly and here were
12 concerns about race being expressed by Inquest.

13 Q. Thank you. Can we move on from this paragraph, please,
14 and then you say:

15 "The issue of race was specifically highlighted in
16 my letter of further instruction to PIRC asking for
17 confirmation that race, and whether there was evidence
18 of racial motivation, was a primary focus of their
19 investigation."

20 We've heard evidence about that letter of
21 2 September and that's the letter that you're referring
22 to there, is it?

23 A. Yes, it is, but I probably want to make it clear that
24 the response by PIRC to Mr Anwar's letter of 31 July,
25 that the crown had been copied into that, and I sighted

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1 the Lord Advocate on that. So to some extent it must
2 have been clear, I think it would have been clear, that
3 by the time we got to a letter of 2 September, PIRC's
4 response to Mr Anwar's concerns, including the concerns
5 about race, had been copied to the crown. So here
6 was -- we're maybe going into the terms of the letter of
7 2 September, but here was a further reminder, in the
8 light of the knowledge of the response that PIRC had
9 given to Mr Anwar in relation to race, here was, as
10 I have put it here, asking for confirmation that race
11 was a primary focus of their investigation. And I don't
12 know if that's a direct quote from my letter, but I know
13 it was a short paragraph but it was, I would suggest,
14 quite directive.

15 Q. And that was against the background of what you have
16 just told us about, the meeting on 14 May, the letter
17 from Mr Anwar, and the steps that had been taken in
18 relation to that?

19 A. The steps that had been taken and the comments and the
20 description by Mr Anwar as to why race was specifically
21 a concern.

22 Q. Okay. Thank you.

23 We've heard from PIRC witness that up until the
24 point at which Mr Anwar's letter of 31 July arrived and
25 then they noted in the decision log in the following

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1 month -- we can maybe look at that briefly for the
2 moment. If we go back to the policy log, PIRC 04154,
3 decision number 21.

4 So this is Mr McSporran's policy log, and we've
5 looked at this before and we're looking at decision
6 number 21. This is "Cultural and religious issues":

7 "PIRC FLOs will establish the religion and sect of
8 the deceased and any cultural issues, seeking support
9 where necessary from Scot Gov lay advisors in order to
10 provide appropriate support, advice and assistance to
11 family of the deceased. Although not directed by
12 Crown Office at this stage, take cognisance of any issue
13 of race if they emerge."

14 And then can we move down and the reason given is:

15 "Provide appropriate support, taking cognisance of
16 cultural and religious issues, address family concerns
17 in a supportive and sympathetic manner."

18 So you'll see there the focus is to some extent on
19 the family and supporting the family?

20 A. Yes.

21 Q. But there is also this phrase which says "PIRC would
22 take cognisance of any issues of race if they emerge"
23 and we've certainly heard evidence from Mr McSporran
24 that in relation to this entry that PIRC were not
25 directed by Crown Office at this stage in relation to

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1 race, but they would take cognisance of any issues of
2 race if they emerge?

3 A. Yes.

4 Q. We've heard from other witnesses -- sorry --

5 A. Sorry, I didn't mean to interrupt you.

6 Q. No at all.

7 A. I -- can I just ask can you remind me of the date of
8 this entry?

9 Q. Yes, if we look at the bottom, 9 May, 2015.

10 A. Thank you, thank you.

11 Q. This is the first entry in the policy log by
12 Mr McSporran, and the phrase used is "take cognisance",
13 but we've heard from -- we have heard from other
14 witnesses, such as Mr Little, that PIRC would be mindful
15 or keep an open mind about race, but we also heard that
16 they did not pursue any active lines of investigation in
17 relation to race during this period and I'm interested
18 in whether this description of PIRC's approach to race,
19 "taking cognisance" which we can just see if we move
20 further -- there we are -- taking cognisance of race,
21 did that match your expectations of the steps that PIRC
22 would take to be compliant with Article 14?

23 A. I think the phrase "taking cognisance" suggests to me
24 that -- again, I have got to be careful that I don't
25 speak for others, but if I give my own interpretation or

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1 my own perspective in respect of this. "Take
2 cognisance" is, you know, that if you came across an
3 issue, you would recognise it and decide how to deal
4 with it. I think that there is a -- there is clearly,
5 as you have referred to, there's an obligation, there's
6 an organisational obligation on those who are tasked
7 with conducting an investigation to factor in
8 specifically the issue of discrimination, which is
9 wider, quite a wide term, discrimination, being treated
10 differently. That to me suggests notions of being
11 treated differently, and being treated less favourably.
12 I know that's a term that's used in respect of
13 discrimination.

14 But "take cognisance" to me suggests if -- you've
15 said keep an open mind. We'll be open to this if we
16 come across it, whereas an active investigation, I
17 suppose an investigative strategy, was something that
18 I think in relation to an effective investigation into
19 race would be -- would be -- would be necessary as the
20 investigation progresses.

21 Q. And were your expectations on the part of the crown that
22 PIRC would pursue an active line of investigation, that
23 they would in terms of Article 14 pursue their
24 investigation with vigour?

25 A. I think to be an effective investigation those kind of

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1 descriptions are required, yes.

2 Q. Right. Can I ask you about the comment made in evidence
3 by Mr McSporran, that although we were not directed by
4 Crown Office at this stage. I'm interested in, and it
5 will be a matter for the Chair, but there may be a view
6 in PIRC that it would have been required for crown to
7 have provided a specific instruction?

8 A. Yes.

9 Q. And at that point in the early stage of the
10 investigation, there was no instruction. In fact, that
11 didn't come until 2 September. So during that period
12 there was no specific formal written instruction and so
13 they were in some way limited by their terms of
14 reference or their written instruction. Can I ask for
15 your comments about that?

16 A. I -- my perspective in respect of that is that the
17 instruction was to investigate the circumstances of the
18 death of Mr Bayoh and it's implicit in that, in my view,
19 that it is an effective investigation that has to
20 consider all relevant aspects. Again, I know it's a
21 matter for the Chair, but I, and I think I said this in
22 my statement, although I wasn't involved in issuing the
23 letters of instruction initially, I was aware that it
24 was a general instruction and that a general instruction
25 to investigate the circumstances was sufficient at that

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1 stage to allow PIRC to explore all relevant lines of
2 Inquiry and I would say from my own perspective that it
3 would be -- it was inconceivable, in my view, that race
4 would not be a relevant consideration, and certainly
5 well prior to the 2 September and to some extent the
6 wording of the letter to the PIRC of 2 September, it
7 was -- the wording was seeking -- was it reassurance or
8 seeking assurance or confirmation, seeking confirmation
9 of something that the crown considered was essential to
10 the -- to an effective investigation and, therefore, to
11 that extent, I think my position is that I don't accept
12 that it required a letter of instruction from the crown
13 to consider race. The letter of instruction was for an
14 effective investigation to be carried out.

15 Q. And I think we touched on this yesterday that the
16 witness interview strategy prepared for the police
17 officers giving statements on 4 June had no questions in
18 it about race. I may have mentioned yesterday that
19 there were certain comments made by police officers
20 within those statements using language such as
21 "coloured", making links between the coloured male and
22 potential terrorist connotations.

23 There was no -- we've heard evidence from PIRC there
24 was no attempt during statement taking to probe into
25 those possible attitudes, perhaps racist attitudes, or

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1 language and to ask officers about their state of mind
2 or their motivation during that. No questions being
3 asked at that time by PIRC about history of any racist
4 or discriminatory comments, misconduct on the part of
5 the officers.

6 And again, are those the types of things you would
7 expect PIRC to be doing even in the absence of a
8 specific instruction?

9 A. Yes, and it was those type of things that of course were
10 to some extent highlighted or to a substantial extent
11 highlighted in Mr Anwar's letter of 31 July.

12 Q. Thank you. Can I then look at the crown's position in
13 relation to this period and regarding Article 14. What
14 steps were crown taking to vigorously pursue lines of
15 investigation in relation to race during this period of
16 time or was that left to PIRC and their investigation?

17 A. I think the general approach of the crown at the time of
18 the submission of the first PIRC report was that there
19 required to be an assessment as to what's still required
20 to happen, what was still required to be done in order
21 to make that investigation -- in order to make that
22 investigation effective, but also to allow the crown to
23 make a properly informed decision at a later stage as to
24 the correct way or the most appropriate way to proceed
25 and so to that extent the letter of further instruction

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1 was to allow the PIRC to review and to review their
2 report and to carry out further inquiries and the
3 specific direction in respect of race was intended to
4 direct them that that required to be a further focus of
5 their investigation.

6 Q. Right. We've heard evidence in relation to the first
7 report sent in August 2015 that it was 351 pages of a
8 PDF, that there were multiple references to "black
9 male", "black guy", two references to the threat level
10 in the UK, five references to an increased terrorist
11 risk, but there was no mention of race, racism, racist
12 or racial discrimination. And there was no part of that
13 report that was sent to Crown Office that covered race
14 or discrimination, or Article 14 for that matter, in any
15 way, not even to raise it and exclude it. In terms of
16 the absence of consideration of that, was that something
17 when you looked at that report from PIRC that caused you
18 concern?

19 A. It certainly informed the further letter of instruction
20 that -- that was sent to PIRC.

21 Q. As far as the crown were concerned, when they received
22 that first report from the PIRC and in the absence of
23 any apparent consideration of race or discrimination,
24 did you take a view about whether that report was
25 satisfactory for the purposes of the crown?

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1 A. I carried out an analysis of that report as regards --
2 as regards the effectiveness of that report and whether
3 it enabled the crown to take a properly informed
4 decision in respect of the decisions that it had to take
5 and, clearly, I considered that it didn't and, as I
6 recollected, those to whom my analysis submitted agreed
7 with that assessment. There was no demurring from that.

8 So to that extent I was -- this was a stage, and I
9 think I have said this in my statement, where the crown
10 were being directive and were being specific in relation
11 to what required to be done. This was -- this was as a
12 result of the analysis of the work that PIRC had done to
13 date and so it was the report and the report was, you
14 know, not short in terms of length so it was quite a lot
15 consideration. It had a lot of material in it, but, as
16 I say, there was an analysis done as to what's still
17 required to be carried out and the Lord Advocate was
18 satisfied that it was appropriate to have PIRC directed
19 to do that and in effect to submit a later report,
20 rather than -- rather than -- well, sorry I'll rephrase
21 that. To allow the PIRC to address those areas of
22 further concern.

23 Q. Was it really the only option for crown at that moment
24 to try and get PIRC to carry out further investigations
25 and further lines to plug -- plug the areas that they

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1 hadn't covered?

2 A. It certainly was the view that this was that appropriate
3 course of action to take and I suppose I'm coming back
4 to some of the observations that I made earlier on that
5 the PIRC were the investigative body and the
6 investigative skill set and were able to make the
7 approaches and to gather the evidence and, more
8 particularly, to analysis the evidence, because that was
9 something that I think was clearly highlighted in my
10 review of the first PIRC report that it included
11 information, but it didn't appear to be the case that
12 there was analysis of the evidence and, in essence, to
13 my mind, that's the -- that is an essential component of
14 an effective investigation. It's not just what people
15 have told you so you put all that together, and I know
16 I'm being simplistic, but, you know, you get information
17 and you put a spine in it and submit it.

18 There has to be analysis, in my view, of where that
19 takes us and an assessment, a comparing, a sifting of
20 information and that was something that I recollect was
21 a clear focus of the further direction that was given to
22 the PIRC and to some extent that reflected the
23 discussions that Lindsey Miller and I had with
24 Deborah Coles and in particular the reference to the
25 Sean Rigg case, because I did -- I was directed or

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1 invited by Deborah Coles to look at Sean Rigg and I did
2 read the report on Sean Rigg and I'm confident that I
3 circulated it around the team and I included reference
4 to that in my analysis. But one of the concerns that
5 Deborah Coles, as I recollect, articulated to us was
6 that she said in the Sean Rigg case had regard to the
7 comments that were made in the review about the
8 effectiveness of the IPCC investigation and that it
9 wasn't sufficiently rigorous in challenging the accounts
10 of the police and various other things and that was one
11 of the key things that I took away from the Sean Rigg
12 case and that informed the -- the review and the
13 analysis that I carried out of the PIRC report.

14 Q. So from the crown's perspective, you having read through
15 the first report sent from PIRC to the crown, there was
16 no analysis of the information that they had gathered
17 and there was no reference to race and discrimination?

18 A. I don't want to overstate this and say there was no
19 analysis. There was -- I considered that there required
20 to be more analysis than there was.

21 Q. Right. And so in the absence of that level of analysis
22 that the crown were looking for and in the absence of
23 consideration of Article 14 race, from the crown's
24 perspective, does the PIRC report meet yours needs?

25 A. Well, it didn't -- it didn't enable the crown to take

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1 the necessary decisions that it required to take
2 principally as to whether criminality could be excluded
3 at that point. That was clearly a very important
4 consideration and that -- I didn't consider that the
5 crown could take that decision with confidence at that
6 stage and I think that was the focus of my analysis and
7 there was general agreement that that was required.

8 Q. Insofar as that first report from PIRC reflected the
9 PIRC investigation between 3 May 2015 and 7 August 2015,
10 is it fair to say that in terms of the crown's
11 perspective it was simply not adequate for your
12 purposes?

13 A. It was clear that significant further work required to
14 be carried out.

15 Q. And in relation to that significant further work, was
16 there any other alternative open to the crown but to go
17 back to PIRC and start taking what you described
18 yesterday as a more directive approach?

19 A. I think there has to be recognition that PIRC are the
20 investigative body, that this is the kind of
21 investigation that they were set up to carry out, and
22 therefore, to that extent, that was their purpose. They
23 were the investigators and here was a crown-directed
24 investigation and it was considered the correct course
25 of action to instruct PIRC or to direct PIRC as to what

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1 further inquiries and work was required.

2 Q. Right. Thank you. I would like to move on now to
3 period 2. This was the period from that first report on
4 7 August, 2015 to 10 August 2016 and I'll just very
5 briefly, because I'm conscious of the time, set out some
6 of the context during this period of time. So this is a
7 period of around one year?

8 A. Yes.

9 Q. Between the first report from PIRC and their final
10 report?

11 A. Yes.

12 Q. Is it fair to say that during this period
13 Police Scotland are out of the picture entirely in the
14 terms if you remember I asked you questions about
15 independence and ongoing involvement with
16 Police Scotland yesterday morning?

17 A. Yes.

18 Q. They're no longer involved during this period?

19 A. Yes.

20 Q. Between the first and the final report.

21 And yesterday we talked about your team and I think
22 information is available to the Inquiry in relation to
23 Erin Campbell's involvement at this stage.

24 Now, I think, as we understand the position, and you
25 can tell me if I'm correct on this, she received a call

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1 from perhaps Lindsey Miller in August 2015, so this
2 would have been round about the time that first report
3 of PIRC coming in, but her secondment to CAAPD did not
4 begin for a significant period. Now, I think yesterday
5 you weren't entirely sure when she started. Was it
6 during this one-year period between the first and the
7 final PIRC report or was it even later?

8 A. I'm very sorry. I have -- I have got an incomplete
9 memory of this. The fact that at the Inquiry has
10 evidence that she was approached in August 2015 probably
11 doesn't surprise me, because it was an approach and if
12 it was Lindsey Miller, and I think it highly likely to
13 have been Lindsey Miller, she was basically perhaps at
14 that stage indicating: you may be involved in this at
15 one stage. But quite when she became actively involved,
16 I couldn't be clear.

17 I do have a very clear recollection that, and my
18 recollection is this was one of the first things that
19 she did was that she was involved in the precognition of
20 eye witnesses. Now, that's at a much later stage.
21 That's after the submission of the second PIRC report.
22 So I have no recollection of Erin Campbell being
23 involved in an active sense prior to that time.

24 Q. Thank you.

25 A. That's my own recollection. Having said that, I think

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1 that the Inquiry might have come across a minute that
2 she -- a handwritten minute where she had attended a
3 meeting prior to the submission.

4 Q. You seem to know more than I do about this. We'll look
5 into this over lunch. But I think we do have
6 information that she was involved at a later stage with
7 Alisdair McLeod?

8 A. Yes.

9 Q. But I'll deal with that in the third period after the
10 final report.

11 A. Yes.

12 Q. During this one year between the first and the final
13 report, you personally don't have a recollection of her
14 being involved in the Sheku Bayoh investigation?

15 A. No, I don't.

16 Q. And so was it really down to you what was being done
17 during this one-year period?

18 A. Well, it was -- I certainly was involved in it, but
19 I was involved in it with other -- other senior
20 officials, typically in fact very much Lindsey Miller
21 and Stephen McGowan --

22 Q. Right.

23 A. -- who had been in it from the beginning.

24 Q. All right. Thank you. We've not heard from either of
25 them yet.

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1 previous correspondence that he was being considered
2 was -- is a possibility, but what was made clear to my
3 recollection was that an expert witness submission was
4 going to be prepared and submitted to the crown.

5 Now, in respect of the actual decision to go ahead
6 and instruct Dr Karch, I couldn't speak to whether the
7 Lord Advocate considered and issued an instruction in
8 respect of that. I know that Stephen McGowan and myself
9 were content that Dr Karch be approached and instructed
10 and what I am also confident of is that, and I think the
11 minutes bear this out, I made -- I made the
12 Lord Advocate aware of the fact that PIRC intended to
13 instruct Dr Karch and I attached the material that
14 included the CV of Dr Karch in respect of that, and
15 there was no indication that the Lord Advocate was --
16 had reservations about Dr Karch.

17 Q. And I think you say in your Inquiry statement:

18 "No one had any concerns about instructing Karch at
19 the time he was instructed."

20 A. Yes.

21 Q. You've explained earlier that Dr Payne-James and
22 Dr Karch had different specialisms, areas of expertise.
23 I think you said Dr Payne-James related to -- although
24 he's a physician, he had experience of restraint --

25 A. Yes.

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1 Q. -- and same methods and Dr Karch was selected because of
2 his knowledge in relation to the impact of drugs on a
3 person's behaviour; is that right?

4 A. Person's behaviour and the physiological and the
5 psychologically, but mainly the physiological, the
6 impact on the body and the heart I think.

7 Q. All right. And as I think I said earlier, Kate Frame
8 understood him to be a cardiac pathologist and a
9 toxicologist and I think you said that accorded with
10 your understanding of his areas of expertise?

11 A. Areas of expertise, yes.

12 Q. Let's look at the instruction letters for both of those.
13 These were the first two experts formally instructed.
14 They were instructed by PIRC --

15 A. Yes.

16 Q. -- in the circumstances you have described. So let's
17 look at PIRC 03434B, and this should be a letter of
18 instruction that PIRC sent to Dr Payne-James on
19 10 August?

20 A. Yes.

21 Q. And would it be fair to assume that the reports come in
22 on 7 August, but this process of drafting the letter of
23 instruction for Dr Payne-James and considering him
24 commenced prior to the report actually coming in to
25 Crown Office?

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- 1 A. I'm sorry. I'm maybe not following you.
- 2 Q. It's probably a poor question. The process of
3 identifying Dr Payne-James as suitable had commenced
4 prior to the report coming in?
- 5 A. Yes.
- 6 Q. But this letter of instruction --
- 7 A. Yes.
- 8 Q. -- is 10 August, which is after the report was actually
9 sent to Crown Office?
- 10 A. After the report from Dr Payne-James?
- 11 Q. No, after the first PIRC report was sent to
12 Crown Office?
- 13 A. I'm sorry. I'm with you now.
- 14 Q. It's my fault?
- 15 A. No, I'm sure it's mine. Yes, I know what you're
16 referring to now. I agree with all of that.
- 17 Q. This spans the report coming in?
- 18 A. Yes.
- 19 Q. So it's just three days after the report was received,
20 and let's have a look at the content of this, so it's
21 been -- if we look at the bottom, we'll see that it is a
22 letter from Kate Frame, the Commissioner, and if we go
23 towards the top of the letter, there's an explanation
24 about there has been telephone discussions with
25 Mr Harrower, there's an explanation about what PIRC are

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1 doing and if we can go down to the instructions, there
2 is -- thank you:

3 "Please accept this letter as formal instruction for
4 you to produce an expert witness report based on the
5 information provided within the attached package."

6 So that's a reference to the witness package, which
7 we've heard evidence was attached with letters of
8 instructions to experts?

9 A. Yes.

10 Q. "In this regard expert witness opinion is sought from
11 you on... "

12 And there's four topics there:

13 "... physiological effect of the drugs detected in
14 the toxicology sample, individually or in combination on
15 the deceased in the circumstances of his arrest; the
16 physiological effect of the CS and PAVA spray,
17 individually or in combination, on the deceased in the
18 circumstances of his arrest; the physiological effect of
19 the physical restraint of the deceased in the
20 circumstances of his arrest and the physiological affect
21 of all three on the deceased in combination in the
22 circumstances of his arrest."

23 So it appears that for Dr Payne-James you're also
24 asking questions here -- PIRC are asking about the
25 toxicology sample and the impact of drugs and the impact

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1 of the spray, as well as the impact of the restraint or
2 the physiological effect of the restraint?

3 A. Yes.

4 Q. Does this -- was his instruction actually wider than
5 simply the physiological effect of the physical
6 restraint?

7 A. It appears so, yes.

8 Q. Yes. And what expertise did Dr Payne-James have in
9 relation to toxicology and the impact of drugs and the
10 impact of CS and PAVA spray?

11 A. I'm struggling to remember exactly what his areas of
12 expertise were. I would have to say that in respect of
13 somebody who was being approached as an expert on
14 restraint, they may be in a position to comment upon
15 those questions. What I would be confident of, as a
16 matter of generality, is that if they couldn't comment
17 upon something and considered it was outwith their range
18 of expertise, because that is one of the functions of
19 approaching an expert, that they would have indicated
20 that they could not comment on that at all.

21 Q. So rather than satisfying yourself that this expert had
22 the relevant experience, there was an expectation that
23 he would identify if he did not have relevant experience
24 or skills?

25 A. If it fell outwith the range of experience, then I would

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1 expect that they would do that but --

2 Q. All right. Thank you. And can we look at the letter of
3 instruction from Dr Karch, please. This is PIRC 03435A.
4 This is a letter dated 13 August so this is another
5 three days later. Again, written by PIRC and if we look
6 at the bottom of the page, I think again prepared and
7 sent by Kate Frame. And if we can look at the
8 instructions here. Again it says:

9 "Please accept this letter as formal instruction to
10 produce an expert witness report based on the
11 information provided within the attached package. In
12 this regard, expert witness opinion is sought from you
13 on:

14 "(a) the physiological effect of the drugs detected
15 in the toxicology sample, individually or in
16 combination;

17 "(b) the physiological effect of the spray,
18 individually or in combination;

19 "(c) the physiological effect of the physical
20 restraint of the deceased in the circumstances of his
21 arrest; and

22 "(d) the physiological effect of all three on the
23 deceased in combination in the circumstances of his
24 arrest."

25 It would appear that PIRC in relation to this letter

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1 of instruction have copied the wording exactly from
2 Dr Payne-James.

3 So in relation to Dr Karch, who Kate Frame
4 understood to be a cardiac pathologist and a
5 toxicologist, clearly the question regarding toxicology
6 would fall within his area of expertise, but where
7 they're asking him about restraint and spray, were you
8 satisfied that that fell within his area of expertise?

9 A. I -- from my recollection, Dr Karch's CV indicated
10 certain areas that he had purported to have expertise in
11 and where he had -- where he had obtained that
12 expertise, but also his track record, if I can put it
13 like that, in relation to the provision of evidence and,
14 as I recollect it, there was a very long list of
15 publications, there was a very long list of the types of
16 cases where he had given evidence and, to my
17 recollection, there was a significant number of those
18 that related to restraint in general. So to some extent
19 one was looking at not only his academic qualifications,
20 but also where his expertise had apparently been used in
21 a practical sense and to a certain extent he had a --
22 I would say he looked as if he had a significant
23 experience of giving evidence in relation to the types
24 of issue that would be relevant to the case of Mr Bayoh.
25 That's a very general recollection but --

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1 Q. Were you satisfied that he had expertise in relation to
2 physical restraint?

3 A. I was satisfied on the basis of the information that I
4 provided to PIRC that it was appropriate to approach him
5 and to ascertain the extent to which he considered that
6 he could provide expert opinion or expert comment on the
7 aspects of this matter.

8 Q. Again, was there an expectation that if he was unable to
9 do so, he would draw that to your attention?

10 A. Yes, and I would say that that's -- it's an expectation.
11 I think it's also a requirement on an expert to disclose
12 whether they can, in fact, comment upon this.

13 Q. And is that an expectation on an expert based in the US
14 as it would be in the UK?

15 A. I would consider that the obligations of an expert are
16 broadly the same in respect of their obligations to a
17 court, if I can put it like that, in respect of their
18 provision of expert opinion.

19 Q. Right. And what do you base that on?

20 A. I base that on the fact that -- I base -- sorry -- I
21 should add that one factor in relation to Dr Karch,
22 which I think was highlighted, was that he had
23 apparently given evidence in the UK. He had given
24 evidence in the well-known prosecution of
25 Dr Harold Shipman, and that was something that was

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1 highlighted I think to the Lord Advocate, but he
2 therefore appeared to have some experience of giving
3 expert evidence within the UK and, as I recollect, he
4 had given lectures within the UK as well.

5 But in relation to the generalities of the
6 obligations of an expert, yes, that was an expectation
7 and I would say I personally, nor did anybody else
8 within the crown team, seek to ascertain what the
9 professional obligations of an expert within the various
10 states of the United States were, but that could be
11 something that was later explored.

12 Q. What relevance would his giving evidence in the Shipman
13 case have had in relation to physical restraint or the
14 use of spray, was it to do with toxicology?

15 A. Yes, essentially I think, yes. Toxicology would be,
16 I think, highly relevant to that particular case and he
17 was being approached, as I understood it, from a
18 toxicological point of view.

19 Q. Prior to instructing either of these experts, was there
20 an approach made to see to what extent either of them
21 could provide an expert opinion on any of these four
22 topics that were of interest to the crown and instructed
23 by PIRC? Was there a discussion with Dr Karch?

24 A. I have to say I don't recollect that kind of Inquiry
25 being made and I was not involved in any such approach.

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1 Having said that and again I don't want to speak for
2 others within PIRC, I -- the process of instructing an
3 expert does normally involve some initial contact with
4 them to ascertain generally their availability, first of
5 all. Then you go down to exploring with them the extent
6 to which they would be willing and confident that they
7 could provide an opinion.

8 That is a standardised approach and that is the
9 approach that was adopted I'm confident by the crown in
10 relation to their approaches to some of the experts in
11 this case, because I know that in particular Mr MacLeod
12 would approach and ascertain their availability and then
13 proceed on that basis and, as I indicated to the Inquiry
14 yesterday, I was engaged in some discussions with a
15 pathologist to try to ascertain the availability of --
16 of an expert as well.

17 Q. To what extent were you satisfied that that standard
18 approach adopted by the crown was being adopted by PIRC,
19 because it was PIRC that sent out these letters?

20 A. Well, I do refer to the fact that the proposal of the
21 experts had I think clearly been sifted and assessed by
22 the Commissioner, because it was the Commissioner who
23 was to my recollection involved in the preparation of
24 the submission and that had been trailed with the
25 Lord Advocate whether in direct discussions between

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1 the Commissioner and the Lord Advocate or in
2 correspondence I don't know for certain, but I am
3 confident that there was dialogue that indicated that
4 the Commissioner -- these were the proposals of
5 the Commissioner having carried out some form of
6 assessment as to -- as to the appropriateness of the
7 selection of these experts.

8 Q. Did you personally check about -- with PIRC or with
9 the Commissioner herself before these letters were sent
10 out about the scope of the skills and experience that
11 the experts had, and their ability to respond to these
12 questions and give expert opinion on these matters in
13 any way?

14 A. I didn't have any direct dialogue with
15 the Commissioner at that stage.

16 Q. Did anyone else, that you know of, check with PIRC about
17 any of these issues?

18 A. I'm unaware of that. As I said earlier, I am aware that
19 other -- Stephen McGowan in particular was aware of the
20 proposals, but I didn't.

21 Q. Thank you. And then the other thing that is absent from
22 these instructions is any reference to cardiac pathology
23 or issues regarding the heart. There's nothing specific
24 mentioned there that I can see?

25 A. There's no mention of the heart. They are -- I suppose

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1 they are quite general questions that leave it open to
2 the expert to comment and perhaps that was one of the
3 intentions in relation to the instruction. This was not
4 a case where an expert was being approached for a single
5 view, but rather a range of opinion being sought.

6 Q. And was this general or open approach to instruction of
7 the experts seen as the most efficient or the best way
8 to instruct experts at this point?

9 A. Well, what I can say is that there was no indication
10 that it was not an appropriate way to approach them
11 having regard to the particular stage that this
12 investigation had reached.

13 Q. All right. Thank you. If we can look at your -- we've
14 mentioned earlier today your letter of 2 September?

15 A. Yes.

16 Q. So we've been talking about the report from PIRC coming
17 in on 7 August. These letters went out to
18 Dr Payne-James and Dr Karch shortly after the following
19 week, and then during this period, between the report
20 coming in and and 2 September, were you reading the
21 first PIRC report during this time?

22 A. Yes.

23 Q. Let's look at your letter, 2 September, COPFS 02557.
24 Now, if we look at the bottom of this letter, if we can
25 go right to the end, this is a lengthy letter, it spills

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1 onto a fifth page and it's written by you, head of
2 CAAPD, Mr Brown. And if we can go to the top, we'll see
3 it's dated 2 September 2015.

4 So is this the letter you sent to PIRC after you had
5 the opportunity to review the first PIRC report?

6 A. Yes, it was.

7 Q. And is this the letter that provided what you describe
8 as a directive approach, much more detailed instruction,
9 about the aspects that you wished PIRC to cover?

10 A. Yes, it was, but -- I think I have said this, but I do
11 want to emphasise that the analysis that I carried out
12 did inform a briefing which was circulated around senior
13 officials and the Lord Advocate and therefore that was
14 my analysis. So that was provided to the Lord Advocate
15 and then the letter was drafted and, as I recollect it,
16 approved by the Lord Advocate in the light of my
17 analysis. The letter didn't -- wasn't sent in
18 isolation. It was sent following a written analysis and
19 submission to the Lord Advocate.

20 Q. And did others have the opportunity to contribute in
21 relation to the analysis of the PIRC report?

22 A. I think the answer to that is, yes, because it was
23 circulated with that -- it was circulated around others,
24 yes.

25 Q. Did others read the PIRC report with a view to

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1 contributing to a more directive approach?

2 A. Yes, I think they did.

3 Q. And who were they?

4 A. I think it likely that it was read by Stephen McGowan
5 and probably Lindsey Miller.

6 Q. Thank you.

7 A. But they would be better to answer that, but that would
8 be my recollection.

9 Q. We've still to hear from them so we can ask what they
10 did.

11 But let's look at this letter, please. And if we
12 can move down the page. And it says here:

13 "The Lord Advocate met with the family and their
14 solicitor on 26 August"

15 So this would be after the first PIRC report:

16 "... and that meeting provided the Lord Advocate
17 with an opportunity to update the family on the progress
18 of the investigation and to respond to a number of
19 issues that were highlighted by the family. The
20 Lord Advocate confirmed that PIRC would be instructed to
21 carry out investigations in respect of a number of
22 matters in order that a properly informed decision be
23 taken by the crown as to the most appropriate way to
24 proceed."

25 A. Yes.

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1 Q. And was this part of the overall plan that you would go
2 back and ask PIRC to carry out a number of further
3 inquiries?

4 A. Yes, it was and that was explained to Mr Anwar and the
5 family, but I consider that this initial paragraph was
6 clearly indicating to PIRC, in the light of everything
7 that I said before the break, where there had been
8 correspondence from Mr Anwar to PIRC, there had been a
9 response from PIRC that had been considered by the crown
10 during the course of August and this was advising the
11 PIRC quite clearly that the Lord Advocate had met with
12 the family and their solicitor, Mr Anwar, recently and
13 therefore by implication this reflected the contents of
14 the meeting and some of the issues that had been
15 discussed at that meeting and that is the way that this
16 progressed.

17 Q. Were PIRC at that meeting or was it only a meeting with
18 the family?

19 A. PIRC were not at that meeting, no, but PIRC were due to
20 meet with the family of Sheku Bayoh very shortly after
21 2 September.

22 Q. But in terms of their instructions from the crown, this
23 letter was the method of communicating the instructions
24 to PIRC after that meeting in Crown Office?

25 A. Yes.

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1 Q. Thank you. And I think in your statement you say it was
2 the first time to your knowledge that extensive further
3 Inquiry had been requested from PIRC?

4 A. Yes.

5 Q. Is that correct?

6 A. Yes.

7 Q. And when you're talking about extensive further Inquiry,
8 is that this letter which set out, spilling on to five
9 pages, details of things PIRC?

10 A. Yes.

11 Q. Had there been the discussion between you and PIRC about
12 the dissatisfaction, if I can put it that way, that
13 crown had the PIRC report, the first report?

14 A. There'd been any detailed discussion in relation to
15 that. What I would say is that there was a degree of
16 sensitivity at this time in relation to the terms of
17 this letter, because it was appreciated that this was a
18 very detailed letter that was being sent to PIRC with
19 detailed instructions. The approach of the crown at
20 that time, bearing in mind that here was the crown
21 asking PIRC to carry out a very -- a very lengthy list
22 of detailed further inquiries and analysis that I would
23 suggest that it was clear from that letter that there
24 were aspects of the report that required further work to
25 be done on it, if I can put it that way.

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1 But the approach I think in general was to try to
2 support the PIRC and to assist them at that stage rather
3 than to be overtly critical at that point when the crown
4 was -- the focus of the crown direction was to give the
5 PIRC the opportunity to carry out this further work and
6 to submit a subsequent report.

7 Q. Right. Let's look at the instructions that were given.
8 We see the first bullet point on page 1:

9 "A detailed analysis should be prepared covering the
10 accounts given by all officers and civilian witnesses in
11 relation to the restraint process from beginning to
12 end."

13 So from your perspective, that had simply not been
14 done?

15 A. It hadn't been done to a satisfactory extent, yes,
16 I think that's probably fair to say.

17 Q. And then -- I am going to take this short. The Chair
18 can read the letter in full:

19 "That account must thereafter be analysed and
20 commented upon by an independent expert who is qualified
21 to comment on restraint techniques that were employed.
22 That person should be asked to provide an opinion as to
23 whether the techniques were in accordance ..."

24 If we can move the page, please.

25 "... in accordance with the training provided to the

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1 officers, whether those techniques were authorised and
2 recognised and, furthermore, whether the use of them was
3 reasonable and proportionate in the circumstances. In
4 particular, the expert should be asked to comment on the
5 apparent decision not remove the handcuffs and leg
6 restraints from Mr Bayoh after he became unresponsive."

7 That was a topic you touched upon yesterday?

8 A. Yes.

9 Q. Let's look at this. This was a request or an
10 instruction to carry out further analysis and to obtain
11 the opinion of an expert in relation to the restraint
12 techniques that were employed?

13 A. Yes.

14 Q. Was this what Dr Payne-James was designed to provide or
15 was this separate?

16 A. No, this was not what Dr Payne-James was to provide.
17 This was in order to -- once the analysis of the
18 information had been carried out and so far as possible
19 a clear or as clear as possible a picture in relation to
20 the restraint actions, the length of it, et cetera, that
21 there was to be an expert comment on that in order to
22 assess the approach by the police and linked with that
23 whether there was any indication that those might be
24 criminal.

25 So I know it's much later on in the process, but the

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1 crown obviously instructed a restraint expert. It was
2 that kind of analysis that the PIRC were being directed
3 towards.

4 Q. In terms of the first report, is it fair to say that
5 this work had simply not been done by PIRC at that
6 point?

7 A. I -- it had not been done to the extent that the crown
8 could place reliance upon it, yes. It was absent.

9 Q. PIRC had not provided the opinion of an expert who
10 commented on whether the techniques used in the
11 restraint were in accordance with their training,
12 whether those techniques were authorised, recognised, or
13 whether they were reasonable and proportionate in the
14 circumstances?

15 A. Yes.

16 Q. And there was no expert opinion commenting on the
17 failure to remove handcuffs and leg restraints?

18 A. Yes.

19 Q. The next bullet point:

20 "An independent expert should be instructed to
21 comment upon the circumstances of the deployment of CS
22 and PAVA sprays, including an examination of the
23 guidelines and an opinion provided on their use and
24 appropriateness of deployment. There will be a similar
25 process followed so that an opinion is obtained from a

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1 suitable expert on the drawing and use of batons during
2 the process of restraint. All of these witness should
3 be provided with evidence gathered from the witnesses,
4 including civilians. It's particularly important that
5 these experts are given the opportunity to comment upon
6 all of the accounts given with the various witnesses."

7 And there's specific reference to Ashley Wyse's
8 statement and a number of entries in that.

9 Was this any reference to the instructions that had
10 gone to Dr Payne-James already and to Dr Karch or was
11 this designed to be a completely separate independent
12 expert?

13 A. I think from recollection it probably was a separate
14 expert, although in relation to this whether PIRC
15 considered that a further approach could be made to
16 those witnesses, I don't know. I'm not entirely certain
17 in respect of that. I suspect from reading it here
18 today that it was for consideration of a further expert
19 to comment upon these.

20 Q. And so in terms of the first PIRC report, no expert
21 opinion had been provided by PIRC whereby there was a
22 comment on the deployment of sprays or the use of
23 batons --

24 A. Yes.

25 Q. -- and whether that was appropriate in the particular

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1 circumstances?

2 A. Yes. And just for clarification, now that I have
3 considered that aspect, I think it is clear that it was
4 a further expert.

5 Q. An expert who would look at the appropriateness of --

6 A. Yes.

7 Q. -- that deployment and perhaps assist in relation to
8 effectively justification for the use of force?

9 A. Yes.

10 Q. Right. There was no -- the PIRC investigation, as
11 reflected in the first report they sent, did not cover
12 justification of force in relation to sprays or batons;
13 is that fair?

14 A. From my recollection again, there were areas that
15 required further exploration in order to make a properly
16 informed decision, yes.

17 Q. The next one:

18 "Independent evidence should be obtained to comment
19 upon the guidance for deployment of sprays, and in
20 particular any guidance on the important of monitoring
21 the condition of a person upon whom such sprays have
22 been deployed and an opinion on whether there is
23 evidence of an appropriate level of monitoring of
24 Mr Bayoh's condition after deployment of the sprays and
25 restraint measures."

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1 So there seem to be three elements mentioned there.
2 Guidance for deployment of sprays, is it safe to say
3 that that is a reference to things like guidance from
4 the OST Manual or standard operating procedures?

5 A. Yes.

6 Q. Now, we looked yesterday at a letter of instruction
7 about standard operating procedures and the type of
8 guidance available. Had the first PIRC report simply
9 not covered the guidance that was available in relation
10 to sprays or their deployment?

11 A. From the terms of this letter, I think it would -- it
12 had been assessed that further work required to be
13 carried out in respect of those. I know that there was
14 a particular focus, even from an early stage of the
15 Inquiry, on standard operating procedures and, to my
16 recollection, it had been highlighted to the PIRC that a
17 comparison with training and standard operating
18 procedures, but in particular standard operating
19 procedures required to be incorporated into the
20 investigation by the PIRC, but this reinforces that.

21 Q. So does it appear that PIRC had not, to your
22 satisfaction at least, observed that part of the
23 instruction?

24 A. Yes, further work was required.

25 Q. And then it also comments on the importance of

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1 monitoring the condition of a person who has been
2 sprayed and monitoring his condition after deployment of
3 sprays and restraint measures and, again, does this
4 appear to focus on another issue about monitoring a
5 person who has -- to whom sprays have been discharged
6 and who has been restrained?

7 A. Yes.

8 Q. And again, was that an issue that simply hadn't been
9 covered by PIRC in the first report?

10 A. Yes, it was an issue of concern that further
11 investigations appeared to be necessary.

12 Q. Right.

13 A. Yes.

14 Q. Then it goes on to say:

15 "A toxicology expert should be instructed who can
16 comment upon the effects and prevalence of the drugs
17 found in Mr Bayoh's body and, in particular, alpha-PVP
18 and its use prevalence and effects within a UK context."

19 Now, we've heard evidence from Mr McSporran that he
20 was interested in alpha-PVP. He explained that it
21 wasn't something the investigators in PIRC knew very
22 much about and he attended a conference in the US to
23 find out more about alpha-PVP, but I'm interested in
24 this reference to a toxicology expert. Obviously, in
25 relation to the letters of instruction we've looked at

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1 for both Dr Payne-James and Dr Karch, there's reference
2 to toxicology. Was this a reference to a separate
3 toxicology expert to be looked at --

4 A. Yes.

5 Q. -- or was that in relation to Dr Payne-James or
6 Dr Karch?

7 A. It was in relation to, I'm pretty confident I think,
8 that it was a separate expert and the focus was on --
9 was on the effect that the drug would have. There had
10 been enquiry I think around about this time by Mr Anwar
11 in relation to the effect that this would have upon a
12 person under I think cognitive ability and later on
13 there was an approach to an expert in relation to that.
14 So yes, that's why I think this was a separate -- a
15 separate expert to be approached in relation to the
16 effect that this could have on a person's, I suppose,
17 behaviour.

18 Q. So there was reference to toxicology in the letter of
19 instruction to Dr Payne-James and in the letter to
20 Dr Karch, but this was designed to be a third expert in
21 relation to toxicology but this was about cognitive
22 effect, rather than physiological effect?

23 A. I think so. Certainly there was a subsequent
24 instruction of an expert for that purpose and it might
25 be, in reading this, that that was what it was referring

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1 to. I can't be certain.

2 Q. Was it your view that three separate experts in relation
3 to the issue of toxicology and the drugs was necessary,
4 rather than simply identifying one expert who could
5 speak to these issues?

6 A. It was -- as I say, it was an issue that was at large in
7 relation to the investigation and that it was something,
8 as I recollect it, that Mr Anwar was particularly keen
9 to obtain an opinion on as regards the effects upon a
10 person's behaviour that the drugs consumed would have
11 and how that interacted with the accounts given by the
12 police in relation to what they observed.

13 Q. Do you think this letter of instruction makes it
14 sufficiently clear to PIRC that it was the impact on
15 behaviour rather than the physiological impact of drugs?

16 A. I think that if it was for that purpose, then it might
17 have been appropriate to issue further direction.

18 Q. And was it for that purpose that you wrote this part of
19 the letter?

20 A. I just can't be certain in relation to that. I can't
21 offer an opinion.

22 Q. And then moving on, it says:

23 "It will be essential to establish precisely what
24 information was conveyed and received to each individual
25 officer in relation to the incident prior to their

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1 attendance. For the avoidance of doubt, this
2 information is entirely separate from evidence that it
3 is now available in relation to Mr Bayoh's actions from
4 various witnesses and accounts.

5 "The focus of the Inquiry should be upon the precise
6 nature of the information that was conveyed to the
7 officers, primarily by way of police airwaves
8 communications, so that it can be established what each
9 officer's state of knowledge was on their attendance.

10 "In respect of the transcripts themselves that had
11 been provided with the report, can you advise whether
12 you can hear what is being said where the hashtags
13 appear at various points?"

14 So this aspect had not been adequately covered by
15 PIRC either in the first report?

16 A. No, and I think in particular the particular concern
17 that I and others had in relation to this is that for
18 the purposes of subsequent instruction of any expert in
19 relation to the actions of the officers and the
20 reasonableness of the officers' actions and whether it
21 could constitute a crime ultimately, it was essential to
22 pare back what they had been told prior to their arrival
23 and not to conflate that with other witnesses who could
24 and did speak to Mr Bayoh's actions prior to the arrival
25 of the police, but which had not necessarily been

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1 conveyed in the information that had been communicated
2 to the police over the airwaves.

3 So that is why there was -- there was that
4 instruction and that direction to focus on that for that
5 critical reason that in assessing the behaviour of the
6 officers it was critical to know what they had been
7 told, rather than what others had perhaps seen and also
8 what they had said in their statements later on.

9 Q. And again, that analysis hadn't been carried out by
10 PIRC?

11 A. No.

12 Q. There's then:

13 "In respect of the various tablets seized can you
14 instruct a pharmacist to comment on what these are and
15 what these are commonly used for?"

16 So that was another separate instruction and then:

17 "I require sight of the terms of your instructions
18 to the pathologists who have been approached to provide
19 expert evidence on the cause and mechanism of death. I
20 note that at page 54 of your report [this is the first
21 PIRC report] that there is confirmation that Mr Bayoh
22 was handcuffed to the front and had leg restraints
23 applied on his arrival at hospital. I require
24 confirmation that all of the pathologist instructed have
25 been advised of this fact and have been asked to comment

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1 upon the significance of this evidence and, in
2 particular, whether such restraint could have
3 contributed to any positional asphyxiation, given the
4 fact that these restraints continued to be applied after
5 he became unresponsive and following resuscitation
6 attempts."

7 And then there was mention of the fractured rib.

8 A. Yes.

9 Q. How many pathologists were being instructed? You talk
10 about instructions to the pathologists who have been
11 approached.

12 A. I'm sorry. I'm not entirely clear what that reference
13 was directed towards. I'm obviously aware that there
14 had been instructions to Dr Karch and Dr Payne-James.
15 Perhaps it was -- it was confirmation as to exactly what
16 they had been -- what they had been asked to comment on
17 and the information that had been provided to them.

18 Q. We certainly heard of Dr Shearer and Dr Bouhaidar who
19 did the postmortem.

20 A. Yes.

21 Q. We've seen that there were instructions being sent to
22 Dr Karch -- had been sent to Dr Karch and
23 Dr Payne-James, but this seems to refer to instructions
24 being sent to pathologists and I just wondered what was
25 going on behind that reference.

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1 A. I don't think I'm in a position at the moment to assist
2 with that. I looked at it and I don't recollect.

3 Q. All right. Well, we'll move on, but in any event you
4 anticipated -- appear to have anticipated that further
5 expert pathologists would be instructed by PIRC.

6 A. Yes.

7 Q. And these were specific matters you wanted covered.

8 A. Yes.

9 Q. Was that because they hadn't been dealt with by PIRC in
10 the first report?

11 A. Yes. As I said yesterday, it was a particular concern
12 on my part, and I think on others, but certainly on my
13 part as to what the effect of the non-removal of
14 handcuffs had been.

15 Q. Okay. At the bottom of the page we see:

16 "I would be grateful for an update on the forensic
17 work constructed regarding comparison of the knife
18 recovered with marks that were subsequently examined on
19 one of the vehicles."

20 And does this relate to the events leading up to the
21 arrival of Mr Bayoh at Hayfield Road?

22 A. Yes, it must have, yes.

23 Q. And what was the purpose of that work being carried out?

24 A. The purpose of that work being carried out was to bring
25 it to a conclusion, to ascertain what had been

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1 discovered or otherwise in respect of that, and to -- I
2 suppose to assess the significance or otherwise that
3 that would have in relation to the overall
4 investigation. It had clearly been instructed and I
5 wanted to know at that stage what the result was.

6 I don't have a clear recollection as to my thinking in
7 respect of that.

8 Q. It's very specific in relation to the knife. We talked
9 yesterday about the forensic strategy meeting on 12 May,
10 and I asked you in particular about the Nicole Short's
11 vest or body armour.

12 A. Yes.

13 Q. That's not part of that aspect. What were your
14 expectations in relation to that?

15 A. The expectations is it was whether in exploring, because
16 I think PIRC's terms of references were to explore the
17 behaviours up until the interaction with the police and
18 that was to some extent relevant to that, but beyond
19 that I can't really comment as to why that was included,
20 other than I was obviously aware at the time that that
21 work was outstanding.

22 Q. Were you satisfied that the work on Nicole Short's vest
23 and the analysis in relation to that had been completed
24 to your satisfaction?

25 A. I don't recollect having any update in respect of that

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1 at that stage.

2 Q. But that's not been mentioned in the letter?

3 A. It's not.

4 Q. Moving on:

5 "I have corresponded previously in relation to
6 potential involvement of the Health and Safety Executive
7 in the investigation of this incident. I understand
8 John McSporrán was going to facilitate a meeting with
9 the Health and Safety Executive officials in order to
10 discuss the evidence that is available to date, in
11 particular in relation to the restraint techniques
12 employed."

13 Can you explain a little about this aspect?

14 Obviously you weren't happy that the PIRC report had
15 adequately covered the issue of the health and safety
16 aspect of the events at Hayfield Road. Can you explain
17 to us why that was of significance to the crown?

18 A. It was of significance because a potential health and
19 safety analysis or investigation was considered
20 appropriate, a consideration of the -- whether there
21 were any health and safety implications in respect of
22 the incident and this was, I suppose, directing the PIRC
23 that there had been discussions at that stage. The
24 Inquiry will be aware that there were direct approaches
25 after this to the Health and Safety Executive, but this

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1 was, I suppose, giving notice that some form of dialogue
2 with the Health and Safety Executive to engage with them
3 at that stage appeared to be appropriate.

4 Q. Right. Thank you. And there was an expectation that
5 Mr McSporrán, the lead investigator, was going to
6 facilitate a meeting to take that forward?

7 A. Yes, and I was advised of that and I had obviously
8 included that in this reference.

9 Q. Okay. And then it goes on to say:

10 "Previous correspondence instructed PIRC to examine
11 whether there is any evidence of an unauthorised access
12 to and interrogation of the information systems of the
13 police service of Scotland and, if so, whether this
14 could constitute a breach of data protection
15 legislation."

16 And so this had been instructed, PIRC had been
17 instructed to carry this out and you have said here:

18 "This investigation should be carried out as
19 expeditiously as possible."

20 A. Yes.

21 Q. Were you not satisfied that this matter had been dealt
22 with by PIRC in the first report?

23 A. Again, clearly there was further work that was required
24 to be carried out in order to bring that to a conclusion
25 and to allow a decision to be made in respect of it.

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1 Q. It goes on then on page 4 to say:

2 "I require confirmation from the Commissioner that
3 issues of race and whether there is any evidence of
4 racial motivation is a primary focus in the PIRC
5 investigation."

6 So this is the first reference to -- specific
7 reference to race in the letter and in fact in your
8 correspondence with PIRC in relation to this
9 investigation?

10 A. Yes.

11 Q. And it is the point where you require confirmation that
12 racial motivation is a primary focus in the PIRC
13 investigation?

14 A. Yes, race and racial motivation are both referred to,
15 yes.

16 Q. And was this against a background of you being aware
17 that the investigation should be Article 14 compliant?

18 A. Yes.

19 Q. "The investigation should examine whether there is any
20 evidence that any of the officers involved has expressed
21 any racist views or opinions in the past, in particular
22 indicated that officers from within the Fife area had
23 been investigated for texting racial slogans and that
24 one of the officers was referred to him. The family
25 have inquired as to whether any of those officers

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1 apparently involved in that inquiry were in the group of
2 officers engaged with Mr Bayoh."

3 So you have specifically asked for confirmation from
4 the PIRC --

5 A. Yes.

6 Q. -- whether there is evidence where issues of race or any
7 evidence of racial motivation is a primary focus of
8 their investigation and you specifically mention
9 evidence of officers being involved in expressing racist
10 views or opinions in the past?

11 A. Yes.

12 Q. Would that have included comments made in their
13 statements, because they're not mentioned, or was the
14 reference to the past a reference to sort of a history
15 perhaps of disciplinary or misconduct proceedings?

16 A. This was a general direction to the PIRC in relation to
17 areas that related to race and potential racial
18 motivation.

19 Q. Mm-hmm.

20 A. It was seeking to highlight potential areas that the
21 crown considered should be investigated and to explain
22 the background to these and the source of the
23 information. That had -- that particular aspect in
24 relation to the racial texting of racial slogans I think
25 had been highlighted previously. I know that the

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1 identity of the source of the information has been
2 blacked out so I won't refer to that, but it had been
3 highlighted to PIRC and I think I do explain in my
4 statement how it came about that that particular
5 investigation came to be -- came to be investigated and
6 highlighted to PIRC, but certainly that had not happened
7 at this point but it was something that had been
8 conveyed to the crown I suspect at the meeting that had
9 been referred to in this letter, but as I recollect also
10 specifically to the PIRC because it was information that
11 Mr Anwar was aware of.

12 Q. Right, I would like to go into this bulletpoint in some
13 detail where it says:

14 "The investigation should examine whether there is
15 any evidence that any of the officers involved has
16 expressed any racist views or opinions in the past."

17 What was that a reference to?

18 A. It was a reference to whether any of the -- generally,
19 whether any of the officers who were involved in the
20 incident had -- had a -- had racism as a background, and
21 whether there was any specific evidence of that.

22 Q. All right. So that related to their past, their
23 respective pasts. Was it designed to include any
24 reference to their statements that they had given on
25 4 June or any analysis in relation to those particular

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1 statements?

2 A. Well, it was a general direction I think to the PIRC to
3 be aware of any racist views or opinions and therefore
4 anything that was relevant to the perspective that they
5 had that was relevant to issues of race would be
6 relevant I think by clear association.

7 Q. There's no reference in this letter to an analysis of
8 the statements?

9 A. No.

10 Q. Or the language that was used?

11 A. No.

12 Q. You've not picked up on the use of the word "coloured"
13 or the link to terrorism on --

14 A. No.

15 Q. -- any of those points that we discussed earlier.
16 You've not specifically mentioned a separate analysis to
17 be carried out by PIRC in relation to Article 14 matters
18 regarding their statements about what happened at
19 Hayfield Road?

20 A. Yes.

21 Q. And looking at that paragraph now and this is -- this
22 bulletpoint comprises the extent of race as a discussion
23 topic in your letter, an instruction topic in your
24 letter. Do you think there would have been merit in
25 expanding this instruction to include an analysis of

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- 1 that statements?
- 2 A. With the benefit of hindsight any direction that would
3 have assisted in the Inquiry would be relevant and would
4 be of assistance. Having said that, I wasn't aware, I'm
5 pretty confident at this stage, that any such terms had
6 been used and if it had been an issue, then I would have
7 considered that that was an appropriate line of enquiry
8 for PIRC to make, but the focus of this at this stage
9 was to issue a general instruction in relation to race
10 and whether there was evidence of racial motivation and
11 also to reflect some of the comments that had been made
12 by the family in relation to specific lines of inquiry
13 that would appear to relate to that.
- 14 Q. To what extent had you read the PIRC -- the first PIRC
15 report in detail by the time you wrote this letter?
- 16 A. I had read the PIRC report by this point obviously.
- 17 Q. To what extent had you read the officer's statements,
18 the officers who attended at Hayfield Road?
- 19 A. I don't recollect whether I was -- I read those at that
20 time so that's -- I don't have a clear recollection of
21 reading those at that time.
- 22 Q. Had anyone within your team read the statements of the
23 officers who attended at Hayfield Road?
- 24 A. I'm not aware of the position in relation to that. The
25 focus of the further instruction was on the basis of the

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1 PIRC report and in the light of the fact that there was
2 going to be a forthcoming meeting with the family and in
3 the light of the fact that PIRC was due to meet with the
4 family later on as well.

5 Q. So at the time you wrote this letter, were you in a
6 position to comment at all about the content of the
7 statements that the officers had given on 4 June?

8 A. I don't know that I would have.

9 Q. And so would you have been in any position to comment on
10 the language used and the link to terrorism that we've
11 been talking about? Would there have been --

12 A. Not the language.

13 Q. No.

14 A. Not the language.

15 Q. Would you have been in a position to comment on the link
16 to terrorism or a possible link being made with
17 terrorism because Mr Bayoh was black?

18 A. From my recollection, I think that might have been
19 something that was mentioned in the report.

20 Q. And it's not mentioned here?

21 A. No.

22 Q. Would it have been of assistance to have some analysis
23 done by PIRC in relation to evidence about making that
24 connection?

25 A. Yes, I think it would have and I know that we may be

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1 taking this chronologically, but I think there was
2 specific reference to that aspect of the case later on.
3 But as I say, this was a direction to PIRC to focus on
4 issues of race and racial motivation in relation to any
5 relevant aspect of those considerations. That -- that
6 was I think part of the intention, but with specific
7 reference to matters that had been highlighted at that
8 point and also bearing in mind, as I have said earlier
9 on in my evidence, that this was a direction or a
10 reminder, a requirement for confirmation that race and
11 race -- racial motivation was a consideration against a
12 background where very detailed information relevant to
13 that had been provided to the PIRC by the family at
14 round about this time.

15 Q. There was a recognition in Crown Office and by yourself
16 that the first PIRC report was, if I can summarise it as
17 inadequate. We talked earlier. There was no reference
18 to Article 14 and investigation regarding race. There
19 was an inadequate analysis of the situation.

20 Was this not an opportunity in this -- doing this
21 letter on 2 September an opportunity for the crown to
22 say "we've looked at this in considerable detail, we've
23 not just -- we're concerned about the adequacy of the
24 report, but we've looked behind that and here's a large
25 area that we think requires further explanation".

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1 Now, PIRC have clearly not of their own of volition
2 adopted an active line of investigation on race so
3 perhaps it would have assisted if the crown had said,
4 "this is what we expect of you. You've not done it
5 yourselves so far, but we recognise that and here is a
6 much more active direction for you to pursue"?

7 A. That was a possibility. Having said that, the
8 investigation was still ongoing and to some extent the
9 attraction in having a general direction put PIRC on
10 notice that this required to be addressed and required
11 them at an organisational level to assess what required
12 to be done in order to fulfil the requirements. So
13 I don't disagree that with hindsight and looking back to
14 that time that any kind of assistance in addressing this
15 would have been -- would have been important.

16 Having said all of that, there was the opportunity
17 to actively engage with the family, which is what
18 I would suggest the crown had been doing, and when the
19 family articulated specific concerns in relation to
20 race, those were communicated to PIRC, particularly in
21 relation to the allegation of the sending of racist
22 texts.

23 Q. Can I ask you, regardless of the family's position, as I
24 understand it, you accept that the obligations under
25 Article 2 and Article 14 are on the crown --

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1 A. Yes.

2 Q. -- regardless of what the family say or do. And you
3 accepted earlier today that the obligations under
4 Article 14 are in line with pursuing vigorous -- with
5 vigour a line of investigation that looks at race,
6 discrimination, racist motivation. You've accepted that
7 the PIRC report there's simply an absence of any sign of
8 active investigation in terms of Article 14 in
9 conjunction with Article 2. There's no reference at all
10 in the first PIRC report about discrimination, race or
11 racism, not even to exclude it.

12 You've identified that as a failing or a failure on
13 the part of PIRC. It would not appear in fact that
14 there is any ongoing or active investigation being done
15 by PIRC at this stage. So highlighting to them that you
16 require confirmation that race -- racial motivation is a
17 primary focus, you know that that just can't be going on
18 because it's not referenced in the first report so
19 with -- I appreciate it is with hindsight, but do you
20 see that perhaps this was an opportunity for the crown
21 to say "we expect more and this is the type of thing
22 that we expect"?

23 A. I think it was an opportunity to more sharply focus the
24 issue of race and racial motivation. I do consider that
25 there were opportunities to engage and seek advice as

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1 regards approaches.

2 Again, whilst I accept that the obligation is on all
3 organisations to comply with the requirement, there was
4 an opportunity for PIRC to address themselves at an
5 organisational level what required to be done, there is
6 an opportunity to engage with others, there had been
7 reference in previous correspondence to IPCC
8 investigations that incorporated race. To some extent,
9 the IPCC could be seen as a partner or an equivalent
10 organisation to the PIRC.

11 So advice as regards how this could be effectively
12 done I suppose could have been sought, but I do accept
13 that at this stage some assistance and with hindsight
14 some assistance could have been of benefit.

15 Q. Because there is no reference in this bulletpoint to the
16 IPCC guidelines?

17 A. No, there isn't.

18 Q. There's no suggestion that they speak to other bodies or
19 other people who might be able to assist in developing a
20 strategy for this race investigation, and really the
21 points mentioned there are really three. One, look at
22 whether the officers have expressed racist views in the
23 past, look more generally at officers within Fife who
24 have been investigated for racist texting and see if
25 there was any connection, and then, in the latter part

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1 We were talking about the bulletpoint that related
2 to race. There we are. And do we see that the three
3 specific examples? We mentioned those just before the
4 break and we looked at the detail of those, but does it
5 appear that they have all come from discussion with the
6 family, so whether there was any evidence that any of
7 the officers had expressed racist views, the family had
8 inquired about officers in Fife engaging in racist texts
9 and wondering if they had had any contact with the
10 attending officers and then it was the family that had
11 asked in relation to any history of racism and
12 specifically about the conduct of PC Alan Paton.

13 So the points mentioned are actually points that the
14 family had specifically raised --

15 A. Yes.

16 Q. -- with the crown?

17 A. Yes.

18 Q. So does that mean that in fact the crown did not come
19 forward in this letter or in other correspondence with
20 other possible lines of active investigation, that the
21 only lines here suggested appear to come from the
22 family?

23 A. Yes. The terms of the instruction, I think with
24 hindsight, were intended to be general, as I said in my
25 evidence this morning, require confirmation, et cetera,

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1 generally race and racial motivation, and then
2 highlighting three specific concerns that had indeed
3 been highlighted by the family.

4 Q. Right. We've had heard some evidence from PIRC
5 witnesses who said they thought it was difficult to
6 investigate motivation?

7 A. Yes.

8 Q. What's in someone's mind?

9 A. Yes.

10 Q. And that they sought guidance or assistance from
11 the crown in relation to that. Their impression, as
12 they explained it to us, and it will be a matter for
13 the Chair, was that they did not receive guidance from
14 the crown and then they raised it again and then really
15 it was recognised that it was difficult, but they didn't
16 really receive the guidance they were looking for.

17 Do you have any comment in relation to that? Do you
18 remember being asked for assistance?

19 A. I don't remember being asked for assistance and in my
20 preparation for the statement and for giving evidence, I
21 haven't come across any request for assistance at any
22 time during my involvement in the case. It is the case
23 that there was -- there were meetings. There was a --
24 and you may be coming on to that -- some discussion
25 where there was mention of the terrorist threat, but I

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1 don't recollect any request for guidance.

2 If there had been, I suspect I would have
3 recollected that, nor do I remember any approach to
4 anybody else at the crown, you know, to indicate, you
5 know, we're struggling with this or we don't feel that
6 we can do that, but having said that we have been
7 through the terms and the instruction and I accepted
8 this morning that, with hindsight, there could have been
9 more specific direction and a more collaborative
10 approach, perhaps with input from others, but I don't
11 recollect any request for assistance at all.

12 Q. Given the evidence you gave yesterday about the can I
13 say limited experience of race investigations and some
14 members of your team no experience of race
15 investigations?

16 A. Yes.

17 Q. Do you take the view that you were -- your team and
18 yourself were well equipped to give that guidance and
19 assistance to PIRC, had they raised it maybe more
20 formally with you?

21 A. I don't know if I would have been best placed to do
22 that. I certainly wouldn't suggest that I would set
23 myself up as an expert or somebody who would do that.
24 I think that in relation to this Inquiry as a whole, as
25 I have indicated, there was some -- there was relatively

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1 little experience of this kind of investigation and
2 I think it is the case that with the benefit of
3 hindsight that there could have been input externally in
4 respect to how to go about this rather than looking to
5 the crown all the time and looking to individuals.
6 That's probably the best way that I can answer that.

7 Q. We did discuss with Kate Frame about the -- whether she
8 would consider the possibility of looking externally to
9 third parties and she, and again I'm summarising her
10 evidence, but she had said they would have quite liked
11 to have been invited to a meeting with Deborah Coles,
12 the director of Inquest, for whatever assistance that
13 may have proven to be?

14 A. Yes.

15 Q. But that was not something that PIRC were invited to.
16 Do you remember any issue about or any decision taken
17 not to invite PIRC or not to include PIRC --

18 A. No.

19 Q. -- in that discussion?

20 A. No, not at all. In fact, as I recollect it, the
21 invitation to meet with Deborah Coles came to the crown
22 so it was an invitation I think to the Lord Advocate
23 originally, but to the crown and the crown attended
24 that, so that was the focus of invitation. There was no
25 suggestion of inviting PIRC, and although I might be

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1 mistaken in respect of this, I think that was around
2 about the time that Mr Anwar had indicated that the
3 family had lost confidence in PIRC and that there had
4 been a breakdown in the relationship with the PIRC. So
5 it wasn't as if the crown were arranging that meeting
6 and thought will we invite the PIRC or not invite the
7 PIRC.

8 The invitation, as I recollect it, was extended to
9 the Lord Advocate and thereafter Lindsey Miller and I
10 attended that and, to the best of my recollection, that
11 was the only time that that there was such a meeting,
12 I think there was a suggestion of a further meeting
13 later on that didn't taken place, so I only recollect
14 one meeting with Deborah Coles. But again there had
15 been mention of Inquest and perhaps Deborah Coles in
16 correspondence and I don't know, I can't speak for
17 Deborah Coles as to whether she would have been be
18 willing to provide input, but I certainly wasn't aware
19 at any time of this being exclusively for the crown.

20 Q. Right. And it was something you were invited to rather
21 than something you were organising?

22 A. Yes.

23 Q. Can we move on to the final bulletpoint in the letter,
24 please:

25 "The family once again raised the question of

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1 whether there was evidence of officers inappropriately
2 conferring prior to the provision of statements to PIRC.
3 Please advise whether social media sites that may be
4 linked to any officers involved have been considered for
5 examination in this regard."

6 And again, is this an indication that this matter
7 hadn't been specifically addressed in the first PIRC
8 report, social media?

9 A. Yes, I don't think it had been referred to, yes, and
10 that had been raised, yes.

11 Q. "And I understand that Constable Paton continues to
12 refuse to provide his weight to investigators.
13 I understand that investigators were approaching
14 Police Scotland to request their assistance in obtaining
15 this information. Please advise of the progress in
16 relation to this."

17 And was this in connection with your examination of
18 the issue of restraint and what the officers had done?

19 A. Yes, it was, but there had, as I recollect, been a
20 specific request by Mr Anwar for the weights of the
21 officers and there was some difficulty in the obtaining
22 of that and the provision of that. Some progress was
23 made during the course of the investigation, but it
24 wasn't immediately forthcoming and, as I recollect it,
25 it was a constant theme to request the weights at

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1 various points and that that wasn't immediately
2 forthcoming.

3 Q. Right. And was that a request made to Police Scotland
4 or to the individual officers.

5 A. I'm thinking and trying to recollect. It was an
6 approach through the PIRC obviously. As to how they
7 went about it, I can't quite remember. I do think that
8 there was an approach through Police Scotland, but
9 I can't say whether that was exclusively through
10 Police Scotland.

11 Q. All right. It then goes on to say:

12 "You will be aware that family of the deceased have
13 expressed reservations regarding the expert pathologist
14 who have been approached to provide an opinion. It may
15 be that others will be required to be approached in this
16 regard and this issue will require ongoing discussion."

17 Now, just to recap, this is the letter of
18 2 September. There's letters of instruction have gone
19 to Dr Karch and Dr Payne-James from PIRC after the first
20 report was received. Who was the expert pathologist
21 that was being referred to here in relation to the
22 family's reservations?

23 A. I have to say in reading that, and I know that the dates
24 are of significance here, my recollection in respect of
25 this was that they were referring to reservations in

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1 respect of Dr Karch and Dr Payne-James and perhaps
2 particularly Dr Karch.

3 Q. Right. So this would be about -- this is something you
4 were aware of by 2 September when you wrote this letter?

5 A. Must have been, yes.

6 Q. Had you discussed these reservations with PIRC at any
7 time prior to this? We know the letter of instruction
8 to Karch was sent on 13 August and this is 2 September,
9 so you clearly knew about the reservations by then. Did
10 you discuss it with PIRC or take any steps in relation
11 to this?

12 A. I don't recollect any discussions with PIRC involving
13 any of the crown team at that time.

14 Q. All right. You don't set out what the reservations
15 were. Is that an indication that you had already
16 expressed -- explained what they were or just something
17 else?

18 A. I think from the terms of it of saying "you will be
19 aware", I think that PIRC were already aware of the
20 reservations through -- probably through Mr Anwar.

21 Q. Right, thank you.

22 And then it says:

23 "I appreciate that a considerable amount of work
24 still requires to be undertaken in relation to this
25 matter. However, you will no doubt agree that the

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1 investigation requires to be as thorough as possible and
2 that concerns expressed by the family of the deceased
3 have to be addressed. The Lord Advocate has indicated
4 that it is his intention to meet with the family again
5 towards the end of October [so that's the following
6 month] and, accordingly, an update on the progress of
7 these inquiries will be required prior to that meeting."

8 A. Yes.

9 Q. And so in terms of, as we were saying, this is the
10 letter which you sent to PIRC after the first PIRC
11 report had been received?

12 A. Yes.

13 LORD BRACADALE: Mr Brown, before we leave this letter, I
14 wonder if you can help me with something.

15 Could we scroll back up to the first page of the
16 letter, please. And if we look at the first two
17 bulletpoints, in the first bulletpoint you required:

18 "PIRC to prepare detailed analysis covering the
19 accounts given by all officers and civilian witness in
20 relation to the restraint process from beginning to
21 end."

22 And then in the first sentence of the second
23 bulletpoint you say that:

24 "That account must thereafter be analysed and
25 commented on by an independent expert who is qualified

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1 to comment on restraint techniques that were employed."

2 Now, in relation to the exercise in the first
3 bulletpoint, it must at least have been a possibility
4 that at least parts of some of the accounts were untrue
5 or for one reason or another unreliable.

6 A. Yes.

7 LORD BRACADALE: Now, how would you have in mind that PIRC
8 would take these difficulties into account in preparing
9 such an account?

10 A. My Lord, the intention in respect of this and the
11 request for an analysis was to I think to examine in
12 detail what each witness had stated and then to compare
13 that with what other witnesses had stated and that in
14 particular that one should be looking at the police
15 accounts and comparing them with, I suppose, the
16 civilian accounts and looking to see whether any
17 inconsistencies could either be resolved or explained or
18 whether there was an obvious inconsistency that
19 suggested the witness was mistaken, if I can put it like
20 that, in respect of it account and if I could perhaps in
21 thinking out loud provide an example of that.

22 Going forward to the time the crown were carrying
23 out their own investigations, there was an analysis of
24 that type carried out by the crown investigators where
25 there is I think reference to this in one of the

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1 documents, whereby each of the crown investigators, the
2 crown team, summarised the accounts that were given by
3 various witnesses and at the -- during -- after that
4 exercise had been carried out, they compared it and were
5 able to identify some clear inconsistencies. For
6 instance, in relation to one witness in particular who
7 had described the number of officers who were involved
8 at that point, it became clear from that analysis, to my
9 recollection, that that must have been mistaken, because
10 that number of officers weren't present at that point.
11 So it's that kind of analysis that I think was envisaged
12 in respect of this.

13 LORD BRACADALE: I can see that an exercise of that kind
14 will identify an inconsistency in a particular
15 situation, but it's the concept of getting together an
16 account out of an exercise of this kind positively to
17 examine.

18 Now, I'm wondering whether, particularly in a
19 situation of the kind that occurred here, you would be
20 likely to end up with a number of scenarios depending on
21 what package of evidence you accepted? Do you follow?

22 A. Yes, you could -- I entirely accept that the conclusion
23 of that exercise would be uncertain and it might be that
24 you did have accounts that were not consistent, but
25 I think the view of everybody that looked at this letter

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1 and approved it, and in relation to myself, was that
2 there was a value in conducting that type of analysis to
3 ascertain whether any of the accounts could be
4 discounted as unreliable and get as clear a picture as
5 possible in order to move the investigation forward. It
6 was that type of analysis that --

7 LORD BRACADALE: If you move on to the second leg of the
8 exercise, the second bulletpoint, you then have the
9 problem of what account you're asking your expert to
10 comment on; do you follow that?

11 A. I do exactly, my Lord. It would perhaps and I don't
12 think the expectation would be that it would produce a
13 single account, but it would in my view be a valuable
14 exercise because it would provide as much clarity as
15 possible in relation to the factual account and
16 thereafter to present that.

17 LORD BRACADALE: It might be that following on from the
18 first exercise you would have to ask the expert to
19 comment on a number of possible scenarios.

20 A. Yes, you might. And in addition to that, you might be
21 left in a situation whereby you simply had to provide
22 the expert with the accounts given by the various
23 witness and to ask, as you put it, for a comment in
24 respect of the salient aspects, yes.

25 LORD BRACADALE: Now, if you do that, if you just give the

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1 expert the accounts given by the various witnesses,
2 what's their expert to make of that?

3 A. Well, the expert -- I think from my perspective the
4 expert would be -- could comment in relation to, well,
5 if that scenario was the situation, then my opinion
6 would be this, and if the other scenario was correct, my
7 opinion either would be altered or wouldn't be altered
8 in respect of it.

9 LORD BRACADALE: Now, in relation to the first bulletpoint,
10 did PIRC prepare such an analysis?

11 A. They didn't prepare -- to my recollection they didn't
12 prepare an analysis that was sufficient for the purposes
13 for which it was intended, hence the crown carried out
14 that type of analysis during its phase.

15 LORD BRACADALE: So I take it that PIRC didn't produce the
16 kind of analysis that you expected, nor did they carry
17 out bulletpoint 2, namely to get an expert to comment on
18 it?

19 A. The -- I think the short answer to that is that there
20 wasn't, no. There were some experts who commented on
21 the restraint process, but in respect of the analysis
22 and an expert who had been approached for the specific
23 purpose of commenting on whether the approach was in
24 accordance with the standard operating procedures and
25 the training and the like, I -- that wasn't present in

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1 the later PIRC report to my recollection, my Lord.

2 LORD BRACADALE: Thank you.

3 MS GRAHAME: Thank you very much. I'm going to move on from
4 this letter and move on to the next. In terms of the
5 chronology, that was the 2 September and on 10 September
6 there is a report received from Dr Karch in response to
7 the particular letter that we looked at before lunch.

8 A. Yes.

9 Q. Can we look at his report PIRC 02526A and this is from
10 10 September. It's 2526A. And we've heard evidence
11 about this before in relation -- this is a report from
12 Steven Karch sent to Kate Frame, the Commissioner, on
13 10 September and we've heard evidence from Ms Frame in
14 relation to this?

15 A. Yes.

16 Q. And I wonder if we can look, please, at -- well, I
17 should say it's a response from Dr Karch and it says:

18 "In your letter of August 13 of this year you posed
19 four questions."

20 And that's a reference to the letter of instruction
21 we looked at before lunch?

22 A. Yes.

23 Q. And then if we can look at page 3, please, or let's
24 start with page 2. The way he does it is he sets out
25 question 1, he repeats the question and then he gives a

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1 brief answer and then an explanation for each, and
2 that's the format that he follows throughout the report.

3 A. Yes.

4 Q. And the first question relates to the physiological
5 effect of the drugs detected in the toxicology sample,
6 either individually or in combination on the deceased
7 and in the circumstances of his arrest and he responds
8 in an answer there.

9 Can we look at the -- page 3 towards the end of
10 paragraph B and he's talking here about MDA -- MDMA and
11 alpha-PVP, and he talks about:

12 "Mr Bayoh, the decedent, exhibited many of the
13 features of Excited Delirium."

14 A. Yes.

15 Q. And he says:

16 "The clinical practice, 10 to 13 symptoms are
17 generally recognised as components of the excited or
18 agitated delirium, depending on who is drafting the list
19 and the list includes... "

20 And then he gives A to K, a series of factors or
21 components, as he puts it in the letter, for Excited
22 Delirium.

23 When -- did you have an opportunity to read this
24 report?

25 A. Yes.

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1 Q. And Mr -- Dr Karch is -- can we just look up at the top
2 of that section, please. No, sorry. If we come down
3 towards the features. That's lovely.

4 He talks there about:

5 "If the increase in brain dopamine is too great,
6 disruption of normal brain function may occur with
7 lethal consequences, sometimes in the form of a disease
8 known as 'Excited Delirium syndrome' and Mr Bayoh
9 exhibited many of the features of Excited Delirium."

10 When you read in this report -- obviously the
11 instructions did not refer to Excited Delirium at all?

12 A. No.

13 Q. There was no invitation to Dr Karch to comment on
14 Excited Delirium, but he has begun to talk about it in
15 his report and what he appears to be talking about as is
16 disease known as Excited Delirium.

17 Now, you'll recollect yesterday we spoke about the
18 final postmortem report and Dr Shearer and Dr Bouhaidar
19 had said it wasn't a disease, it wasn't something
20 pathological, it was at best some sort of psychiatric
21 matter, but not something that the forensic pathologist
22 could comment on?

23 A. Yes.

24 Q. But there was an awareness that this was a controversial
25 area. When you read this, what did you think about it

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- 1 when it appeared in this report? Mention of Excited
2 Delirium and mention of it being a disease?
- 3 A. Yes, I think I was -- I was somewhat surprised to see
4 it, that's looking back, surprised to see it in the
5 sense that, as you say, there hadn't been a specific
6 direction to it, but by that stage, even mention of
7 Excited Delirium, because of concerns that had been
8 expressed by Mr Anwar, was enough to make it jump out at
9 me and I think others so there was mention of it. We
10 may be looking further down in the report. But seeing
11 that in respect of this, when there had already been or
12 at least the start of representations to the crown that
13 Excited Delirium, as I think I referred to it yesterday,
14 was something to be treated with extreme caution, here
15 it was arising so I did note that.
- 16 Q. He says:
- 17 "In clinical practice 10 to 13 symptoms were
18 generally recognised."
- 19 He makes no reference to ICD10 or DSM5 or
20 psychiatric classifications of disease. When you read
21 this, did you understand that excited delirium was in
22 fact a disease? Were you questioning the report you had
23 from Dr Shearer and Dr Bouhaidar?
- 24 A. I wasn't questioning their report at that stage at all.
25 That wasn't something that I think was done at any stage

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1 to question the report, because, as I said yesterday,
2 I think it was always the intention of the crown and in
3 fact they did return to those two original pathologists,
4 but, no, it did not cause me to think this revises or
5 discredits the examination that had been carried out.

6 Q. I mean Dr Karch is not a psychiatrist of any
7 description, you'll agree with that?

8 A. Apparently the Inquiry has, I think, heard evidence
9 about that.

10 Q. And then on page 6, where he refers to question 3, again
11 he mentions the question:

12 "What is the physiological effect of restraint of
13 the deceased in the circumstances of his arrest?"

14 And he says:

15 "Given the details of the situation, the effect of
16 physical restraint would have been de minimis."

17 Now, given our discussion yesterday, is it fair to
18 say, my understanding, that he is the only expert that
19 the crown obtained a report from that said "the effect
20 of physical restraint would have been de minimis"?

21 A. Yes, and he stated it in those terms, which is perhaps
22 surprising, but that's what's there.

23 Q. Another surprise that he would be so forthright in that
24 regard also.

25 A. Yes.

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1 Q. And then in relation to his explanation if we -- you'll
2 see that "(a), mechanical asphyxia".

3 If we can go on to the next page, page 7, at the
4 top, he's talking about mechanical asphyxia. We've
5 heard about positional asphyxia, mechanical asphyxia,
6 and he said:

7 "No clinically significant effects were observed.
8 Indeed, the whole concept of restraint asphyxia, as
9 applied in this case, has been refuted many times in the
10 peer-reviewed literature."

11 Did that come as a surprise to you as well?

12 A. I think the short answer to that is, yes. I am thinking
13 of -- yes. It was expressed in very definite terms and
14 it was something that stuck out, let's put it that way,
15 to me.

16 Q. And then "(b) primary effects of prone positioning" he
17 discusses this in some detail in the paragraph:

18 "... series involving the hogtie, formally known as
19 maximal prone restraint positioning or hobble restraint,
20 as a cause of death also called 'positional asphyxia'
21 were first proposed late in '92. However, the results
22 of the initial research were ultimately withdrawn in
23 open court by the very author who very first suggested
24 the idea. A large body of literature suggests MPRP has
25 very little clinical effect. It is surprising, given

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1 the lack of evidence, that anyone would suggest that it
2 can. It is equally surprising that this outmoded idea
3 remains in the vocabulary of modern forensic
4 pathologists, given the complete lack of supporting
5 evidence."

6 What was your impression when you read that?

7 A. My impression when I read that was that this -- it was
8 bordering on the personalised I thought. It was -- it
9 was openly criticising other unnamed experts or
10 contemporaries and it was adopting a particular view in
11 general about, obviously, an issue about which there was
12 another body of opinion which -- with which he
13 vehemently disagreed, as he put into this -- it's termed
14 a report, but it's compendium of information and
15 addressed back. But he was expressing a very definite
16 view on something that, you know, might be considered a
17 comment on a very broad area of medical expertise.

18 Q. Thank you. Did this cause you to have any concerns
19 about his impartiality?

20 A. I think it probably caused me to pause and to realise
21 that careful consideration would require to be given to
22 this in the round and as regards -- rather than
23 impartiality as to what the basis for this particular
24 view was -- that's.

25 Q. And then looking down at the bottom of the page,

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1 question 4 appears. There we are:

2 "What was the physiological effect of a, b and c on
3 the deceased in combination in the circumstances of his
4 arrest?"

5 And the answer is:

6 "I concluded factor c is irrelevant."

7 Factor c, you may recall, was the restraint?

8 A. Yes.

9 Q. "Factor c is irrelevant as there is no proof that such a
10 disease entity even exists.

11 "Factor b is similarly irrelevant as there is no
12 evidence of toxicity present."

13 That related to the sprays.

14 When you read that the restraint was irrelevant as
15 there was no proof that such a "disease entity" exists,
16 so it's at the combination of restraint is irrelevant,
17 he said it's de minimis, which contradicts other
18 evidence you have, but also the idea that this is some
19 sort of disease entity; what were your views at that
20 point?

21 A. Well, I think at that stage there were some concerns
22 emerging from my own personal perspective. I can't
23 speak for the rest of the team. But what was notable
24 from my recollection was that he was at odds already
25 with the original pathologist and he was at odds as

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1 well, as I recollect, with the much -- I was going to
2 describe it -- yes, I would describe it as much more
3 extensive and perhaps detailed report that had been --
4 that was ultimately obtained from Dr Payne-James.

5 So this was -- if I term it an outlier perhaps
6 that's much of a generalisation, but it was definitely
7 not consistent and was extremely inconsistent with the
8 conclusions of the other pathologist. So that was the
9 kind of considerations that I was having at that point.

10 Q. Thank you. And we don't need to go to this, but
11 Dr Payne-James' comment was in relation to excited
12 delirium at least:

13 "I do not consider that his condition as described
14 at the time of police contact represented Excited
15 Delirium Syndrome."

16 A. Yes.

17 Q. So in that regard he was contrary also to
18 Dr Payne-James.

19 Can I ask you to consider a letter PIRC 04246. Now,
20 this is a letter dated 12 October, 2015, and I think we
21 may have touched -- one of your answers may have touched
22 on this at this time. So this is --

23 The Karch report was 10 September, so it's just over
24 a month after the Karch report had been obtained. And
25 it's from PIRC and we'll see at the bottom of the page

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1 it's from, I think, Kate Frame. It's a lengthy
2 letter -- there we are -- from the Commissioner. And if
3 we can go back to the top, there's the summary of the
4 situation in relation to the death of Mr Bayoh and the
5 cause of death as given in the final postmortem.

6 A. Yes.

7 Q. And if we can move down. There's then talk about expert
8 witnesses and mention of PIRC presenting CVs of several
9 experts to the Lord Advocate and that Dr Payne-James and
10 Dr Karch had been instructed to provide opinions and
11 then PIRC providing the expert witness package with
12 various information to the experts and there's
13 confirmation of the questions that were asked of those
14 experts that we looked at the earlier.

15 A. Yes.

16 Q. And in addition, at some point, there has also been
17 additional queries sent regarding the handcuffs and the
18 fractured rib?

19 A. Yes.

20 Q. And if we can move down, it indicates that the draft
21 reports of Dr Payne-James and Dr Karch have now been
22 received and it provides a summary of the conclusions
23 and it mentions Dr Payne-James' conclusion and we see
24 there the conclusion in relation to excited delirium
25 that I just mentioned?

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1 A. Yes.

2 Q. I would like to look at the comments on Dr Karch,
3 please. Here we are. It says:

4 "Consultant in cardio-pathology and toxicology."

5 Now, I should say that we have also heard from
6 Kate Frame that was her understanding at the time, but
7 she was not aware at that time that Dr Karch was not a
8 forensic pathologist and had never conducted any type of
9 autopsy. And also she was not aware that he didn't have
10 any formal toxicology qualifications. That's only
11 something that become known to the Inquiry subsequently:

12 "Dr Karch is considered to be one of the world's
13 foremost experts in this field."

14 A. Yes.

15 Q. And she talks about his answers to the questions that
16 we've just looked at, but let's move on from that
17 section, please.

18 And here it says:

19 "Additional expert opinion. The Lord Advocate
20 informed Mr Anwar, solicitor acting for the family of
21 the deceased, that he had instructed the PIRC to obtain
22 expert opinion from Dr Payne-James and Dr Karch.
23 Mr Anwar erroneously concluded that the PIRC was seeking
24 evidence of Excited Delirium Syndrome to explain the
25 cause of death. However, and as the Lord Advocate is

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1 aware, no such opinion on EDS was sought."

2 And certainly we didn't see any actual instructions
3 to either of the experts inviting them to comment on
4 excited delirium in any way. I think that's fair to
5 say.

6 A. Yes.

7 Q. But was it the intention that these experts -- were they
8 selected for the purpose of obtaining their views on
9 excited delirium?

10 A. No.

11 Q. "Mr Anwar on behalf of the family was requested to
12 provide details of additional experts whom he considered
13 may add value to the investigation. Mr Anwar had
14 already sought expert opinion from Dr Nat Carey, an
15 eminent pathologist, as to the cause of death and has
16 agreed to share Dr Carey's report with the PIRC and the
17 Lord Advocate. Dr Carey was provided with a pack
18 containing the same information shared with
19 Dr Payne-James and Dr Karch and was given access to
20 samples for examination."

21 I would like to ask you about this section.
22 Obviously, Mr Anwar erroneously concluded that excited
23 delirium was being -- opinions on that were being
24 sought. The crown position is that they were not being
25 sought, but, in any event, both Dr Payne-James and

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1 Dr Karch did speak about excited delirium in their
2 reports?

3 A. Yes.

4 Q. At that time you have told us that the family were being
5 given exceptional levels of engagement and disclosure in
6 relation to assisting them to obtain their own expert
7 opinion. Can you explain what was happening at this
8 time in relation to these discussions with Mr Anwar,
9 because we have also heard that it is unusual for the
10 family to be asked to contribute in any way to the
11 instruction of experts during an investigation?

12 A. Just that -- just so I'm clear what it is you're asking
13 here. Could I ask you --

14 Q. Let's break that down, because that was a bit of a long
15 question. What was happening at this time with
16 Mr Anwar?

17 A. What was happening with Mr Anwar, to the best of my
18 recollection, was that Mr Anwar was -- was -- was
19 engaged in seeking opinion on behalf of the family and
20 that he was being provided with information that the
21 Lord Advocate and others considered was appropriate to
22 assist him in doing that. So it was -- it was from the
23 point of view of assisting him to be engaged in the
24 process at this time.

25 Q. Right. So the crown had the two pathology -- the

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1 postmortem report from two pathologists, Dr Shearer and
2 Dr Bouhaidar. Mr Anwar had instructed Dr Nat Carey,
3 who's also a pathologist.

4 A. Yes.

5 Q. And the crown had instructed Dr Karch and
6 Dr Payne-James, but not with a view to obtaining
7 opinions on excited delirium?

8 A. Yes, they had been asked to provide expert input at that
9 stage.

10 Q. Not specifically in relation to excited delirium?

11 A. No.

12 Q. Right. And if we can move down the page, please.

13 So Mr Anwar was invited to comment on further
14 experts, and on 16 September he wrote to the PIRC asking
15 that the following three experts be considered for
16 instruction, Professor Crane, another pathologist,
17 Dr Lipsedge, a psychiatrist, and Professor Pounder, a
18 second pathologist?

19 A. Yes.

20 Q. Can you tell us, first of all, how common in your
21 experience is it for the family to be asked to recommend
22 experts in an investigation?

23 A. I don't think I have had experience of that. Having
24 said that, because of the particular circumstances of
25 this particular investigation, involving as it did

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1 police officers and the requirements for independence
2 and involvement of the family, I -- I appreciated that
3 that's why this was being done, but the short answer to
4 your question, I had had no previous experience of this
5 happening.

6 Q. Right. And do we see in relation to this suggestion
7 that there's now at the two pathologists who carried out
8 the postmortem, and Mr Anwar's firm have instructed
9 Nat Carey, a third pathologist, and now two further
10 pathologists are being -- have their names put forward,
11 Professor Crane and Professor Pounder?

12 A. Yes.

13 Q. Was there a need for five pathologists to be involved in
14 this investigation?

15 A. I think that's a difficult question to answer directly.
16 It was that the number of experts, whatever their title,
17 they were being asked to provide input to assist in, as
18 I said yesterday, separating out the various elements of
19 the cause of death. And as I recollect it, Mr Anwar
20 accepted that that was a course of action that was --
21 was appropriate. I hope I'm not misrepresenting that.

22 I think there was correspondence that pointed out
23 that that was -- that was something that clearly was
24 being undertaken, but he was clear that it had to
25 involve consideration of the role of restraint and any

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1 other contributing factors and, as I say, I'm very
2 confident that by this stage he had already made very
3 clear concerns about any reference in any meaningful
4 sense to excited delirium.

5 It was the role in particular of restraint, but also
6 whether there was asphyxiation in the commonly -- in the
7 common understanding, namely some form of either
8 positional asphyxiation or mechanical asphyxiation,
9 whereby there had been pressure applied to Mr Bayoh.
10 And what we had by this stage, we had the original
11 pathologist who had given a narrative cause of death and
12 that's how I termed it, a desire on the part of the
13 Lord Advocate to separate those out and then instruction
14 of two experts, one of whom had given an opinion that
15 was unexpected, if I can put it like that, and Mr Anwar
16 was, as I recollect it, keen to put forward experts that
17 he, I would assume, would be able to assist in
18 determining some of the crucial questions.

19 So whilst I know that the number of pathologists is
20 to some extent adding up here, he considered that these
21 pathologists were appropriate and had a particular
22 expertise in relation to determining issues that were
23 considered important.

24 Q. Did the crown consider the option of simply going back
25 to Dr Shearer and Dr Bouhaidar, who you've said

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1 yesterday were well regarded pathologists, and simply
2 exploring these additional issues with them, if further
3 clarification needed to be sought?

4 A. As I say, at the start of this process of this exercise,
5 my recollection is the Lord Advocate was keen to explore
6 with other experts the various elements and, in
7 particular, to seek out experts that could assist in
8 relation to potential exploration or rather exploration
9 of the behaviour of the police officers with particular
10 reference to asphyxiation.

11 Q. And in relation to Dr Lipsedge, just to be clear on
12 those three names, he was a consultant psychiatrist?

13 A. Yes, he was.

14 Q. And he was the first and only consultant psychiatrist
15 that was to be considered for instruction?

16 A. Yes.

17 Q. Was he a counterpoint to views on excited delirium
18 expressed by Dr Karch?

19 A. I don't think I would term it a counterpoint, because
20 I don't think the Inquiry should make the assumption
21 that Dr Karch's opinion was being accepted at all, but
22 rather the consultant psychiatrist was considered of
23 assistance to determining behavioural aspects in
24 relation to the incident and the effect of the
25 consumption of the drugs that were taken.

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1 Q. Thank you. And then I would like to ask you some
2 further questions. We may be assisted if we look at
3 your -- one of your answers to question 166, page 102 of
4 your PDF, and this relates to Dr Karch again and it
5 relates to comments that he made to The Sun newspaper.
6 Here we are. It's on the screen:

7 "As I recollect, I was referring to the article
8 referring to Dr Karch apparently making comments to
9 The Sun newspaper on the day of its publication and the
10 Lord Advocate was made aware. The Lord Advocate was
11 extremely displeased at the situation and expressed his
12 frustration to Mr Anwar at a meeting shortly afterwards
13 and considered that it impacted on the independence and
14 reliability of Dr Karch. Crown Counsel were aware of
15 the criticism and I consider it unlikely that
16 Crown Counsel would have placed reliance on the opinion
17 of Dr Karch."

18 So looking at that I think we've heard other
19 evidence that -- and there's other evidence available to
20 the Chair that there was a quote in the newspaper from
21 Dr Karch saying that he saw evidence of heart disease.

22 A. Yes.

23 Q. And making reference to the alleged use of steroids by
24 Mr Bayoh. And that was on 1 November 2015.

25 A. Yes.

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1 Q. This is after the report has been obtained and concerns
2 have been expressed by the family about Dr Karch.
3 You've said there the Lord Advocate was extremely
4 displeased by this.

5 A. Yes.

6 Q. And took the view it impacted on Dr Karch's independence
7 and reliability. Was there to be rehabilitation of
8 Dr Karch after this comment being made to the newspaper?

9 A. If I can phrase it like this, the crown considered that
10 in the light of all of this information that the opinion
11 of Dr Karch would be of limited assistance in reaching
12 the conclusions that it required to reach.

13 Q. And you say "limited assistance" so what would that
14 limited assistance have amounted to?

15 A. Less than de minimis.

16 Q. Thank you. Is it fair to say that the Lord Advocate no
17 longer wished to rely on the reports or views of
18 Dr Karch?

19 A. Yes, I -- I think that he made that clear and that was
20 made clear in the presence of Mr Anwar.

21 Q. Right. So from around the 1 November or within a short
22 period after that, the Lord Advocate made his views
23 clear and presumably if at the Lord Advocate, the head
24 of Crown Office, says "we don't want to rely on the
25 report of Dr Karch", is that taken seriously in

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1 Crown Office?

2 A. Yes.

3 Q. What steps did you take to ensure that no reliance would
4 be placed on the report of Dr Karch?

5 A. Well, there was general -- there was a widespread
6 awareness of the views of the Lord Advocate in respect
7 of Dr Karch.

8 Q. And is that widespread in your team as well?

9 A. I think in relation to -- yes, I consider that there was
10 within that and, yes, I do.

11 Q. And we've -- we will hear in due course -- we will
12 discuss in due course the fact that Alisdair McLeod
13 wasn't part of your team in November 2015. There's the
14 question mark about when Erin Campbell came on board
15 and, as I understand it, Ashley Edwards had not been --
16 become the dedicated advocate depute at that stage?

17 A. Yes.

18 Q. To what extent did you take steps to ensure that anyone
19 coming on to the team to help with the investigation
20 would know in the future that views had been expressed
21 by the Lord Advocate about Dr Karch?

22 A. Sorry, I can't recollect anything specific in relation
23 to -- in relation to that.

24 Q. Did you put any warning on the report in the file or a
25 notice on the front of the file or some sort of rider

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1 attached to any of the correspondence?

2 A. No.

3 Q. Did you assume that anyone becoming involved in the
4 investigation would know about at the issues with
5 Dr Karch?

6 A. At the time, everybody was aware of the situation with
7 Dr Karch.

8 Q. You've said there:

9 "Crown Counsel were aware of the criticism and I
10 consider it unlikely that Crown Counsel would have
11 placed reliance on the opinion of Dr Karch."

12 As I understood it, Crown Counsel, Ashley Edwards,
13 who became the dedicated advocate depute in the
14 investigation, had not been appointed to that role in
15 this period round about November 2015. How were you
16 satisfied that she was aware or became aware at the
17 point she was involved in the investigation, became
18 aware of the criticism in regards to Dr Karch?

19 A. I'm sorry. I don't have a recollection in relation to
20 that.

21 Q. Did you take any steps to draw this to her attention
22 when she did become involved?

23 A. I don't recollect any and maybe that was an assumption
24 on my part.

25 Q. There's evidence available to the Chair that Ms Edwards

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1 was not aware of any issues relating to Dr Karch or if
2 she was, she doesn't now recall. She's not aware of
3 either of the relevant Lord Advocate's held views with
4 regard to Dr Karch and the only information she used to
5 assist her understanding of Dr Karch's opinion was the
6 opinions of the other experts in the investigation.

7 So it would appear that she did -- did not know
8 about these concerns, did not know about the concerns
9 expressed by the Lord Advocate and the view taken by the
10 Lord Advocate, and had read the opinion of Dr Karch.

11 Does that cause you some concern looking now with
12 hindsight?

13 A. I don't know that -- well, I think there's a number of
14 considerations there. It's obviously regrettable if
15 there wasn't widespread awareness of that, because it
16 was more than widely known within the investigative
17 team.

18 With regard to the opinion of Dr Karch, I'm
19 confident that during the course of the inquiry the
20 views of Dr Karch were entirely at odds with every other
21 expert who expressed an opinion and that, in particular,
22 although I know Dr Karch made reference to excited
23 delirium, he also made reference to, as I think you
24 mentioned there, very clearly to apparent heart disease
25 and that he noted evidence of heart disease and that

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1 subsequent to experts who had a specific expertise in
2 respect of that indicated that there was no evidence of
3 that whatsoever. And indeed my recollection is that not
4 only they confirmed that, but the original pathologist
5 confirmed that.

6 So we had a situation whereby Dr Karch was
7 expressing an opinion that it was entirely at odds with
8 every other opinion that had been expressed. So to that
9 extent I consider -- that is partly why I expressed in
10 my view that I think it highly unlikely that
11 Crown Counsel would have placed any reliance on the
12 evidence of the opinion of Dr Karch.

13 Q. Can you think of a way in the future to draw attention
14 to members of Crown Office staff to specific concerns
15 being raised by the Lord Advocate about individual
16 experts or other matters? Is there a mechanism whereby
17 that could be -- that a warning could be retained on the
18 file or something could be used to draw that to their
19 attention?

20 A. I could give that some consideration. I -- the
21 situation is that once -- to some extent, once a report
22 is brought into existence, it's in existence and,
23 although the Lord Advocate was expressing extreme
24 frustration, that was in the moment, because I think he
25 was expressing frustration from the time -- at the time

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1 that the specific newspaper article had appeared so
2 there was -- frustration was perhaps an understatement
3 as to how he felt in relation to this.

4 But depending on further procedure, there would be
5 disclosure issues in respect of a report that even --
6 that had been obtained. So to some extent that would
7 have to be factored, I think, into anything, but clearly
8 in respect of comment by the Lord Advocate as regards
9 what his wishes were at that time in respect of it
10 instruction of the report, there could be some form of
11 recording that would have made that clear.

12 Q. All right. I'm conscious of the time at the moment.

13 LORD BRACADALE: Take a 15-minute break.

14 (3.02 pm)

15 (A short break)

16 LORD BRACADALE: Ms Grahame.

17 MS GRAHAME: Thank you.

18 A. I wonder if there's something that I could just add in
19 respect of it questioning just before we broke.

20 Q. Of course.

21 A. The questions you were asking me about the impact of
22 Professor Karch on Crown Counsel and decision-making and
23 reflecting the fact that there is evidence before
24 the Inquiry that some of the team, including
25 Crown Counsel, weren't aware of the Lord Advocate's

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1 views.

2 I think I did allude to this yesterday, but in
3 respect of the impact that Professor Karch or Dr Karch's
4 opinion could have had, as I said yesterday, for the
5 purposes of decision-making at each point Crown Counsel
6 made the assumption that the causal link was
7 established. So to that extent it couldn't have had any
8 impact on Crown Counsel's decision-making.

9 Q. Certainly not in relation to the cause of death. Leave
10 it is that.

11 We were talking -- we're talking about period 2, the
12 year between August 2015 and August 2016.

13 A. Yes.

14 Q. And during this particular year, I think, the Inquiry is
15 aware that a further six experts were formally
16 instructed between 13 November 2015 and then the final
17 report I think was obtained in May of 2016. So during
18 that period experts were being instructed and producing
19 their reports.

20 A. Yes.

21 Q. And they were Dr Lipsedge, who we've heard was a
22 psychiatrist?

23 A. Yes.

24 Q. Professor Mary Sheppard, who you actually mentioned just
25 before the break, who we've heard was a cardiovascular

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1 pathologist. Dr John Parkes, a psychologist.

2 Dr Anthony Bleetman, a doctor in emergency medicine.

3 Dr Elizabeth Soilleux, I'm sure I have pronounced that
4 incorrectly.

5 A. That is the correct pronunciation.

6 Q. Oh, is it? Thank you. She was a histopathologist who
7 was looking into issues regarding sickle cell anaemia?

8 A. Not at that stage.

9 Q. Right.

10 A. My recollection is that both Dr Sheppard and Dr Soilleux
11 were instructed in respect of the heart, whether there
12 was any underlying issue with the heart, and the effect
13 of drugs on the heart and, in particular, the comment by
14 Dr Payne-James in his report that the expert opinion
15 of -- in relation to that that and a cardiac specialist
16 should be sought. That to my recollection was the
17 reasoning behind the instruction of Dr Mary Sheppard and
18 Elizabeth Soilleux.

19 Q. I apologise. So it wasn't until a later stage --

20 A. It was.

21 Q. -- that Dr Soilleux then started to look at sickle cell?

22 A. Yes.

23 Q. Thank you.

24 And then finally, the sixth expert was

25 Professor Jack Crane, who we mentioned before the break,

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- 1 and was a forensic pathologist also?
- 2 A. Yes.
- 3 Q. Thinking about that period between August '15 and
4 August '16 when the final report was prepared, can you
5 tell us in your experience, not prior to the
6 investigation of Mr Bayoh, but just generally your
7 experience as head of CAAPD, was that period of a
8 further year, having obtained the first PIRC report,
9 until obtaining the final PIRC report, how common was it
10 for a further year to elapse before the final PIRC
11 report was available?
- 12 A. If I can put it this way, and I'm thinking back, I don't
13 recollect any other case where there was a period of
14 that length.
- 15 Q. And we've heard some evidence from PIRC witnesses, and
16 again I'm summarising here, that the reason for that
17 period of an additional year until the final PIRC report
18 was sent in was because of the extensive additional
19 instructions that had intent to PIRC by the crown,
20 starting with your letter of 2 September, 2015, and that
21 that caused that delay before the final report was
22 prepared and I wonder if you have any comments on that?
- 23 A. I think it's important to bear in mind that there were
24 other aspects of this investigation that PIRC were asked
25 to investigate. There were obviously investigations in

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1 relation to data protection, from a variety of aspects.
2 There were instructions to investigate material that
3 was -- that was held by Police Scotland. There was the
4 instruction, obviously, to investigate the sending of
5 texts and, in particular, whether there was a connection
6 in relation to the sending of those texts. There was
7 consideration of whether there had been an attempt to
8 pervert the course of justice.

9 All of those, to my recollection, were aspects of
10 the investigation as well as the core incident on 3 May.
11 So to that extent, it was -- it was -- there were
12 various elements to the investigation. That's the only
13 comment I would make in respect of it.

14 Q. So in terms of that period, did you have any concerns
15 about the additional one-year period being required for
16 PIRC to complete an investigation?

17 A. Obviously, one would hope to get the report as quickly
18 as possible, but that's the only comment I would make in
19 respect of that.

20 Q. Were you satisfied that you did get the final report as
21 quickly as possible?

22 A. I think that's quite a difficult question for me to
23 answer. Obviously, we got it when we -- when it was
24 submitted, when it was approved for submission, because
25 I think there is a checking process that goes on in

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1 PIRC, but I -- I don't -- I don't recollect any
2 particular representations being made by PIRC in respect
3 of them, you know, considering that there would be a
4 significant delay.

5 Q. Right. And did you consider that this was a delay which
6 caused concern to the crown?

7 A. Well, as I say, I am mindful of the fact that it
8 would -- it caused concern because of the impact that it
9 probably would have on others, in particular the family
10 of Sheku Bayoh, and the clear interest that they would
11 have in this progressing as expeditiously as possible.

12 Q. And we looked at the crown relationship with the family
13 and engagement with the family in the earlier period?

14 A. Yes.

15 Q. During this period, I think the Inquiry has information
16 available that there were four meetings in Crown Office,
17 26 August 2015, 8 October 2015 and 5 November 2015, and
18 then a further one in 2016, 9 May 2016.

19 Frank Mulholland was the Lord Advocate during that
20 entire period. James Wolf didn't become Lord Advocate
21 until later.

22 Did this period of one year while you waited for the
23 final PIRC report have an impact on the crown
24 relationship with the family?

25 A. Again, I can only give my own impression --

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- 1 Q. Yes.
- 2 A. -- in respect of that. I think there was every attempt
3 to keep the family advised as to what was happening in
4 general terms, even although the investigation was with
5 the PIRC, that the intention was to reassure them that
6 it remained a priority in the sense that the law
7 officers and the core team were pursuing the case and
8 that it was -- it was still something that was high on
9 the agenda, if I can put it that way.
- 10 Q. All right. And could there -- any more have been done
11 by the crown? In the interest of minimising any delays
12 or the duration of the investigation, was there anything
13 more that could have been done by the crown to keep that
14 period as short as possible, perhaps shorter than it
15 was, looking back now?
- 16 A. I'm afraid there's nothing springs to mind at the
17 moment.
- 18 Q. All right. I would like to move on to, again, focusing
19 on the race investigation and Article 14 again in
20 relation to this period of around one year. By this
21 stage, the crown have raised the issue of race
22 specifically, because after the first report from the
23 PIRC your letter of 2 September specifically raised that
24 issue --
- 25 A. Yes.

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1 Q. -- with them. And you have given evidence earlier today
2 that the Lord Advocate was clear that considerations of
3 race would have to be a focus and race was central to
4 the investigation.

5 We have heard evidence from PIRC, under reference to
6 the log, the decision log, that we've looked at a couple
7 of times today and evidence in regard to this by the
8 lead investigator, Mr McSporrان.

9 And again, to summarise that evidence that we've
10 heard, it would appear that PIRC were investigating
11 racism in Fife, in particular in relation to individual
12 officers' text messages and whether there had been
13 contact with the attending officers. PIRC were
14 investigating the Professional Standards Department
15 records of officers who were involved in the incident
16 looking for areas where allegations of racism,
17 discrimination, discriminatory behaviour appeared and
18 they were also examining the history of PC Paton, one of
19 the individual officers who attended.

20 It would appear, and this will be a matter for
21 submission for the Chair, but it would appear that
22 perhaps PIRC did not go much beyond the instruct --
23 specific instructions that the crown had given to PIRC?

24 A. Yes.

25 Q. Now, you've explained earlier today that you gave a

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1 general -- you made a general comment and you raised it
2 generally and you would have had expectations on PIRC
3 that they would -- can I use the phrase -- pick that up
4 and then pursue lines of investigation that they saw
5 appropriate. But it does appear that they stuck to
6 within your specific instructions which came I think --

7 A. Yes.

8 Q. -- we looked at from the concerns of the family?

9 A. Yes, and I know I've referred to concerns of the family,
10 but there was an expectation that the PIRC were engaging
11 with the family actively and were in a position to
12 respond in particular to the concerns that we had in
13 relation to race but, yes.

14 Q. Right. I think earlier in your evidence you said there
15 had been a breakdown in the relationship between the
16 family and PIRC by this stage?

17 A. We were advised that, yes.

18 Q. You were advised of that. So you knew that that
19 relationship had broken down.

20 A. Well, we had been advised, I think by Mr Anwar, that
21 their relationship had broken down. I mean
22 relationships can fluctuate. I mean you can take steps
23 to repair a relationship or to build one up again. So
24 I know that's a generality, but I wasn't proceeding, and
25 I don't think the team were proceeding, on the

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1 instruction that it was -- it was -- it could not be
2 repaired.

3 And certainly, as I recollect, I don't think I'm
4 wrong in relation to this, at the time that that letter
5 was sent on 2 September, that was sent I think
6 deliberately at that time as quickly as possible because
7 a meeting with the PIRC and the family was due to take
8 place within the next few days. I hope I'm not wrong
9 about that, but I seem to recollect correspondence that
10 indicated that that was about to happen.

11 So that was an opportunity to perhaps reset, because
12 there had been correspondence, there had been an
13 instruction and detailed instructions from the
14 Lord Advocate, at that stage, and Mr Anwar knew that
15 there had been that meeting and that further
16 instruction, because I recollect that there was
17 correspondence that was sent to him to advise him of
18 that and that correspondence I'm pretty sure included
19 reference to the reminder about race.

20 Q. I would like to ask you if you accept from me for the
21 moment that perhaps the scope of the PIRC investigation
22 during this period in relation to race was very much in
23 line with the --

24 A. Yes.

25 Q. -- the crown instructions?

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1 A. Yes.

2 Q. And there was no real line of investigation developed or
3 pursued by PIRC that beyond the four walls of the crown
4 instructions. Would that -- were you aware of that,
5 that the PIRC approach was limited to the crown
6 instruction?

7 A. No, and I do make reference to some discussions that
8 took place and some further correspondence that I'm sure
9 you're aware of that did make further reference to race.

10 Q. Had you known that the PIRC investigation would be so
11 restricted to the crown investigation, the crown letter
12 of instruction, would that have caused you concern
13 during that year period that we're looking at?

14 A. I think one of my -- my concerns subsequent to the
15 sending of that letter was that the considerations of
16 race had to -- had to address, had to consider the
17 actions of the officers at the scene and what their --
18 what aspects of the behaviour was relevant to that line
19 of enquiry, whether it had any influence of race,
20 irrespective of -- the term was "overt racism" --
21 whether any other factor linked to race had affected
22 their overall approach to dealing with Sheku Bayoh.

23 Q. Do you feel that you communicated that desire to PIRC in
24 correspondence or in communications?

25 A. Well, I did make reference to the distinction between

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1 overt racism and what I termed in my statement "implicit
2 bias" in the sense of had -- had attitudes or beliefs or
3 perceptions been influenced by race. I do recollect,
4 because it's certainly in the correspondence, that there
5 was reference to the perception that this might be a
6 terrorist incident, and I well appreciate how offensive
7 that will appear to the family, but there was reference
8 to that. From my perspective, that was something that
9 was clear and obvious and had a link to the Inquiry.

10 Q. That wasn't in the 2 September letter, but that was in
11 subsequent correspondence during this period.

12 A. It was in correspondence and it was in a conversation or
13 rather a discussion, about which there was a note a file
14 note that I've referred to in my statement.

15 Q. Right. We'll come to your statement in a moment. Let's
16 look. As well as those instructions had been given, you
17 had also instructed PIRC to undertake an audit of
18 Police Scotland's IT systems that were operational and
19 determine if an officer had unlawfully accessed the data
20 of certain persons that were named in a letter or
21 letters sent by Mr Aamer Anwar. We've heard evidence
22 about that.

23 A. Yes.

24 Q. As part of that instruction to look at the actions of
25 the officers, did you consider instructing PIRC to

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1 consider the -- whether there were any unlawfully
2 accessed data searches and to consider the racial
3 implications of any searches?

4 A. I don't recollect any specific instruction in respect of
5 that.

6 Q. Right. Looking back now, do you think that would have
7 been an appropriate instruction for the crown to give
8 PIRC to consider the racial implications of those
9 searches?

10 A. I think that would have been a consideration depending
11 on the results of the actual examination as to whether,
12 first of all, there had been any access and, secondly,
13 what the reasoning had been for that.

14 Q. And we've heard evidence that there were searches
15 carried out in relation to Mr Anwar himself and there
16 was a classification of data that had been recovered?

17 A. Yes.

18 Q. In light of that, when you became aware of that, did you
19 consider instructing PIRC to carry out some sort of
20 analysis or assessment of the racial implications of any
21 of that information?

22 A. I think in respect of that particular aspect, the focus
23 of the crown concerns, and they were very clear concerns
24 on the part of the whole of the crown, including the law
25 officers, that the focus of that should be to ascertain

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1 the basis upon which that information was held and
2 whether there was any -- whether there was anything more
3 to be seen in the light of the way that that information
4 had apparently been recorded.

5 And I think I have referred to in my statement that
6 PIRC were instructed to explore that, but that shortly
7 after that a decision was taken, which I was aware of,
8 by others at Crown Office that the most appropriate way
9 to pursue these, and the most effective way to pursue
10 these, was through at the office of the
11 Information Commissioner and that was an ongoing
12 investigation.

13 Q. But in relation to the obligations on Crown Office in
14 relation to Article 14, and not just on Crown Office but
15 on PIRC, was there consideration given to exploring the
16 racial implications of this information, not just from
17 the point of view of whether there was or was not
18 criminality, but whether there were any racial
19 implications in terms of Article 14?

20 A. As I say, I don't -- there wasn't a specific
21 instruction. I don't recollect that that particular
22 consideration was something that was put forward at that
23 time, but depending on the results of that, then it's
24 entirely possible that that would then become a focus of
25 the subsequent investigation, but at that stage it

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1 was -- it was focused on finding out what the
2 situation -- what the factual position was.

3 Q. So in fact no Article 14 issues were pursued in relation
4 to that matter at that time?

5 A. I don't recollect there being -- that being a focus.

6 Q. Right. And in relation -- we've talked briefly about
7 excited delirium and its appearance in the opinions of
8 Dr Karch and Dr Payne-James. We've talked about the
9 concerns of the family, particularly in relation to
10 Dr Karch, I think you said.

11 Was there any instruction given or consideration
12 given to considering the racial complications of excited
13 delirium as part of your Article 14 investigation?

14 A. No I don't recollect any -- this would be some form of
15 consideration as to excited delirium in relation to a
16 link in racial cases.

17 Q. Yes. We've heard some evidence, primarily from
18 Dr Lipsedge, to the Inquiry that in fact there are
19 racial routes and implications in relation to that and
20 the way it has traditionally been used as a cause of
21 death in relation to black men who have died at the
22 hands of the police and that that is used as a mechanism
23 whereby the use of force and the -- and the consequences
24 of use of force in the cause of death are minimised in
25 favour of pursuing a line of excited delirium and a

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1 narrative that presents that as a cause of death and I
2 think that's my summary of evidence that we've heard.

3 A. I -- that was not something that neither I nor anybody
4 else was aware of and to that extent there wasn't any
5 exploration of that aspect.

6 Q. Right.

7 A. (inaudible).

8 Q. In terms of the obligations on the crown under
9 Article 14 in conjunction with Article 2 what steps were
10 the crown taking during this period of a year between
11 the two reports two comply with obligations under
12 Article 14?

13 A. I think the position of the crown was that it was -- it
14 was attempting to provide further instruction to the
15 PIRC and the various elements that PIRC were being
16 directed to investigate, including race, and that the
17 report that PIRC were -- would ultimately produce would
18 be assessed in the light of all of the instructions that
19 had been given, but in effect the investigation I
20 suppose was back with PIRC at that stage.

21 Q. Right. So in a sense when you say "back with PIRC" were
22 the responsibilities and actions in relation to
23 Article 14, were they being carried out more by PIRC at
24 that time?

25 A. Well, I think the obligations in respect of the

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1 investigation had substantially transferred back to PIRC
2 in the light of the fact that they were -- they were in
3 effect going to produce their -- what became their final
4 report but their second report.

5 Q. And in terms of your perspective, did that --
6 "alleviate" is probably not the right word -- but did
7 that release the crown from their obligations under
8 Article 14, because they had handed over that baton to
9 PIRC?

10 A. I think the position would be that the crown has got
11 that obligation that it doesn't shift back and forward.
12 I think both organisations have got obligation, but
13 looking to the practicalities of the situation where
14 PIRC had been instructed to carry out significant
15 further inquiries and, take it back to the point, I
16 don't recollect any indication as to how long it was
17 anticipated that those would take, but in effect they
18 took a year, that that was the -- that was the direction
19 that I was aware personally. Whether there was other
20 consideration going on elsewhere in the organisation,
21 I don't know, but that was what was happening at that
22 stage.

23 Q. So in terms of the crown's obligations in terms of
24 Article 14 in conjunction with Article 2, the way in
25 which the crown was endeavouring to comply with those

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1 obligations was demonstrated by the instructions to PIRC
2 that were being given during that period?

3 A. Yes, the overall investigation that at that stage that
4 was being actively pursued by the PIRC with the
5 intention of submitting a full report to the crown as
6 quickly as possible.

7 Q. And if there were any others in Crown Office taking
8 additional steps to comply with Article 14, Article 2,
9 would you have anticipated that they would have informed
10 you of any other additional steps, because you had
11 oversight of the whole investigation?

12 A. Yes, I think that that would be the case. If there was
13 anything that was affecting the investigation, the
14 chances are I would know about it, although, as I said
15 just a second ago, in relation to the enquiries with the
16 Information Commissioner or Commissioner's office that
17 was something that I was not directly engaged in, that
18 was taken at a pretty senior level at Crown Office, and
19 there were some meetings, I'm confident, that took place
20 with the Commissioner where I was not present and that
21 certainly was one of them, because I know
22 that the Commissioner was present at that meeting.

23 Q. Can I leave aside the Information Commissioner aspect
24 for a moment?

25 A. Yes.

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1 Q. But did any others in Crown Office come to you during
2 that period in saying -- and say "We are also doing X, Y
3 and Z" whatever it may be. You might want to know about
4 this because this is in furtherance of Article 14 or
5 Article 2? Did anyone come along and say anything like
6 that during that year?

7 A. Not that I recollect.

8 Q. Right. Looking at the Information Commissioner element,
9 and this is the audit being undertaken or PIRC were
10 instructed to undertake an audit, we've heard that that
11 was ultimately done by Police Scotland, were you aware
12 that Police Scotland carried out the audit we've heard
13 for security reasons?

14 A. I'm sorry. I think -- what audit is you're referring
15 to?

16 Q. Your instruction to PIRC in relation to the database
17 searches you asked PIRC to conduct. The word that was
18 used in evidence was "audit".

19 A. Yes.

20 Q. To assess those database searches. That was a concern
21 that was expressed by Aamer Anwar --

22 A. With the list of names.

23 Q. -- with the list of names.

24 A. Yes.

25 Q. And you then instructed PIRC to do an audit of that?

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- 1 A. Yes, that wasn't -- I'm sorry.
- 2 Q. Sorry, no.
- 3 A. That wasn't so much the Information Commissioner's
4 Office concern. That was something separate.
- 5 Q. Yes.
- 6 A. But in relation to the audit in relation to the
7 access -- whether there was evidence of unauthorised
8 access to the list of names that Mr Anwar provided, your
9 question is, was I aware that Police Scotland carried
10 those out?
- 11 Q. Mm-hm.
- 12 A. I don't recollect that I was.
- 13 Q. Would that have been of concern to you in relation to
14 thinking about the comments we discussed yesterday about
15 the importance of independence to an Article 2
16 investigation?
- 17 A. Yes, it would be. For the same reasons as I tried to
18 articulate yesterday, the focus on independence and the
19 perception of independence are of crucial importance
20 and, thinking out loud in respect of that, the
21 consequence of that, how can PIRC assure themselves that
22 the check had been carried out accurately.
- 23 Q. And having commenced this investigation as part of the
24 crown instruction, one of the names on the list was
25 Mr Anwar?

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1 A. Yes.

2 Q. And that then led on to the situation with the
3 Information Commissioner, as I understand it.

4 A. Yes.

5 Q. And I think earlier when I was asking about this you
6 said there was -- and forgive me if I'm misrepresenting.
7 I don't have access to the transcript at the moment --
8 that there was not any aspect of that part of the PIRC
9 investigation where you asked them to consider racial
10 implications or Article 14 implications in relation to
11 the Aamer Anwar intelligence?

12 A. No.

13 Q. So in fact, in terms of an Article 14 compliant
14 investigation, this aspect of the PIRC investigation had
15 nothing to do with Article 14 in terms of no
16 instructions from the crown to investigate the racial
17 implications, whatever they may be?

18 A. And we're talking about the --

19 Q. Intel with Mr Anwar?

20 A. Mr Anwar.

21 Q. And the data searches and that aspect?

22 A. Yes.

23 Q. So do you agree that that wasn't part of any Article 14?

24 A. There wasn't consideration at that stage. The focus, as
25 I said, was on trying to establish the factual position

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1 in respect of that.

2 Q. All right. So as the PIRC investigation is carried out
3 during this one-year period to complete their final
4 report, I wonder if we can go back to look at paragraph
5 102 of your Inquiry statement. I stopped you earlier at
6 the point where you said you were moving on in terms of
7 chronology so I'm looking at paragraph 102 and we had
8 looked at the early parts of that and this spans a
9 number of pages, you'll recall. So it's 102. As I say
10 it does cover a number of pages here. There we are and
11 you'll recollect that it's began:

12 "The issue of race was central to the ongoing
13 investigation."

14 And we looked at that earlier and if we can move
15 down, you were talking about PIRC provided assurance
16 prior to the submission of the first report.

17 A. Yes.

18 Q. That if racial motivation was identified in the course
19 of the investigation, this would immediately be referred
20 to the Lord Advocate and race was clearly within the
21 scope of their considerations --

22 A. Yes.

23 Q. -- during the first part of their investigations.

24 And then:

25 "Following my meeting with Inquest and the

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1 interaction with the family following submission of the
2 first PIRC report, I submitted a full analysis in a
3 briefing to the Lord Advocate and referred to the
4 Sean Rigg investigation."

5 So this is the point within paragraph 102 of your
6 statement where you start to talk about a period after
7 you have received the first PIRC report and before the
8 final report has been received.

9 So let's look through this paragraph, please. You
10 say:

11 "It also identified these are areas of further
12 enquiry that require to be undertaken by PIRC before a
13 decision could be taken on whether there was evidence of
14 criminality."

15 And is that a reference really to your 2 September
16 letter that we've looked at in some detail?

17 A. Yes.

18 Q. "The issue of race was specifically highlighted in my
19 letter of further instruction to PIRC asking for
20 confirmation that race and whether there was evidence of
21 racial motivation was a primary focus of their
22 investigation."

23 And then you say:

24 "My recollection is that at the meeting attended by
25 Stephen McGowan at myself with PIRC in October 2015 that

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1 is referred to in the file note. There was discussion
2 regarding the approach to racial matters."

3 And is this the meeting that you mentioned shortly a
4 moment ago?

5 A. Yes.

6 Q. Where there was a meeting with PIRC about racial matters
7 between you and Stephen McGowan in the October, in the
8 month after your letter?

9 A. Yes.

10 Q. "My intention was to make clear that whilst evidence of
11 overt racial motivation was to be investigated that
12 there required to be consideration by PIRC of implicit
13 bias in the sense of whether the approach of officers
14 was in any way, including in an unconscious way,
15 influenced by race."

16 A. Yes.

17 Q. And do you feel that you were able to communicate that
18 effectively to PIRC at that meeting, that that was your
19 desire from the perspective of the crown?

20 A. Yes.

21 Q. That this investigation by PIRC would not just be simply
22 in relation to overt or obvious matters, but would look
23 beneath the surface and actually consider things such as
24 implicit bias?

25 A. Yes.

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- 1 Q. And was there discussion about how that would be
2 achieved at that meeting?
- 3 A. I don't recollect specifically any discussion in
4 relation to that.
- 5 Q. Were you asked any questions by PIRC at that meeting
6 about how they would go about investigating implicit
7 bias?
- 8 A. I'm sorry. I have reflected, because coming to give
9 evidence and I don't -- I don't recollect the detail
10 beyond what's contained within the file note.
- 11 Q. Right.
- 12 A. But what I do recollect was that I was -- I took the
13 decision to raise this at that meeting in order to make
14 the point that it did require to focus on the incident
15 and that evidence of overt racism was not an end of
16 racial consideration.
- 17 Q. Right. From your recollection did Stephen McGowan
18 provide any further guidance to PIRC in relation to how
19 he saw the investigation?
- 20 A. No, I don't.
- 21 Q. Were any examples given to PIRC about things that could
22 be considered?
- 23 A. I can't clearly recollect whether there was. I know
24 that my later correspondence did refer to the perception
25 of terrorist threats so it's entirely possible that I

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1 highlighted that and the reason I mention that here
2 today is that to me that was the -- that was the
3 clearest factual example of the type of thing that I was
4 talking about.

5 Q. Was there discussion about analysing the language and
6 comments made within the statements of the officers on
7 4 June?

8 A. No, I don't think there was.

9 Q. Had you had an opportunity to read those statements by
10 that -- the date of that meeting?

11 A. I can't recollect if at the date of that meeting I had.

12 Q. Were there any other examples given about lines of
13 enquiry that could perhaps have been pursued in relation
14 to issues of race and racial motivation, particularly
15 regarding the events at Hayfield Road, or trying to
16 determine if there was any type of racial motivation on
17 the part of the officers?

18 A. I don't recollect any detailed questioning or discussion
19 in respect of this. But as I say, my thinking at that
20 time was that there required to be that analysis of the
21 situation provided and I did it.

22 Q. Was there any discussion about how inferences could
23 perhaps be drawn, inferences about race or racial
24 motivation?

25 A. No, I don't -- I don't recollect anything in relation to

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1 that.

2 Q. Was there any other consideration to the speed at which
3 events occurred and the speed at which officers elected
4 to use force in the circumstances and whether that could
5 give rise to any inferences of racial motivation?

6 A. No, I don't, I don't recollect any -- that -- it being
7 put in that way.

8 Q. Was there ever any consideration or discussion at that
9 meeting about whether PIRC should go back to the police
10 officers and seek further statements?

11 A. I don't think there was any discussion in respect of
12 that, but that was a course of action that I -- with
13 hindsight, I think was open to PIRC and may well have
14 been appropriate.

15 Q. We've heard that there were no race questions in the
16 witness interview strategy and although matters
17 impacting on race may have appeared in the statements,
18 there was no particular probing in those 4 June
19 statements. So would that -- was it ever considered
20 that might be a useful line of investigation?

21 A. With hindsight, it would be a useful investigation but I
22 don't recollect any -- any detailed discussion in
23 respect of that.

24 Q. Would there have been anything stopping PIRC going back
25 to the officers and asking if they would give a further

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1 statement specifically about race and racial motivation?

2 A. No, I don't. Having regard to the stage that the
3 investigation had reached, because it was -- PIRC
4 already had the whole investigation or rather the
5 further work to be carried out and the expectation was
6 that they would -- they would -- they would be in a
7 position to progress that and I don't think there was
8 anything to stop them making enquiry of officers as
9 regards what their state of mind and their rationale
10 and, in particular, I suppose in relation to the
11 terrorist threat as to why they made that connection,
12 what were the factors they took into account and I
13 suppose the obvious question, although I don't think
14 this -- I don't recollect this being articulated at the
15 time, where you would say: well, would you think that
16 all the time or what was it about this incident that
17 made you make that connection?

18 Q. Perhaps considering whether a comparator, a hypothetical
19 comparator, what approach may they have taken if
20 Mr Bayoh had been white. Was there any discussion about
21 using a white man as a comparator?

22 A. Yes.

23 Q. There was discussion about --

24 A. No, I'm sorry. I accept that that would be one way of
25 approaching, but there wasn't any discussion about that.

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1 Q. Was there any discussion about whether less forceful
2 options would have been open to the officers and were
3 precluded and whether that could be probed and
4 considered?

5 A. I don't recollect any discussion in respect of that.

6 Q. Can we move down, please:

7 "That clarification was also provided in my letter
8 of 13 January 2016."

9 So that's around three months later. The meeting is
10 in October, this letter is in January and this is to
11 John Mitchell, director of the operations, that referred
12 to earlier discussions and sought to draw the same
13 distinction between overt racism and the overall
14 approach to the incident, including whether they
15 considered that the incident was potentially terror
16 related.

17 And so is this is the point at which you raised --
18 specifically raised that connection with the
19 terror-related matter?

20 A. Yes, so -- sorry. I was referring to the distinction
21 between overt racism and the overall approach to the
22 incident, including as one example whether they
23 considered the incident was terror related. So that was
24 one example of the overall approach to the incident.

25 Q. And this is January 2016?

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- 1 A. Yes, it would be.
- 2 Q. "I was reassured by the reply from PIRC that stated for
3 the avoidance of doubt that their report would, where
4 possible, address the issue of whether there is an
5 indication that race influenced the approach taken by
6 officers, either individually or collectively, in the
7 response to the incident."
- 8 A. Yes.
- 9 Q. And that reassurance was given to you in 2016?
- 10 A. Yes, yes it was. And I think I am quoting directly from
11 that the terms of that letter and there was no
12 indication that there was difficulties being experienced
13 or how do we do this or let's -- it was -- it was an
14 assurance. I was reassured by the reply. It said "for
15 the avoidance of doubt". That was the -- I think that
16 was the terminology used.
- 17 Q. There was an emphasis in a sense put on that.
- 18 A. Yes.
- 19 Q. And then can we move on, please:
- 20 "My advice was given against a background where it
21 was accepted that at all times race and racial
22 motivation required to be considered as a continuous
23 process as the Inquiry progressed and that an absence of
24 overt racial motivation should not be regarded as
25 determinative. Consideration of implicit bias and

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1 assumptions based on race in the overall approach
2 required to be assessed as the investigation developed
3 and the evidence was gathered."

4 So is it your understanding that where there is an
5 investigation and if it is to be compliant with
6 Article 14, that race and racial motivation should be
7 considered as a continuous process as the Inquiry
8 progressed?

9 A. Yes.

10 Q. From beginning to end?

11 A. From beginning -- yes.

12 Q. And moving on, please:

13 "The team at Crown Office would have been aware that
14 PIRC had been specifically directed to investigate
15 allegations of past racist behaviour by officers. These
16 investigations were instructed to provide potential
17 context and background to the behaviour of officers
18 during the incident and were not confined to whether a
19 separate crime could be proved."

20 I'm interested in this sentence. So when you say
21 "the team at Crown Office would have been aware", was
22 this in 2016 or generally your team would have been
23 aware?

24 A. I think I meant generally the team.

25 Q. And was this broader than just simply 2016? Were your

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1 team aware when the investigation into the death of
2 Mr Bayoh was going on, because that obviously took place
3 over a number of years?

4 A. Yes.

5 Q. Were your whole team aware that that it was -- these
6 investigations regarding racist behaviour provided
7 context and background which was relevant to the
8 behaviour of the officers at the time in Hayfield Road?

9 A. Potentially relevant.

10 Q. Potentially, yes.

11 A. It was a consideration, yes.

12 Q. But that that could provide some sort of context, some
13 sort of background to the actions taken by the officers
14 at Hayfield Road?

15 A. Potentially.

16 Q. Potentially and it wasn't simply confined to whether a
17 crime could be proved?

18 A. Yes.

19 Q. "The team were also aware that Ade Johnson had raised
20 the issue of an investigation into an alleged racist
21 behaviour by Fife officers but PIRC had been unable to
22 identify the incident until I became aware that Fife
23 officers had sent racist texts when another separate and
24 unconnected case was brought to my attention that
25 referred to such events. This resulted in an

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1 instruction to PIRC [sorry, I took my eye off the
2 screen there] this resulted in an instruction to PIRC to
3 investigate whether this was a link to any officers
4 involved in the incident on 3 May 2015 and the crown
5 office team were cited on this and analysed the results
6 in the precognition."

7 So is this at a stage where you're actually in the
8 process of carrying out the crown precognition after the
9 final PIRC report had been received?

10 A. At that stage when there's reference to the precognition
11 but in relation to that Inquiry, that was at a much
12 earlier stage, a much earlier stage, and in fact my
13 recollection is that very, very soon after the events in
14 May 2015 that there was information and as I recollect
15 it quite specific information coming from Ade Johnson
16 through Mr Anwar but also I think directly through Ade
17 Johnson himself that he recollected being involved
18 himself in some form of investigation that involved
19 officers from Fife constabulary that it had a racial
20 element and as I recollect it, he was being brought in
21 to assist the police in respect of that so there was
22 information and that was communicated, as I recollect,
23 to the PIRC and the PIRC had advised, I think
24 repeatedly, that they were unable to locate anything
25 that bore any resemblance to that. That's my

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1 recollection in relation to this. But as I said in my
2 statement, while I was working one day, there was an
3 entirely separate inquiry that had come from I think a
4 High Court case where there had been inquiry I think
5 about the whereabouts of an officer, an officer who had
6 been dismissed, and that was the focus of the -- that's
7 why it came to my attention, it was in relation to
8 whether what we knew about this officer who I think was
9 a potential witness in an entirely unconnected
10 High Court case and I had asked about what it was or
11 information had been given to me that it concerned an
12 allegation of racism and he was no longer a police
13 officer. And I had asked, "Well, where was that?" and
14 then it became apparent that it was in Fife and I
15 provided the name of that officer obviously to PIRC and
16 I immediately advised the Lord Advocate and I think
17 again it was at a meeting with the Lord Advocate that
18 I was -- I was able to say, "Well, we've found what it
19 was or apparently what it was that it was being talked
20 about".

21 Q. So it was thanks to you that that connection was made?

22 A. Well, it was by chance and I said it was by chance but I
23 certainly made the link which it had been brought to me
24 entirely by chance and I did say in my statement that I
25 thought that that did demonstrate the value of actively

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1 engaging with the family because I know that Ade Johnson
2 was very clear, it wasn't just something that he had
3 heard, he had been involved in this and to that extent
4 I was able to give the name of the investigation to
5 allow the PIRC investigation to progress but prior to
6 that, I think that the correspondence will demonstrate
7 that despite the provision of that information that
8 there was an apparent inability --

9 Q. We've heard there was no connection --

10 A. We've heard there was no connection, yes.

11 Q. I'm interested in the fact that you say PIRC couldn't
12 find anything because you've talked in your statement
13 about your view about them being very highly skilled and
14 experienced investigators. Does it surprise you that
15 they couldn't find anything?

16 A. Yes.

17 Q. Did it cause you any concern?

18 A. I think my position was that I found it surprising that
19 with the amount of information that had been conveyed
20 that I think was reasonably specific that inquiries had
21 not been able to identify that. It had -- from my
22 recollection, it had resulted in disciplinary
23 proceedings and dismissal and that was something that I
24 find puzzling.

25 Q. I'm conscious of the time now. I wonder if that might

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