

Transcript of the Sheku Bayoh Inquiry

Wednesday, 1 May 2024

(10.06 am)

FORMER LORD ADVOCATE JAMES WOLFFE KC (continued)

Examination-in-chief by MS GRAHAME (continued)

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

MS GRAHAME: Thank you, good morning, I would like to go back to something we looked at yesterday just briefly.

A. Yes, thank you. I should say there are a couple of points I'd quite like to pick up on from yesterday as well, but I'm happy to take that.

Q. All right. Let's see if they're the same points. Could we look at the letter of instruction that we looked at yesterday, COPFS 00008. This was the letter of instruction to Martin Graves, and we talked about this yesterday. If we could look at -- it's 24 January 2018, and there was a passage in bold that we looked at yesterday which I think was on page 2 of this. Here we are, yes:

"Given your expertise the crown wish to instruct you."

Do you see that?

A. Yes.

Q. And we went through that yesterday and you see the point -- so this is the instruction to Mr Graves who was the OST, or the restraint expert, and in particular

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1 the crown are seeking an opinion on:

2 "Whether the method of engagement with and restraint
3 of the deceased by officers was reasonable and
4 justifiable, taking into account the requirement for
5 their use of force to be necessary, accountable,
6 proportionate, legal and ethical."

7 And I would like to ask you about the use of this
8 phrase, "whether the method of engagement with and
9 restraint of the deceased by officers was reasonable and
10 justifiable". So he's invited to express a view on that
11 and I want to ask you, reflecting on the use of that
12 phrase, this appears to be an invitation to
13 Martin Graves to read the evidence that's provided, the
14 documentation and such like that's been provided by the
15 crown to him and to form his own judgment on the facts
16 to see whether he thinks the restraint was reasonable
17 and whether you have any thoughts on whether that
18 approach to Martin Graves is really usurping the
19 function of the court or ultimately the jury in a
20 High Court trial or whether that is in effect passing
21 the responsibility to Martin Graves to form a view which
22 is actually the function of the crown to consider
23 whether there's a sufficiency of evidence which -- from
24 which it would be open to the jury to conclude that the
25 force was not justified or whether it was justified?

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1 And I'm interested in your thoughts on whether
2 taking that approach with Mr Graves is really asking him
3 to decide the issue which would ultimately be for the
4 jury in a trial. Do you have any thoughts on the use of
5 that approach in this letter of instruction?

6 A. I suppose the first observation that I would make, and
7 this is borne of receiving reports from CAAPD in
8 relation to cases of police assault generally because,
9 you know, that was one of the types of case that CAAPD
10 dealt with is that it was and I can't say whether it was
11 routine in every such case, but I certainly saw other
12 cases where part of the work that CAAPD did was to seek
13 advice from someone with appropriate expertise about the
14 techniques of restraint, techniques of -- the techniques
15 used by police officers in particular situations in
16 order to inform the judgment of whether force used in a
17 particular case had or had not been excessive because if
18 one --

19 So the first point to make is it's not, at least in
20 the experience I had of these cases, by any means
21 unusual or out of order to instruct or to take advice
22 from somebody with experience of methods and techniques
23 of restraint.

24 Why should that be? Well, one steps back and asks
25 what's the purpose of instructing an expert or allowing

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1 opinion evidence to be led in any case. Well, the
2 purpose is to inform the decision-maker about facts and
3 circumstances or issues or matters which may not be or
4 aren't, you know, something which are in the sort of
5 common run of general knowledge and I suppose the
6 instruction of an expert to give evidence in relation to
7 restraint techniques flows from a recognition that the
8 way in which the police -- the methods available to
9 police to respond to particular situations, which may be
10 very various, you know, in a sense is -- does involve
11 specialist knowledge in the sense of understanding the
12 different techniques that could be used, understanding
13 the, you know, what the I suppose the current state of
14 the art is in terms of the way in which officers
15 approach particular situations, understanding the way
16 that officers who have had training could and should be
17 expected to respond to a particular set of
18 circumstances.

19 You know, the fact-finder, whether they be a lawyer
20 sitting in Crown Office or whether it be a member of the
21 public sitting in a jury, who's never been a police
22 officer, never had to deal with these kinds of
23 situations, may need to be informed about, you know, the
24 techniques available, as I say, what's regarded as
25 appropriate and reasonable in particular circumstances.

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1 So I suppose that's quite perhaps a slightly
2 long-winded way of explaining why I'm not surprised that
3 the crown was instructing an expert to advise on issues
4 of restraint and it's also fair to say that, you know,
5 it's an interesting point where one gets it with many
6 types of experts, you know, where's the line between the
7 expert expressing a view on the ultimate issue which is
8 for the fact-finder and the decision-maker and where --
9 you know, where's the line short of that that is
10 providing useful information that can help the
11 decision-maker?

12 I mean I suppose, speaking about expert evidence
13 generally, one would -- again, I'm perhaps not -- one
14 could think of other circumstances involving issues of
15 negligence and the like where an expert might be asked
16 to express a view on what was a reasonable course of
17 action in a particular circumstance even though that's
18 the ultimate question. The important point is that the
19 factual basis upon which the view is reached is robust
20 or if there are alternative factual scenarios that
21 that's, you know, explored and is patent in the ultimate
22 view of the expert so that the expert's opinion and the
23 basis for it can be properly scrutinised and tested,
24 first of all by the lawyer in the context of a
25 prosecution and then, ultimately, tested and scrutinised

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1 in court through the process of cross-examination.

2 Q. I'll come on to the alternative scenarios in a moment.

3 A. Yes, and I'm conscious that was one of the issues that
4 you explored with me yesterday. So you know, in terms
5 of the, you know, the overall -- the issue of principle
6 of instructing an expert on restraint, I'm, you know,
7 that I think is entirely justified and appropriate in a
8 case involving, you know, our situation and a set of
9 professional responsibilities that police officers have
10 in a situation which is not the common run of
11 experienced members of the public.

12 And perhaps, thinking of again a slightly different
13 context, in a professional negligence case one might
14 well instruct an equivalent professional to express a
15 view on whether what was done was -- by the defender in
16 a civil case was or was not consistent with what you
17 would expect from an ordinarily competent member of the
18 profession and although that's the ultimate question for
19 the court, that's evidence that is routinely led and
20 admitted.

21 Q. Right. There's a lot in there.

22 A. And it's helpful.

23 Q. So there's a lot in that answer.

24 First of all, in the way that this particular
25 instruction is framed, asking whether the method -- the

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1 restraint was reasonable, is that -- I think you would
2 agree that is really a question for the ultimate
3 fact-finder?

4 A. Well, I think the -- strictly I think the question is,
5 was excessive force used? There may be -- it's a long
6 time since I looked at the details of that law here but
7 that --

8 Q. We've heard that it is lawful, potentially, for officers
9 to use force during the course of their duties, but in
10 order for it to be lawful -- they can use force, but in
11 order to be lawful it has to be justified.

12 A. Yes.

13 Q. And that justification has to be vouched for by each
14 officer in relation to each individual use of force by
15 showing that it was reasonable, it was the absolute
16 minimum necessary, it was proportionate, and other less
17 forceful options had been perhaps tried and failed or
18 were not pursued because it was not appropriate in the
19 circumstances.

20 A. Yes.

21 Q. So that's the sort of legal framework as we understand
22 it.

23 A. Yes, and as I say in, you know, I can't remember
24 numbers, but I certainly saw reports from CAAPD, indeed
25 from Mr Brown, looking at precisely those sorts of

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1 questions in the context of allegations of police
2 assault, because you're absolute right in the context of
3 the ordinary functions a police officer, for a variety
4 of reasons an officer may require to restrain an
5 individual, they may require to use force and it's one
6 of the reasons why, you know, that question is such a
7 sensitive question because it's an unusual feature of
8 their role and responsibilities in society that they may
9 be required to do that and it's not unusual or not
10 unknown at least for individuals who are lawfully
11 restrained to view what's happened as an assault and to
12 make an allegation. That then has to be investigated
13 and that's precisely the role that CAAPD played so this
14 was a kind of issue which I certainly saw Mr Brown
15 addressing in other cases in the course of the time when
16 I was Lord Advocate.

17 Q. So if each individual use of force is not justified by
18 the officer, and whether that be because it wasn't
19 reasonable or there were less forceful options that were
20 suitable but not adopted, then if it's not justified,
21 then it's unlawful use of force.

22 And what's being asked here is whether the restraint
23 by the officers was "justifiable" is the word that's
24 used and that is effectively a decision for the ultimate
25 fact-finder whether that be a jury in the High Court or

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- 1 some other?
- 2 A. Yes, I entirely take that point.
- 3 Q. Right. In asking the witness, the expert witness, to
- 4 form a view on that, would you accept that that in
- 5 itself is effectively usurping the function of the
- 6 ultimate fact-finder?
- 7 A. I'm not sure I would use the word "usurping" and I
- 8 recognise that there is a principle of law of evidence
- 9 that, you know, I mean ultimately the ultimate question
- 10 is for the fact-finder not for any expert but, you know,
- 11 as a -- illustrate by their reference to the
- 12 professional negligence context it's not unknown, and
- 13 indeed perfectly routine in certain context, for an
- 14 expert to be asked to give a view on the ultimate
- 15 question and then of course what's really important is
- 16 that the opinion is patent, that you could see the
- 17 assumptions made, that one can test that and,
- 18 ultimately, if there are conflicting views, that the
- 19 cogency of the reasoning for one position or the other
- 20 can be tested. That's something that certainly happens
- 21 in other contexts.
- 22 Q. Can we restrict our comments to criminal proceedings?
- 23 A. Yes.
- 24 Q. Because this obviously is in relation to the crown
- 25 precognition for -- to assess criminality and,

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1 ultimately, this crown precognition was designed to look
2 at whether there should be criminal proceedings or not?

3 A. Indeed.

4 Q. And --

5 A. But the basic principles of the law of evidence are the
6 same, at least as I understand them.

7 Q. Right. You think the law of evidence in a criminal
8 trial is the same as a civil proof?

9 A. Well, I mean there are lots of specific rules to the
10 criminal context with which, you know, you and I are
11 well familiar. Some of the basic principles, for
12 example, in relation to the place of expert evidence
13 are, at least as I recall it, common.

14 Q. I would like to focus on potential criminal proceedings,
15 which is what would be looked at here. And just so
16 those listening aren't confused, you would not ask a
17 road traffic reconstruction expert if the driving had
18 been dangerous?

19 A. No.

20 Q. That would ultimately be a decision for the jury to
21 make. That would be an objectionable question if that
22 was asked.

23 A. Yes.

24 Q. So in asking an expert whether the force used in a
25 restraint was justified, whether it was reasonable, that

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- 1 would ultimately be a decision for the jury to make,
2 wouldn't it, in a trial?
- 3 A. Absolutely, yes.
- 4 Q. Thank you. Is it possible that taking this approach in
5 the letter of instruction to Mr Graves would give rise
6 to a risk or perhaps a temptation to hand over
7 responsibility for taking a view on restraint and
8 whether it was justified to the expert, asking them to
9 make that decision and then simply saying, well, we
10 accept what you have said on that, so to proceed on
11 that, rather than applying your own independent process
12 and thought; do you think that's a risk?
- 13 A. Yes, of course it's a risk and then one hopes mind is
14 supplied independently, as I say, as one would with all
15 sorts of areas of expert evidence, to the cogency of the
16 explanation, the basis upon which the opinion is
17 expressed, and, you know, test the -- testing the
18 opinion effectively.
- 19 Q. And a moment ago you talked about the importance of the
20 factual position.
- 21 A. Yes.
- 22 Q. And we talked yesterday about factual situation where
23 there were, and it was recognised by Mr Graves in the
24 body of his report that there were differing versions of
25 the factual position. And I think yesterday I drew your

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1 understanding to a part of his report where
2 PC Tomlinson, PC Smith and Mr Nelson had taken -- given
3 statements to -- to PIRC about one factual position and
4 that that was that Mr Bayoh was lying on his front with
5 PC Walker lying over his upper body and then there was
6 an alternative and different factual position presented
7 by the statement of PC Walker, where he said PC Walker
8 was on his knees with his upper body over Sheku Bayoh's
9 right shoulder with him lying on his left-hand side.

10 And I think yesterday you helpfully explained about
11 hypotheses and how one technique that lawyers can use is
12 to present alternative hypotheses so the crown does not
13 say we pick one version that is correct, but the crown
14 can explore those different scenarios, as you have said
15 earlier today. So here is one hypothesis scenario that
16 Tomlinson, Smith and Nelson are correct and they can
17 explore the implications of that factual position, but
18 they can at the same time say let's now explore an
19 alternative factual position as presented in the
20 statement of PC Walker. And it allows them to look at
21 all the possibilities and that's what you are talking
22 about yesterday with hypotheses.

23 So this technique of using hypotheses to explore
24 alternative factual positions is a recognised one that
25 lawyers can use to create effect with experts; would you

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- 1 agree with that?
- 2 A. Absolutely and indeed where there are competing
3 hypotheses of fact and ultimately one doesn't, you
4 know -- as you made the point, ultimately the factual
5 position as it will emerge at the end of a trial. You
6 know, if there's conflicting evidence there may be
7 different possibilities and you might explore with an
8 expert what the expert's view was on the different
9 outcomes for which there was a basis and one might
10 explore, as you say, a perfectly normal process of
11 engagement with an expert in certainly my own
12 professional experience.
- 13 Q. And the crown will look at whether there is a
14 sufficiency at least on one or perhaps more factual
15 hypotheses when they're considering whether to instigate
16 criminal proceedings. They'll look at whether there's a
17 sufficiency based on --
- 18 A. Indeed.
- 19 Q. And looking at that approach, what I can say is in this
20 letter of instruction there were no hypotheses or
21 alternative hypotheses suggested. What we did look at
22 yesterday was on page 7 of 12 where -- if we can look at
23 that again, in relation to the restraint, which was
24 towards the bottom of the page -- there we are. Do you
25 remember we went through this about the Snapchat

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1 footage?

2 A. Yes.

3 Q. At the very bottom:

4 "From that Snapchat footage it appears Mr Bayoh was
5 lying on the southern pavement on Hayfield Road
6 surrounded by five police officers. A sixth officer,
7 believed to be PC Walker, appears to be lying lengthwise
8 on top of or beside Mr Bayoh."

9 So there is a hypothetical or a factual hypothesis
10 presented there by the crown. There's no alternative
11 presented in that passage about the statement of
12 PC Walker, which is he was on his knees with his upper
13 body over Mr Bayoh's right shoulder.

14 Looking at that, can you see that the use of
15 hypotheses to address the situation where there are
16 differing accounts you have accepted that can be a very
17 useful technique, do you think that's a technique that
18 ought to have been used by the crown in relation to
19 exploring restraint in this investigation?

20 A. I'm conscious this is a letter of instruction and I
21 frankly can't now recall what subsequent engagement
22 there was with the expert.

23 Q. I think --

24 A. But, you know, looking at the issue at the level of
25 principle, you know, it could have been a useful way to

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1 explore the issues with the expert, particularly if
2 there were potentially alternative factual positions,
3 but ultimately, ultimately, you know, the crown has to
4 take -- take a view on the factual, you know, the
5 evidential position and whether that evidential position
6 supports criminal proceedings.

7 Q. Thank you. I think yesterday I raised with you that we
8 have a note of a consultation that took place with
9 Crown Counsel and Martin Graves and I indicated that it
10 did not -- we haven't heard yet from APCC,
11 Ashley Edwards, but we -- it did not appear on the face
12 of the consultation notes that the issue of the
13 restraint and the differing versions of what had
14 happened had been put to Mr Graves in that consultation.
15 And I think I also said to you yesterday that we have
16 also heard that there was a precognition of
17 Martin Graves by Fiona Carnan and there did not appear
18 to be this issue addressed in the notes that we have of
19 that either.

20 If we can proceed on the basis that this issue was
21 not addressed or certainly is not in the notes that we
22 have and subject to hearing further evidence on this
23 matter, if this issue of the alternative hypothesis and
24 an exploration of what was happening in the restraint
25 was not done with Martin Graves, do you think that is of

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1 concern to you that that issue was not bottomed out, for
2 want of a less colloquial expression?

3 A. Well, you have put the point to me on a number of
4 hypotheses. I think if put it this way, I mean if I
5 were meeting him, I suspect that I would want to explore
6 different hypotheses with him, assuming that there were
7 reasonable understandings of the facts, but I'm not sure
8 how far I can really go at the level of abstraction.

9 Q. Right. And two final points, you mentioned a phrase
10 earlier, I know I asked you to focus on criminal
11 proceedings, but you talked about asking an expert about
12 what an ordinarily competent member of the profession
13 might do and is it -- as part of presenting a hypothesis
14 to an expert is it also a recognised technique that you
15 can ask what would an ordinarily competent person or a
16 person who is complying with all their training and
17 their ethical obligations and their legal obligations,
18 what would that person do or what was the range of
19 possibilities open to that person in that particular
20 factual hypothesis? Is that also a recognised approach?

21 A. Absolutely. Even though you might be asking the expert
22 to express a view on what's the ultimate question, it's
23 helpful in terms of, you know, one's own understanding
24 of -- as you I think it's implicit in your question
25 recognise that in many situations there may be a range

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1 of responses which are -- I'm speaking again entirely
2 generally not necessarily to this case -- there may be a
3 range of responses which are within the bounds of
4 acceptability and the question is whether what's been
5 done exceeds those bounds in the context of particular
6 legal rules that one is looking at that.

7 Q. Thank you. And can I ask, when you were Lord Advocate,
8 was there training given to members of staff who were
9 engaging with the experts in not just this scenario but
10 a number of different scenarios, because this can be
11 difficult and complicated dealing with experts and was
12 there training given to staff to assist them with
13 identifying the right questions to ask and a good
14 approach to take with experts?

15 A. I'm afraid I don't know whether there was training at
16 that time, I. Think you showed me yesterday a piece of
17 guidance on engagement with the experts and I made the
18 point that that would be guidance directed at staff at
19 all levels. When it comes to experienced Crown Counsel,
20 one is dealing with people with a very substantial
21 amount of professional experience and expertise in
22 dealing with all sorts of evidence and including expert
23 evidence.

24 That's not to say that any of us -- all of us can
25 benefit from training and, you know, reflection on our

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1 practice but, you know, I would expect experienced
2 Crown Counsel to be well familiar with different ways of
3 engaging with experts and, you know, the nature of the
4 issues that one might want to explore with an expert.
5 And I would also expect, you know, an experienced
6 procurator fiscal to have also had experience over their
7 career of dealing with experts in a range of contexts.

8 Now, as I say that's not to diminish the value of
9 training or diminish the value of reflecting on one's
10 professional practice in any context at any level, you
11 know, we all do that I hope, all the time, but, you
12 know, in this case I had, you know, a highly experienced
13 prosecutor who will have dealt over her career, I would
14 expect, with a wide range of experts in all sorts of
15 contexts and be very familiar and comfortable with the
16 ways of handling an expert. But you'll have to ask her
17 what she did, you know, in terms of, you know,
18 factually.

19 Q. Thank you. So to go back to what we were saying earlier
20 to sum this up, although I think you agreed you would
21 not ask a road traffic reconstruction expert whether the
22 driving was dangerous, you could ask that expert how
23 would a careful or a reasonably careful driver drive
24 along the road where the speed limit is 60mph, it's
25 pouring with rain, it's a Thursday afternoon, the road

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1 goes through the middle of town and there's lots of
2 members of the public. So you could present a factual
3 scenario and ask how a reasonable or careful driver
4 would drive along that road. You could perhaps even ask
5 if that careful driver would drive along that road at
6 80 miles an hour with tinted windows in the middle of
7 the storm.

8 So those are appropriate questions to ask of an
9 expert which would then provide the fact-finder, whether
10 that's a jury or otherwise, with the framework against
11 which they can compare what a reasonable driver would
12 do, a careful driver, and then consider the ultimate
13 question of was this driving dangerous; is that a fair
14 summary?

15 A. Yes, I mean in any particular legal context there may be
16 a wide range of questions that one will explore and can
17 perfectly legitimately explore with an expert, you know,
18 up to and -- and different ways of approaching it in a
19 way which, you know, provide useful assistance to the
20 fact-finder while always recognising the fact-finder's
21 absolute -- the ultimate questions for the fact-finder.

22 Q. Thank you. I would like to move on to another issue
23 related to Article 2 compliance and reasonable
24 promptness or delay, but I'm still conscious you said
25 there was one or two matters you wanted to raise with

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1 the Chair.

2 A. Well, just a couple of points. You're reflecting on the
3 evidence yesterday and I may say I couldn't find the
4 transcript on the website yesterday evening.

5 Q. All right.

6 A. So this is just very much reflecting on the issues that
7 you raised with me yesterday, thinking, first of all,
8 about the points that we discussed I think before lunch
9 in relation to questions of subconscious bias and racist
10 tropes and I think what that illustrated was the
11 importance of addressing questions of subconscious bias
12 and racist tropes and the need to tackle those issues
13 wherever -- where one finds them.

14 I suppose the -- and indeed that those may well be
15 important issues to explore if there haven't been
16 criminal proceedings in the context of a fatal accident
17 inquiry or a public inquiry.

18 I suppose the question that I found myself
19 reflecting on last night was and I don't have an answer
20 to these and it may actually support some of the points
21 that we did discuss, but where questions of subconscious
22 bias plays into questions of criminality, you put to me
23 comments made by officers in statements and of course,
24 you know, the first question would be were those
25 statements admissible. And I can't now remember, but

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1 you will know whether the crown -- I think I'm right,
2 but you will correct me if I'm wrong, that the -- at the
3 point of marking the case the crown took the view that
4 it should proceed on the basis that those -- that the
5 officers' statements against interest would not be
6 admissible, but that's a question that would need to be
7 asked and answered.

8 Q. We did explore that with Fiona Carnan, so the Chair has
9 that evidence available to him.

10 A. Yes. And as I say, I'm afraid my recollection is misty.
11 So that's a question one would have to ask: is that
12 material admissible? And then on the question of --
13 questions of subconscious bias as opposed to, as it
14 were, an active racist animus, where does -- how does
15 that play into the law on mens rea of assault?

16 Again, you know, I'm afraid I haven't looked up the
17 books overnight, but, you know, it strikes me that
18 that's a difficult question, you know, and, you know,
19 does subconscious bias play at all into questions of
20 mens rea and if so, in what way? As one adminicle among
21 many, is it enough on its own? I would question that.

22 And then I suppose the third possibility is that
23 those issues may play into questions of whether
24 potentially excessive force had been used and I suppose
25 there the question that I think one would consider would

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1 be whether if, as it were, objectively and without
2 regard to questions of subconscious bias the methods of
3 restraint used were applying tests that you gave me a
4 moment ago within the bounds of reasonable
5 acceptability, then, you know, does the issue of
6 subconscious bias in the context of a criminal case take
7 you any further?

8 Now, I make those points because -- not for a moment
9 to diminish the importance of those issues and indeed at
10 some level I think it perhaps supports the proposition
11 that, you know, one might want to see that process of
12 analysis worked out, but I make those points because,
13 you know, and I'm conscious the decision not to
14 prosecute is not --

15 Q. That's not part of our --

16 A. -- part of the inquiry at all.

17 Q. -- exploration at all.

18 A. But and I think you recognised in your questions to me
19 yesterday that those issues, you know, there would be a
20 series of questions that would follow and I just wanted
21 to tease out some of those and, you know, I think, you
22 know, one has to, you know, I think it's may be
23 important just to perhaps make those points that in the
24 context of our criminal investigation I think there's a,
25 you know, at the very lowest a question about where

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1 those issues go.

2 Now, reflecting back on it, I entirely recognise
3 that one would want to see that played out in the
4 thinking and it perhaps goes to support the proposition
5 that it would be better in a case of this sort if one
6 had, as it were, a twofold investigation that was
7 looking at issues of criminality and other issues at the
8 same time, rather than the sequential approach which was
9 taken and was, as I say, an entirely orthodox approach
10 to be taken to these questions.

11 And I say that because of course, you know,
12 ultimately, there was a decision not to prosecute. It
13 was reviewed by then a principal Crown Counsel and
14 I think in, you know, it's perhaps important for me to
15 say that, without in the least taking away from the
16 importance of the points that you are putting to me,
17 that it doesn't -- doesn't necessarily have any impact
18 on the -- those decisions?

19 Q. We are not wanting to go into the decisions or explore
20 those.

21 A. No, I appreciate that. The -- yes, sorry.

22 Q. No, I was just going to say that given what you said
23 this morning and your evidence yesterday, can I sum it
24 up as these are difficult questions, difficult issues,
25 that they should be asked, the questions and the

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1 difficulties should be addressed by the crown and given
2 careful analysis; can I say that?

3 A. Well, I suppose the questions is if you've taken the
4 view that the statements are inadmissible, then in a
5 sense, that, and as I say you'll -- I don't recall where
6 the crown got to on that, then the comments against
7 interest by the officers, you know, as with the points
8 about expert evidence you put to me yesterday, simply
9 fall out of the picture.

10 Q. I shall perhaps say that we have heard evidence about
11 the issue of admissibility from Fiona Carnan.

12 A. Right.

13 Q. And there were a number -- a series of questions asked
14 of her and I think she accepted, and I'm summarising
15 here because I don't have the exact transcript, but she
16 accepted that she had not set that analysis out fully in
17 her -- in her paper, her analysis, she had not
18 considered the case law, she had not addressed the test,
19 and she had within the body of analysis said a number of
20 things about admissibility. She had said they were not
21 admissible, the statements were not admissible in
22 relation to assessing criminality against the officers,
23 but, equally, she took into account the statements fully
24 in relation to their justification for the use of force.

25 So there appeared on the face of it to be an

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1 inconsistent approach and a failure to address a
2 detailed analysis in light of the case law.

3 A. Yes.

4 Q. Or to express a view on what the courts would ultimately
5 decide. So I'm only give giving you that information to
6 put your comments into context, but can I also suggest
7 that, from what you've said this morning, would you
8 agree that you cannot separate out all of these issues?
9 If you are truly considering the whole circumstances,
10 and in particular if you're considering Article 2 and
11 Article 14, racial motive, racial motivation, that all
12 of these issues should be fully and comprehensively
13 addressed by the crown as part of their investigation?

14 A. Can I say I, you know, I think it's implicit in my
15 acknowledgment that it would be much better if one
16 didn't have an investigation that was focused, as it
17 were, narrowly on the question of criminality at the
18 outset, but looked broadly that, you know, that one
19 would want all issues to be looked at. And I also
20 entirely accept that, you know, one would want to see
21 the questions that we've addressed, you know, worked
22 through.

23 And on the question of admissibility, I suspect even
24 though it may not be in the analysis, I suspect that
25 Crown Counsel had a view which would be informed by her

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1 own expertise and experience. You know, she's not
2 driven, nor ultimately am I driven when I receive a
3 report from her, by the -- what's in the analysis and,
4 equally, if one is going to, you know, if one is wanting
5 to explore whether there's a basis for saying that there
6 was a racist animus that plays into mens rea, one would
7 want to see all those issues explored and thought about.

8 But I suppose there is a point, and we may come back
9 to this in relation to Article 2 and it again -- I think
10 it feeds into this question of whether it's wise or
11 appropriate to have a sequential approach of looking at
12 criminality and then other issues, and I accepted
13 yesterday and I do accept that if it were thought that
14 issues of race should be put to one side until issues of
15 criminality had been bottomed out, then I wouldn't --
16 that would not seem to be sound at all. I'm not -- you
17 know I don't know if that -- I'm not sure that was --
18 the Inquiry will form its own view whether that's the
19 approach across all the whole -- or all those involved.

20 But the, you know, the difficulty I think in terms
21 of asking the Article 2 question is that the question of
22 whether the state has complied with its Article 2
23 obligations is something that ultimately one asks when
24 the full process of investigation has been completed and
25 in this case that of course includes this Inquiry. Now,

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1 that's not to diminish the significance or importance or
2 necessity of the crown being absolutely mindful of
3 Article 2 and fulfilling its obligation and routinely
4 its work will, you know, in terms of a criminal
5 investigation, prosecution, potential FAI, will be the
6 mechanisms that fulfil the state's obligations.

7 But I think there are difficulties in, as it were,
8 picking one part of that process and saying -- trying to
9 reach a concluded view in relation to Article 2
10 compliance or not, unless one can say that the failure
11 was one which in effect infected, as it were, the whole
12 of the state's response to the particular -- particular
13 death.

14 Q. In terms of the terms of reference for this Inquiry, the
15 Chair has an obligation to consider the crown's
16 compliance with Article 2.

17 A. Yes. No, I absolutely appreciate that and I recognise
18 it's a really important question and it's something that
19 I think will be of great value going forward. I mean I
20 took a particular view about the role of the crown, the
21 importance of the crown's investigation in Article 2
22 terms, but I also took a view that if one is asking, you
23 know, has there been a breach of Article 2, by then one
24 can't put out of account that the criminal process is
25 not the only Article 2 process that will be in place and

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1 will be put in place by the state. And, indeed, you
2 know, I was acutely conscious of that responsibility
3 when considering the question of what form of inquiry
4 should proceed once the question of criminal
5 investigation had been concluded.

6 Q. And certainly in relation to the role of the Chair, he
7 will not be in a position to go back and cure any
8 deficiencies that may or may not have existed in relation
9 to the crown investigation?

10 A. Oh, indeed, you know, and, you know, as I entirely
11 accept in my statement there are -- there's the
12 potential for the crown to do something or not to do
13 something which, you know, infects everything, and
14 that's part of the responsibility that the crown bears
15 in relation to Article 2, but in terms of, you know, it
16 came into focus for me in the -- as the Inquiry knows in
17 the context of disclosure and what the crown's
18 obligations were in relation to disclosure in the
19 context of a criminal investigation, and whether looking
20 at the Strasbourg case law, one, as it were, looked at
21 the criminal investigation process in isolation or
22 whether actually the right approach was to consider the
23 whole course of investigation that would -- that would
24 follow.

25 Q. Thank you. In terms of the terms of reference of

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1 this Inquiry, however, the Chair is obligated to look at
2 Article 2 and Article 14.

3 A. Yes. Oh and that -- that is absolutely -- well, first
4 of all, it's the terms of reference, but secondly of
5 course that's, you know, that's part of the state
6 fulfilling its obligation under those articles is the
7 establishment of this Inquiry with the terms of
8 reference that it has and, you know, that was one of the
9 reasons for setting up this inquiry.

10 Q. We'll come back to that in a moment.

11 A. Yes.

12 Q. Just to conclude the issue about the officers'
13 statements and the analysis.

14 A. Mm-hm.

15 Q. I have summarised my understanding, although it's a
16 matter for the Chair, my understanding Fiona Carnan's
17 position.

18 A. Mm-hm.

19 Q. But in terms you asked or posed the question would the
20 statements be admissible, would be the first question
21 for the crown, regardless of any ultimate view taken,
22 but we did hear from Les Brown in evidence in the first
23 week of this hearing and he indicated that Crown Counsel
24 had proceeded on the basis that the statements were
25 admissible as evidence against the officers.

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1 A. Right. Okay.

2 Q. So despite the issues with Fiona Carnan's own analysis,
3 that was the way Crown Counsel proceeded.

4 A. Okay.

5 Q. As we understand -- we've not heard from her, but as we
6 understand the position on admissibility.

7 A. Okay.

8 Q. So on the basis that those were or may have been
9 admissible, the evidence about language and links to
10 terrorism would have been available to the crown for use
11 at any subsequent trial.

12 A. Well, certainly if they were regarded as admissible, I
13 entirely -- I entirely accept that.

14 Q. Thank you.

15 A. So but as you say I think -- I don't have enough of a
16 clarity in my own mind about what view was taken, so I
17 think you would need to ask APCC.

18 I should say there's two other brief questions --
19 brief points just to pick up. One was you asked me a
20 series of points like the one you made -- raised with me
21 this morning in relation to particular pieces of expert
22 evidence and of course, again, one would need to look at
23 how each of those particular issues played through into
24 the ultimate thinking of the crown, and whether any
25 particular issue of expertise, as it were, infected, in

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1 the language you've used, the decision-making process is
2 something you would have to look at in light of the way
3 it was taken into account in the ultimate
4 decision-making.

5 I have wondered, because you put to me whether I was
6 involved in the suggestion of was it Dr Lawler --

7 Q. Dr Lawler, the forensic pathologist.

8 A. Yes. And I gave you an example from my own experience
9 of -- in and these were complex civil cases where in
10 effect the legal team had a sort of -- an experienced
11 scientist in effect as a member of the legal team, not
12 as an intended witness, who could assist in, as it were,
13 the process of translation of the expert material to the
14 legal team and I have wondered whether that was the
15 genesis of the idea of instructing --

16 Q. Dr Lawler.

17 A. -- a reviewing pathologist, but that's speculation on my
18 part. I have no active memory of that at all. And, you
19 know, that model is not, you know, not someone whom one
20 would be using as a witness, but someone who is in
21 effect assisting the lawyers to understand, assimilate
22 the body of expert material and to test it.

23 I think the other point just I did want to
24 acknowledge, since we have been discussing the role of
25 APCC, is that of course ultimately she reported the case

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1 to me and I had the opportunity to look at the material,
2 to discuss the case with her and ultimately approved
3 her decision. Given the scale and complexity of this
4 case, it would have been, I'm afraid, unrealistic for me
5 to in effect remark the case and I cannot now recall
6 what I read, looked at or indeed the terms of the
7 discussion that I do remember that I had with APCC. I
8 read enough clearly to be able to have some form of
9 intelligent discussion with her and that discussion
10 resulted in some further work being done on restraint,
11 again, I'm afraid the detail of which I cannot now
12 remember, but I think it is important, you know, that I
13 acknowledge that and put that firmly before the Inquiry
14 as the Inquiry already has it.

15 Q. Well, in fact touching on this issue is something I was
16 going to go into.

17 A. I thought you might, yes.

18 Q. So could we perhaps look at Ashley Edwards' Inquiry
19 statement.

20 A. Yes.

21 Q. And we'll begin with paragraph 10 of that. So this is
22 SBPI 00445, paragraph 10, and I'll just read through
23 this, if I may, to give some context to what I'm going
24 to ask you.

25 A. Yes.

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1 Q. "I have read my email to Mr Brown. I reported with my
2 draft CCI [so that means Crown Counsel instruction] to
3 the Lord Advocate on the 1 June 2018."

4 So this is around two years after you have come into
5 the position of Lord Advocate.

6 "This was partial CCI and dealt with the cases
7 against the individual officers."

8 So that, as I understand, was the issue regarding
9 criminality in relation to the officers:

10 "I forwarded my second draft CCI to the
11 Lord Advocate on 19 June."

12 So around halfway through that month there's a
13 second CCI:

14 "This dealt with the health and safety aspects of
15 the case."

16 So that's a separate matter. The Chair has evidence
17 available that there was a second supplementary
18 precognition on the health and safety elements:

19 "I sent a further supplementary draft CCI to the
20 Lord Advocate on 22 August... "

21 So this appears to be a third draft CCI sent the
22 following month:

23 "... following my consultation with one of the
24 experts."

25 We've not heard from Ashley Edwards yet so we've not

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1 got the full picture here:

2 "I issued my CCI [so no longer a draft, a CCI] on
3 26 August 2018."

4 So that appears to be a final CCI, Crown Counsel
5 instruction:

6 "By the time of this email I had completed all of my
7 reading and research, including all the consultations
8 with all but one of the experts. In advance of issuing
9 my final CCI, we were looking at potential next steps.
10 I am not sure about [if we can move up] the paragraph
11 that he's specifically been asked about. From the email
12 I understand that concerns whether there should be an
13 FAI or whether the circumstances may be better aired in
14 the form of a public inquiry. The investigation looked
15 at all potential criminality. That meant that we were
16 looking at all those involved in the restraint
17 post-incident actings and the police service of Scotland
18 as a whole."

19 So if we could go up again to the top of the
20 paragraph. I'm interested in a number of elements of
21 this and I'm hoping you can put some context around
22 this. This process of a series of partial Crown Counsel
23 instruction followed by a final Crown Counsel
24 instruction, is that now the norm or was that the norm
25 in Crown Office when you were Lord Advocate?

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1 A. I mean --

2 Q. The norm where there was an allocated AD?

3 A. It wasn't at all unusual for cases to be reported to the
4 law officers for one reason or another and indeed there
5 are conventions that certain types of cases are
6 routinely reported to the law officers. Normally that
7 would come with a -- in the shape of a report, a written
8 report with a recommendation and a law officer, whether
9 it be myself or the Solicitor General, would consider
10 the report, the recommendation, you know, look at such
11 material as what one needed in order to address the
12 question and respond.

13 I think the practice was certainly as I recall it
14 that the CCI would be issued by Crown Counsel,
15 notwithstanding the case had been reported to the law
16 officer. I don't recall a practice of, as it were,
17 draft CCIs followed by final CCIs and I don't. I have
18 to confess -- I remember, and I think do cover this in
19 my statement somewhere, I do recall receiving a report
20 from APCC and then, you know, having the opportunity to
21 discuss that report with her and then some further work
22 being done before she, and I think the documentary
23 material I was shown and able to review in advance of
24 the Inquiry supported this, you know, before she came
25 back with some further report and I approved the marking

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1 of the case.

2 Q. In relation to this approach, do you recall having one
3 meeting with APCC to discuss a number of draft CCIs?
4 And I don't want to ask you about the discussion, but
5 was there one meeting and if so, when was it in relation
6 to this series of instructions?

7 A. I don't know if you're able to point me in my own
8 statement to the point where I deal with this, because
9 I think that's probably the best place.

10 Q. I'll get somebody to find it. We'll come back to that
11 aspect.

12 A. Yes.

13 Q. But from your own recollection, was it one meeting that
14 you had with Crown Counsel?

15 A. At that stage I remember -- I mean I remember having a
16 meeting with her following a receipt of her report.
17 I think, you know, and again, I think some time passed
18 before I met with her. Then I think there was some
19 further work done and the case was further reported.
20 Whether there was a further meeting, I can't remember.
21 Whether in fact there was more than one meeting, I'm
22 afraid I simply can't remember.

23 Q. Looking at the screen, it says in the middle of the
24 paragraph that we can see on the screen:

25 "I sent a further supplementary draft CCI to the

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1 Lord Advocate [that would be you at the time] on
2 22 August after my consultation with one of the
3 experts."

4 And earlier you said you had had a discussion and
5 asked Crown Counsel to go and do some further
6 investigations?

7 A. Yes, I think that is covered in my statement.

8 Q. Right.

9 A. So if somebody could just direct me to the right
10 paragraph, I'll be able to give you the answer
11 straightaway from the material that I was able to review
12 ahead of, you know, in order to prepare the statement.

13 Q. We're in the process of trying to identify the
14 paragraph. We'll come back to that when we get it.

15 A. Thank you.

16 Q. In the meantime, you've talked about having the
17 opportunity to look at material and earlier you said you
18 looked at material and discussed the case. I'm
19 interested in what material were you furnished with
20 prior to your discussion with Crown Counsel?

21 A. I think I would have had access to in effect the
22 whole -- file.

23 Q. Right.

24 A. -- through the Crown Office system and I don't think --
25 I mean, again, I really can't remember, I don't think

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1 I had any particular body of hard copy, but I may be
2 wrong about that, and I simply now cannot recall what
3 material I looked at. I mean, you know, I looked at
4 enough to allow me to have, you know, a discussion with
5 Crown Counsel to test her thinking, if I can put it that
6 way.

7 Q. Thanks. When you say "enough" did you have the crown
8 precognition or access to the crown precognition?

9 A. I would certainly have had access. Well, you know, in
10 both senses, I would have had access to the narrative
11 and the analysis and I would have had access to the
12 underlying material I think probably electronically
13 through the system, rather than being provided with hard
14 copy, but, you know, I now can't remember that.

15 Q. Although you can't remember the details, what was your
16 normal practice prior to a meeting with Crown Counsel?
17 Was it to read the entire narrative and analysis or was
18 it simply to read the analysis or was it something else?

19 A. I mean it would vary enormously. I mean there were
20 cases that came to me which would be in, you know, when
21 the evidence was in very short compass, you know, where
22 in effect I would, you know, could remark the case.

23 Now, that would have been frankly impossible in this
24 case and also not appropriate. You know, I had most --
25 you know one of my most senior prosecutors who had

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1 consulted with key witnesses and so on. There are other
2 cases, and anyone who has been an advocate depute will
3 recognise this, where I might receive a phone call from
4 an advocate depute seeking my approval for a particular
5 course of action and where in effect I probably had
6 access to visually no written material and what I would
7 do in that case is test the recommendation that was
8 coming to me, ask questions to try and tease out
9 thinking and, you know, form a view.

10 You know, in this case and I'm trying to think,
11 I think this -- yes, I would have read I expect the
12 narrative and analysis. I think I would probably have
13 read or at least looked at the some of the underlying
14 material, probably focusing -- probably focused frankly
15 on the expert material and, you know, I would then
16 have -- as I say, I had a meeting with APCC and we
17 discussed a variety of issues and my practice, as with
18 the case of the phone call with no papers, would be to
19 sort of test and question in order to seek to identify
20 whether there were things that needed to be -- needed
21 further work.

22 Q. Do you remember preparing for this meeting with
23 Crown Counsel, in considering the papers that you had
24 available, did you notice that there was an absence of
25 analysis in relation to race? We discussed this

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1 yesterday?

2 A. Yes.

3 Q. Was that something that you were alert to, alive to,
4 when you read the material?

5 A. Well, I mean I was certainly alert to the background of
6 race. I mean I cannot now remember, you know, is the --
7 I would be -- well, I think perhaps I could go as far as
8 to say I would be surprised if I didn't ask her about
9 her thinking in relation to the question of whether race
10 played into the question of criminality, but it would be
11 not fair, either to her or to anybody else, to put it
12 higher than that and, you know, she may have a
13 recollection that I don't have.

14 Q. All right.

15 A. I think, you know, as I say, I think I would be
16 surprised and disappointed in myself if I can put it
17 that way, if I didn't ask her questions about that
18 aspect of the case, because it was, as we discussed
19 yesterday, clearly, you know, a core question.

20 Q. There's no reference in paragraph 10 that we can see and
21 I wonder if that questions was asked by you, whether
22 race played into the question of criminality, whether
23 you would have invited further investigations in
24 relation to that as you did with --

25 A. With restraint.

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1 Q. -- the expert?

2 A. Well --

3 Q. Was it the restraint expert that you asked?

4 A. I think it was specifically in relation to restraint,
5 I think the fact is I didn't so, you know.

6 Q. Right.

7 A. So, you know, that -- had I done so, I'm sure it would
8 have been done.

9 Q. Yes, all right. So was there a reason that you can help
10 us with why this approach, where there appears to have
11 been a series of draft Crown Counsel instructions, can
12 you help us understand why this approach was taken in
13 relation to the investigation into Mr Bayoh's death?

14 A. I think the -- from looking at the materials, and I'm
15 afraid I wouldn't have remembered this without looking
16 at the documents, there was first a report in relation
17 to -- as APCC says in her statement, first a report in
18 relation to the officers and then there was a second
19 report in relation to health and safety aspects and
20 that's I think consistent with the documents that I have
21 seen. As I say I wouldn't have remembered without
22 seeing them.

23 The -- so that I think explains the sequence of, you
24 know, one report then another report. The fact the
25 report -- reports came with a draft CCI, in a sense I

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1 suppose that simply reflects the fact the point of the
2 report was to provide a recommendation to me in terms of
3 the way the case should be addressed or disposed of or
4 dealt with at that stage.

5 The fact that it was produced in the form of a draft
6 CCI rather than simply a paragraph at the end of the
7 report, if that's the way it was produced, I'm not sure
8 what particularly one might take from that.

9 Q. You have said you would be surprised and disappointed
10 with yourself if you hadn't asked a question of whether
11 race had played into the question of criminality. We've
12 not had the opportunity of speaking to Ms Edwards at
13 this stage, but if you did ask about the issue of race
14 and whether it played into the question of criminality
15 and if, as it appears, you did not ask for further
16 investigations or further consideration to be given to
17 that question, in light of the questions I asked
18 yesterday about race, Article 2 and Article 14, and your
19 evidence about that, if you also did not ask about race,
20 do you wish to reflect on your own role and comment on
21 any of that?

22 A. Well, indeed, I suppose the first question point -- at
23 least at the point where I'm having a discussion with
24 APCC is that I can't remember what I looked at. I may
25 or may not have had access or, you know, looked at the

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1 statements and those issues. I would be coming to the
2 case with the narrative and the analysis as the sort of
3 the first document and APCC's report and I'm afraid
4 I don't think in the papers I was shown that I had that,
5 so I can't recall what the focus of that report was.
6 You know, it may be that what I would ask her would be
7 to -- I would in effect be looking for assurance that
8 she had considered and thought about whether the
9 evidence that I certainly had been aware of that one of
10 the officers had expressed racist remarks in the past
11 and whether that played into -- into the decision at
12 all -- whether I went -- whether I would have had in a
13 sense in my mind the material to go beyond that, I
14 simply can't now say.

15 Now, certainly as I reflect back on the whole course
16 of material, course of the material, I, you know,
17 I think it was perhaps a missed opportunity not at an
18 early stage in the investigation to examine the question
19 of how race might be considered and play into the whole
20 case. I think the -- and I would acknowledge that
21 that's a missed opportunity that, you know, that
22 ultimately rests with me.

23 I, you know, you know, I had put in place a very
24 experienced team of investigators. I think it is
25 important to say that my experience of Crown Office was

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1 that it was a -- an institution that both internally and
2 externally was very alive to issues of equality and
3 inclusion. You know, I attended staff conferences on
4 equality and inclusion. I was party to external
5 engagement and everything that I saw about the
6 organisation would lead me to conclude that it was an
7 organisation that had a very strong ethos, perhaps
8 dating back to the Chhokar era, of inclusion and in
9 relation to equalities both internally and externally
10 and I guess I assumed -- I frankly assumed that race
11 would be investigated by the very experienced team that
12 was put in place and I didn't myself seek to audit that.

13 Now, as I reflect back on this, of course I can't
14 but regard that as a missed opportunity potentially to
15 have race looked at in a different way, certainly as I
16 have come to think about these issues, you know, more
17 recently for a variety of reasons.

18 Q. So given your comments yesterday about the importance of
19 race from a very early stage in this investigation, and
20 given what you know about Fiona Carnan's approach to
21 race in the analysis, and if you didn't address this
22 specifically with Crown Counsel and didn't ask for
23 further consideration to be given to it, if, I
24 appreciate you don't recollect, looking back at that
25 now, do you think that ought to have been done?

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1 A. It's the fact of the matter I didn't ask for further
2 work to be done. I think, you know, if one is looking
3 back with the benefit of, as it were, perfect hindsight
4 and now you have put in front of me a lot of material
5 yesterday that frankly I wasn't -- wasn't necessarily
6 sighted on when I was engaged in the process of testing
7 and, you know, asking APCC about her the reasons for her
8 recommendation, you know, with perfect 20/20 hindsight,
9 yes, that was a missed opportunity. It was a missed
10 opportunity to identify an issue and to have that issue
11 looked at in a different and fuller way.

12 For the reasons I mentioned earlier, it doesn't
13 follow that it would have resulted in a different
14 decision and I think it's quite important remembering
15 that, you know, there are individuals with Article 6
16 rights, as well as individuals with Article 2 and
17 Article 14 rights that, you know, one -- one recognises
18 that the question of what would have been a viable
19 criminal prosecution, considered by very, very
20 experienced prosecutors, you know, those issues don't
21 necessarily affect that question and I know you're alive
22 to that.

23 Q. And we're not asking you to reconsider that decision.

24 A. It's impossible to do. It's impossible to do and of
25 course that's one of the problems if one identifies an

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1 issue that wasn't pursued as it might have been or as it
2 should have been, one can't say how that would have
3 unfolded.

4 Q. In fairness to you, you asked me to identify some
5 paragraphs in your statement and I understand it's
6 paragraphs 26 and 27 of your statement or it may be the
7 ones that you're looking for. This is SBPI 00529, and
8 if we could have a look at 26 and 27. 26:

9 "Although the convention about law officers
10 involvement in decisions to prosecute is strictly
11 applied only where a prosecution was recommended, I
12 envisaged that this case would be reported to me whether
13 or not APCC concluded that a prosecution should be
14 initiated with her conclusions and recommendations so
15 that I could take or approve the final decision. If at
16 any point during the course of the investigation APCC
17 wish to raise any issue, I would have been able to
18 discuss the case with her. I recall a discussion with
19 her about disclosure and the documents which have been
20 made available to me contain a reference to a meeting in
21 December 2017, which is couched in terms which suggest
22 that there were other meetings which I cannot now
23 recall."

24 And then if we move down to 27:

25 "Following the completion of the crown

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1 investigation, APCC did, as expected, report the case to
2 me on 4 June 2018 with her conclusion and
3 recommendation. On 19 June she submitted a further
4 report which addressed the question of whether the
5 evidence disclosed a basis for a Health and Safety at
6 Work Act prosecution."

7 This seems to mirror the Ashley Edwards statement:

8 "I had a meeting with her to discuss her
9 recommendation. Whilst I do not have a detailed
10 recollection of what was discussed, I do recall
11 instructing that some further work be undertaken [which
12 again appears to be what you have just said]. I can see
13 from the papers provided to me that this discussion took
14 place on 15 August 2018 and the additional work involved
15 further consultation with the restraint expert and
16 consideration of whether the evidence disclosed a basis
17 for a Health and Safety at Work Act prosecution
18 unconnected with the death of Mr Bayoh and on
19 23 August 2018 APCC re-reported the case to me following
20 that additional work."

21 So this appears to mirror the process that was
22 adopted that Ashley Edwards speaks to in her statement.

23 A. Yes.

24 Q. And does that help you pinpoint the point of time at you
25 had the discussion with her which was 15 August 2018?

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1 A. Yes.

2 Q. And so that was her draft CCI had gone to you on 1 --
3 well dated 1 June. It was a partial CCI. Dealt with
4 the cases against the individual officers. She says she
5 forwarded her second draft CCI to you on 19 June.
6 Again, that would have been available to you before the
7 meeting in August and that dealt with health and safety
8 and then a supplementary draft CCI on 22 August
9 following her consultation with one of the experts.

10 So it would appear you had two draft CCIs, one
11 relating to the criminality regarding the individuals,
12 one relating to health and safety. You had a meeting on
13 15 August with Crown Counsel, and then further work was
14 done and then on 22 August a supplementary draft CCI was
15 issued to you after Crown Counsel had had a consultation
16 with one of the experts. So it would appear that you
17 have instructed that further work on 15th and then a
18 supplementary draft CCI was sent on 22 August after that
19 consultation had taken place.

20 A. Yes, I mean that all -- that's all consistent with the
21 documents that -- that I was able to review ahead of
22 this -- preparing this statement.

23 Q. All right, thank you. I would like to go back to the
24 issue of the incremental strategy that we talked about
25 yesterday. We had heard about some called it a linear

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1 strategy or a sequential and Les Brown had given
2 evidence calling it an incremental strategy.

3 So the decision in relation to the individual
4 officers or the draft CCI was sent to you on 1 June
5 2018. Although there were subsequent draft and a final
6 CCI, is it fair to interpret from your evidence and the
7 evidence of Ashley Edwards that the issue of criminality
8 relating to the officers had been resolved by June or at
9 least at the point where your meeting took place with
10 Crown Counsel on 15 August?

11 A. Well, the investigative work had been undertaken to
12 allow APCC to produce a report to me. She then reports
13 it to me. I instruct or I can't remember just how it
14 would be put, but, you know, further work was then done
15 following that meeting and then, you know, the decision
16 ultimately is made following the APCC's re-report to me.

17 Q. Towards the end of August that process had been
18 complete?

19 A. Yes, so that's -- yes, and presumably some point after
20 23 August -- I think the statement is maybe the blacked
21 out part -- I approved the marking of the case.

22 Q. So by the end of August the decision had been made by
23 Crown Counsel, the recommendation had been made and you
24 had met and approved that and some further work had been
25 completed and the matter was concluded in that sense.

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1 A. Yes.

2 Q. Could we look at Les Brown's Inquiry statement, please,
3 SBPI 00419, paragraph 105, and this is simply to remind
4 you about the incremental strategy that Les Brown spoke
5 about. So 105, and it starts with the passage:

6 "A key element of the incremental strategy... "

7 There we are:

8 "So resolve the issue of potential criminality
9 first, and then it would permit Crown Counsel to take a
10 decision with the necessary confidence and then permit
11 the investigation to move forward to other areas in
12 anticipation of an inquiry whose forum had yet to be
13 determined. It had been hoped initially the necessary
14 further inquiries could be completed relatively
15 quickly."

16 And then Les Brown went on to say:

17 "The precognition was requested and created for the
18 limited purpose of enabling Crown Counsel to take a
19 decision on potential criminality, but it was not
20 intended to be the end of the investigative process by
21 the crown, particularly in relation to race and implicit
22 bias, and further detailed inquiry would likely have
23 been undertaken had an FAI been instructed and this
24 would in my opinion have been highly likely to have
25 required precognition of the police officers."

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1 So there's that process, that incremental linear
2 process, with a view to issues of race being explored
3 subjected issues of criminality.

4 A. Mm-hm.

5 Q. And the -- you have said that by the end of August 2018
6 a decision on the issue of criminality regarding the
7 officers has been taken and approved.

8 Can you tell us what was happening in that period
9 after that decision was taken in relation to exploring
10 these further issues regarding race and implicit bias
11 and moving on to consider whether an FAI should be
12 instructed?

13 A. I can't say whether anything was being done at that
14 stage, because at that stage I suppose there are two --
15 at least from my point of view there would be two
16 questions. One is what form of further inquiry would be
17 appropriate and the other -- the other issue, which
18 certainly became looking at the documents the live issue
19 in my mind as we approached the meeting with Mr Bayoh's
20 family, was that they of course have a right to review
21 the decision and so the crown investigation into the
22 question of criminality can't be regarded as complete
23 unless and until you have had a victim right to review
24 and that review process has reached its conclusion.

25 And I'm afraid I don't remember the details, but in

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1 fact there was a review, the review was triggered, and
2 then principal Crown Counsel, Alex Prentice, under the
3 oversight of the Solicitor General, undertook that
4 review and my recollection is that itself took some
5 time. So, you know, the crown investigation in relation
6 to questions of criminality wasn't, as it were, final,
7 couldn't be regarded as final until that process had
8 reached its conclusion.

9 Q. So were any steps taken from the end of August? We know
10 the VRR commenced on 1 February the following year, but
11 was there any other steps taken during that period to
12 commence looking into the issues of race and implicit
13 bias at that time?

14 A. I'm afraid, I can't remember. I would infer, given that
15 Mr Brown considers that would be likely to involve
16 precognition of the police officers that -- that may
17 well have been something that was deferred until
18 questions of criminality had been resolved, because, as
19 you will appreciate, one couldn't approach police
20 officers for precognition while there was a question of
21 criminal proceedings outstanding.

22 Q. Leaving aside the position of the officers or
23 precognosing them, do you remember if any steps were
24 taken to analysis the language used by the officers or
25 looking at the link to terrorism or any of the things we

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1 talked about yesterday?

2 A. I have no recollection. I mean you would have to ask
3 the -- those who were directly involved in the, as it
4 were, investigative process.

5 Q. Right. Thank you. Could you give me a moment, please,
6 would that be an appropriate.

7 LORD BRACADALE: We'll take a 20-minute break at this point.
8 (11.33 am)

9 (A short break)

10 (11.58 am)

11 LORD BRACADALE: Yes, Ms Grahame.

12 MS GRAHAME: Thank you. Could we look, please, at paragraph
13 128 of your Inquiry statement. You are you were asked
14 by the Inquiry about any experience you had of racism
15 being a factor in relation to a death in custody or a
16 death following police contact and you'll see the
17 question actually on the screen as well there, question
18 62, and you were asked to provide details. And you said
19 at 128:

20 "Other than in connection with this case, Mr Bayoh,
21 I had, so far as I can recall, no experience of these
22 matters."

23 I wanted to ask you maybe a less specific question.
24 Did you have experience of a case where race was a
25 factor although it wasn't a death in custody or a death

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1 following police contact? Did you have that sort of
2 experience?

3 A. Yes, I can give you some illustrations from my
4 professional experience before I became Lord Advocate.
5 I argued on a pro bono basis what I think was the first
6 case in the Court of Session on the public sector
7 equality duty which was then -- it was in a section of
8 the Race Relations Act 1976, I think it may have been
9 section 71, which concerned the closure of a community
10 centre which was used by ethnic minority communities.

11 I -- in relation to Article 14, I suspect I've
12 probably considered Article 14 in a variety of contexts.
13 The one that comes to make is the Inner House decision
14 in *A v Uganda*, which was a case in which I represented
15 the spouse of a refugee who was challenging
16 the Home Office policy which on -- in a case of domestic
17 abuse granted ILR to -- leave to remain to spouses
18 I think of individuals who already had indefinite leave
19 to remain. And on behalf of a spouse of a refugee who
20 had suffered from domestic abuse, I challenged that
21 policy on Article 14 grounds successfully and as it
22 happened in the Inner House. I think those are the two
23 that --

24 Q. All right.

25 A. And I suppose that's not -- that I suppose the

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1 differentiation there wasn't on -- wasn't to do with
2 race. It's more a general point about Article 14 and my
3 awareness of that article.

4 Q. Did you have any experience of criminal cases, criminal
5 investigations, where race or racial motivation had been
6 a factor or a potential factor?

7 A. I have a recollection when I was an advocate depute of
8 prosecuting one. I think it was a -- it was certainly a
9 case that involved the death of an asylum seeker and
10 I can't now remember the details of it, but I think
11 there may have been issues of race involved in that.
12 But that was a case that, you know, so far as I recall,
13 I probably as it were picked up for trial rather than
14 being involved in the investigation in advance.

15 I have dealt with some asylum cases but they're not
16 particularly cases that involve issues of racism.

17 Q. All right, thank you. Could we look now at paragraph
18 122. You were commenting on your involvement with this
19 investigation. You say.

20 "I do not recall any consideration being given to
21 Article 14."

22 And I wondered whether you recall any discussions
23 amongst or with your staff when you were Lord Advocate
24 about Article 14 and the implications of Article 14 in
25 conjunction with Article 2?

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1 A. I certainly don't remember any. I think, as I said
2 before the break, my experience of Crown Office, and
3 certainly over the piece as Lord Advocate, was that it
4 was -- staff were, you know, it was an organisation that
5 was very alive to a whole range of issues of equality
6 and inclusion, both internally and externally. Looking
7 at this with hindsight, I assumed that the experienced
8 staff who were involved in a case that -- where there
9 was an issue of race would, you know, would investigate
10 that as part of the investigation.

11 Q. You said you assumed they would take account of race.
12 Did you take any steps personally to ask if they were
13 taking account of these issues or having regard to these
14 issues or specifically ask them if they would have
15 regard to these issues?

16 A. I suppose this goes more generally to my -- the role
17 that I had as the investigation unfolded and it would be
18 fair to say that I relied on the investigative team that
19 was set up in accordance with the minute that
20 Stephen McGowan sent to me and which we have seen to
21 investigate the case appropriately. Now, of course that
22 doesn't in the least take away from my responsibility
23 for what, you know, for what's been done. I don't
24 recall myself interrogating the way in which they were
25 approaching any particular issue. You know, I don't

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1 recall, although there's some evidence that I may have
2 had meetings, a meeting or meetings, with APCC. I don't
3 recall those. She may have a better recollection.

4 I recall particular anxiety that I had at one point
5 about the time that the whole process was taking and
6 interrogating that, both with the crown agent and also a
7 meeting with Mr Brown in my room in Crown Office, but as
8 far as I recall that was focused really on issues of
9 management and timescale rather than the substance of
10 the investigation. And I was receiving regular
11 briefings as part of the log about, as it were, progress
12 at the generality.

13 I did not take steps to as it were scrutinise the
14 substance of the investigation, you know. That might be
15 regarded as a missed opportunity. On the other hand,
16 I had a very experienced senior Crown Counsel with,
17 frankly, much greater experience of criminal
18 investigations than I did who was allocated to the case
19 who had all the powers and responsibilities of the
20 Lord Advocate and, you know, I, you know, it might have
21 been regarded as -- well, I mean was it necessary for me
22 to in a sense oversee her work in that regard? With the
23 benefit of hindsight, of course one can say there's a
24 missed opportunity to ask questions but I -- I relied on
25 that team.

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1 That's the context in which I'm ultimately
2 responsible for the decision made that I, you know, as I
3 say in my statement, Lord Advocates have to, you know,
4 deal with the situations as they come along across the
5 whole range of responsibilities. The extent to which
6 they get -- any individual Lord Advocate becomes
7 personally involved in any particular issue will depend
8 on the range of competing demands and the particular
9 pressures, but ultimately the Lord Advocate is
10 answerable for the decision to take an active role or
11 not to take an active role in an individual case.

12 That's one of the challenges of that particular
13 office and I suppose, you know, I suppose in this case I
14 took the view that we -- I had an experienced team
15 allocated, there was oversight in a sort of general
16 sense from senior Crown Office officials, very
17 experienced prosecutors themselves, and that if there
18 was an issue that required law officer focus or
19 attention that that would be brought to the law officers
20 and, you know, my experience across the piece was that,
21 you know, if in relation to particular case there was an
22 issue that needed to be brought to law officers'
23 attention then it would be brought to their attention.

24 Now, so to that extent I suppose I relied on the
25 system, I relied on the particular, as I say, highly

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1 experienced individuals who were in place and I didn't
2 ask, you know, I didn't seek to, as it were,
3 second-guess or exercise a kind of oversight of what
4 they were -- what they were doing.

5 Q. So in relation to your role as Lord Advocate you've
6 talked about the Lord Advocate having essentially a
7 decision to make whether to take an active role or not
8 an active role. Is it fair to say that in relation to
9 the Sheku Bayoh investigation that you did not take what
10 you would describe as an active role in relation to the
11 investigation itself, but rather left that to a large
12 extent to the team that had been put together to deal
13 with the investigation?

14 A. I think the phrase "left to" is perhaps to diminish, you
15 know, the expertise.

16 Q. Sorry.

17 A. My responsibility was to put in place arrangements to
18 have an effective thorough investigation. The starting
19 point for that is a skilled and experienced team who
20 undertake that investigation and, you know, there were
21 other large significant cases ongoing. I had no --
22 I had the same role, as it were, internally in relation
23 to other large and complex cases. You know, the nature
24 of the work in Crown Office very largely is that the
25 investigation -- investigative work is undertaken by

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1 those who are undertaking investigations with the input
2 of Crown Counsel as required, you know, as head of the
3 system.

4 My responsibility was for the whole system and, you
5 know, I -- I don't think it would be right to say that
6 I, you know, took a conscious decision in relation to
7 this case not to play a role. In fact, I had a more
8 active role in this case than for most equivalent cases,
9 in part because of the interaction with the --
10 Mr Bayoh's family and correspondence with Mr Anwar. So
11 I think it would be right to say this case, as it were,
12 came, as it were, actively on to my radar more often and
13 more than other large complex significant cases. I mean
14 the great bulk of the highly -- even the highly
15 sensitive cases undertaken in Crown Office don't come
16 to -- on to law officers' desks or at least in my time
17 that was the position.

18 It may be different with other Lord Advocates and
19 that's also a reality of the role that, you know,
20 different people, you know, the way that they approach
21 the role in all sorts of ways ultimately reflects both
22 the exigencies of the times and the pressures that bear
23 at different points in time and the judgment and
24 approach of individual incumbents.

25 Q. Specifically in relation to the race, although you

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1 recognised the specific importance of race, and we've
2 talked about that, is it fair to say that your approach
3 regarding race, insofar as it related to the
4 investigation into Mr Bayoh's death, was not to take
5 proactive steps or not to take a proactive role in
6 relation to how that investigation was managed and
7 conducted and ultimately resolved?

8 A. I think that would be right in the sense that I relied
9 on the experienced team to undertake a -- an appropriate
10 investigation.

11 Q. Thank you. Now, we've touched on paragraph 12 -- well,
12 actually, 123 first of all:

13 "To what extent was Article 2 of the ECHR considered
14 in the investigation in respect of the duties of
15 Police Scotland and PIRC?"

16 And you have said at 123:

17 "I do not recall being involved in any consideration
18 of Article 2 ECHR in respect of the duties of
19 Police Scotland and PIRC. The involvement of the PIRC
20 in the investigation provided structural independence
21 from Police Scotland, given the circumstances of
22 Mr Bayoh's death."

23 We've heard evidence from a number of witnesses in
24 relation to the independence issue, so I won't ask you
25 questions about that today, but I'm interested about in

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1 this paragraph:

2 "I do not recall being involved in any consideration
3 of Article 2 in respect of the duties of Police Scotland
4 and PIRC."

5 Are you talking about you personally or are you
6 talking about discussions amongst the team that you're
7 aware of or raising any issues about Article 2?

8 A. Yes, I can't really go beyond. I simply don't recall
9 any discussions of that sort and I don't recall myself
10 being involved in them. I don't recall being made aware
11 of them. That's frankly not to say it didn't happen.
12 It's just that I don't have a recollection of the issue.

13 Q. Right. Can we move on to 125, and we've touched on this
14 today so I don't want to go into this in too much
15 detail, but I'm interested in the section that starts:

16 "I also acknowledge of course."

17 And you'll see that's just below halfway down this
18 paragraph:

19 "I also acknowledge of course that a deficiency in a
20 Crown Office investigation."

21 Do you see that?

22 A. Indeed.

23 Q. "... in a case to which Article 2 applies would be
24 capable of contributing to a breach of the state of its
25 Article 2 obligations. For example, if the way in which

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1 Crown Office proceeded with an investigation were to
2 justify or to contribute to a conclusion that it had not
3 proceeded with reasonable expedition, it follows that
4 issues can arise as an investigation is ongoing as to
5 whether anything done by the crown is such as to breach
6 Article 2 ECHR in any particular case."

7 Can I ask you about the processes that were in
8 Crown Office at the time you were Lord Advocate. Was
9 there any process whereby Article 2 obligations, or
10 indeed Article 14, were monitored or you used the word
11 earlier before the break of "auditing", you said you
12 didn't personally audit Article 2, but I'm interested in
13 whether there was a process within the wider
14 Crown Office staff whereby even sampling investigations
15 to look at them from the perspective of whether they
16 were compliant with Convention obligations?

17 A. I don't have any recollection of such a process. I mean
18 it's fair to say that at this time, specifically in
19 relation to the death investigations, there was a --
20 just a real problem of an overstretched system that was,
21 you know, across the piece taking longer than one would
22 want to see in relation to death investigations. Of
23 course not every death investigation engages Article 2,
24 but they tend to be the more complex ones and those in
25 particular were taking a very long time.

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1 I don't know whether there was a process of
2 monitoring against time -- well, actually I suppose -- I
3 suppose what I became aware of in relation to the work
4 of SFIU, but probably a slightly different point, was
5 that the KPI, the key importance performance indicator,
6 was for a certain proportion of the cases, and I can't
7 remember the detail, to be concluded within quite a
8 short timescale.

9 Now, the consequence of that particular KPI was the
10 system focused on completing the investigation in those
11 which were relatively straightforward with the result
12 that the more difficult ones became -- there was a
13 potential for them to take even longer. Now, that was
14 part of the modernisation, SFIU modernisation project
15 that I think I touched on yesterday was about addressing
16 both, you know, the -- having the appropriate, as it
17 were, KPIs and auditing and oversight of death
18 investigations generally and also, and absolutely
19 critically because it couldn't be done without it, was
20 securing quite significant additional resources in order
21 to do that.

22 Q. Leaving --

23 A. So I think -- you would have to ask others. I mean I
24 suspect Lindsey Miller, who I think you've already had,
25 would have been a good person to ask about what were the

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1 KPIs, what was the process of auditing in that sort of
2 management sense.

3 You know, I, as Lord Advocate, would not necessarily
4 be aware of those routinely, because, you know, as you
5 appreciate, Lord Advocates not, you know, it's an
6 unusual role in that you're not really the chief
7 executive managing in that sense, but you have an
8 overall responsibility for the system, including
9 Crown Office's performance within the system, and one
10 is -- you know, one wants to be informed about ideally
11 the way the Crown Office is fulfilling its functions.

12 Q. Leaving aside the issue of the system being
13 overstretched or the issues of resources, of which we've
14 heard some evidence already, do you think there would
15 have been any benefit, you having been Lord Advocate,
16 can you see any benefit in doing some sort of or
17 introducing some sort of audit process whereby crown
18 could pick up issues as they are happening? And whether
19 those be issues relating to delay or independence or
20 adequacy, could you see any benefit in a system that
21 assessed things as the investigation was ongoing?

22 A. Well, I think any -- any organisation benefits from a
23 process of having appropriate targets, indicators and
24 auditing its performance against those targets and
25 indicators and, you know, I mean this is I suppose

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1 reflection borne of experience being Lord Advocate and
2 in other roles that, you know, a part of the -- you
3 know, one of the ways one achieves change is by thinking
4 hard about what are the right indicators and targets to
5 put in place addressing any issues of resourcing that
6 need to be put in place in order to achieve those
7 targets and then auditing against, you know, auditing
8 against the targets to assess how the organisation is
9 performing.

10 Q. And --

11 A. And I suppose just -- sorry, to again -- just reflecting
12 on it, one of the things that the SFIU modernisation
13 project put in place, as I recall it, was a process of,
14 as it were, internal oversight of investigations which
15 ensured that, you know, at appropriate points there was
16 a review of where an investigation had reached and
17 whether it was -- how it was continuing. Precise
18 details I'm afraid I now don't remember, but that was,
19 as it were, a new process put in place after this case
20 wouldn't have -- you know, it was specific to SFIU so
21 and, you know, I can't say whether this case would have
22 proceeded in a different way had that been -- that sort
23 of system been in place or indeed whether, you know,
24 given the role of senior crown staff, like
25 Lindsey Miller and Stephen McGowan, whether, you know,

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1 in a sense that oversight was there.

2 Q. All right. And from what you've said, you don't know if
3 those key indicators related to Article 2 obligations,
4 do you?

5 A. I don't think they were -- they were not specifically
6 focused on Article 2. Whether there was any process at
7 that time of picking up and identifying the cases to
8 which Article 2 applied, I'm afraid again I can't --
9 I can't say.

10 Q. All right.

11 A. I suspect not. I suspect there was a -- there was an
12 appreciation. I'm pretty confident there was an
13 appreciation particularly within SFIU and by Ms Miller
14 as the DCA of the role of Article 2 in death
15 investigations. Just how that was brought to bear
16 across the caseload, I'm afraid I can't say.

17 Q. Could we move on, please, to paragraph 129:

18 "Mr Bayoh's race was not a factor in any of my
19 decisions or actions, except to the extent that the
20 allegations of racism on the part of the police was an
21 element in the circumstances prompting greater than
22 usual law officer involvement in this case."

23 Sorry. I should perhaps have said the question you
24 were asked was "To what extent was race a factor?" and
25 you have said that it was not.

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1 When you were Lord Advocate, did you considered, or
2 were there any discussions with your staff or
3 discussions that you're aware of in Crown Office, about
4 whether the investigation into the death of Mr Bayoh
5 effectively investigated the death of Mr Bayoh in the
6 same way that Crown Office would have investigated the
7 death of a white man who had died in police custody or
8 after contact with the police?

9 A. I have no recollection of any such discussion. But
10 I would be -- I would be astonished if there was a
11 difference in approach other than of course that the
12 issue of racism, and potential impact of race on the,
13 you know, on the circumstances would be something that
14 would need to be factored in in the context of a black
15 man as opposed to a white man.

16 So I mean the basic -- as it were, the basic
17 principles of independence, thoroughness, you know,
18 investigating the issues that needed to be investigated
19 would be the same, I would have thought, but one would
20 have to include into that the question of whether race
21 had played a role in the -- in the death. And that
22 would be true as a matter of, you know, general, you
23 know, just the proper investigation of the circumstances
24 of the individual case in the public interest and also
25 because of Article 14.

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1 Q. We've heard some evidence and we may hear further
2 evidence about this issue at a later hearing that --
3 about the issue of whether treating everyone the same
4 and doing the same thing across the board is a
5 sufficient and adequate approach to avoid discrimination
6 and whether -- it may be an issue for the Chair that
7 whether the application of Crown Office policies and
8 strategies regarding investigations had any indirect
9 discriminatory effect. And so those maybe issues that
10 we will explore further and may hear further evidence
11 on.

12 But when you were Lord Advocate, did you considered
13 whether this incremental, linear sequential approach
14 that we've discussed yesterday and this morning had any
15 impact in relation to the particular circumstances that
16 were faced by Crown Office in relation to the death of
17 Mr Bayoh who was obviously a black man?

18 A. Yes, absolutely. I don't -- I don't recall is I'm
19 afraid the answer. I absolutely -- I absolutely
20 recognise and would have recognised at the time that --
21 that treating everyone the same may not be either
22 legally or morally correct if one is not taking proper
23 account of differences and specifically in the context
24 of race that one may need to look at -- one has to as
25 appropriate factor that issue in to whatever process one

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1 is concerned with. So I recognise absolutely that
2 Article 14 both requires you to treat like cases like,
3 but also to treat different cases with, you know,
4 appropriately differently and that ultimately I suppose
5 is the issue that you're foreshadowing.

6 Q. So do you remember personally giving any consideration
7 to the issue of whether this incremental approach to the
8 investigation into Mr Bayoh's death could indirectly
9 discriminate, whereby that approach, that sequential
10 approach, did not perhaps address all the issues
11 regarding race or racial motivation from the very
12 beginning?

13 A. Yes. I mean I think the only point at which I would
14 have considered the -- the issue in the way that you've
15 described is there was the minute from Stephen McGowan
16 which was seeking in effect law officer approval of the,
17 you know, in effect the -- at the very high level of the
18 team that was being put in place and that minute clearly
19 proceeds on the basis that what was envisaged at that
20 stage was a criminal investigation.

21 I would have -- frankly, I would have proceeded on
22 the assumption that race would be considered in the
23 context of that criminal investigation to the full
24 extent that it was relevant and I think we looked at the
25 a passage yesterday in my statement, where I said I had

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1 no preconception or presumption about how that -- what
2 that would be and I assumed that -- I assumed that it
3 would be.

4 Q. When -- you've talked a number of times about making
5 these assumptions in relation to how race was going to
6 be or the investigation into racial motivation was going
7 to be explored within the team. Can you provide
8 the Chair with some explanation of why you felt
9 comfortable making these assumptions?

10 A. Yes. I suppose two -- two factors. First of all, you
11 know, on the face of it was, and I think from my
12 experience of them in actuality, a highly experienced
13 team was put in place of -- in the shape of Mr Brown and
14 Mr MacLeod very experienced procurator fiscals who over
15 the course of my time -- I don't think I knew them
16 previously, but I dealt with them on a number of
17 occasions -- with the oversight of one of my most
18 experienced prosecutors in the context and with
19 demonstrable, as it were, input and oversight, at least
20 as I perceived it, from Deputy Crown Agent Ms Mitchell.
21 I knew that, for example, she was meeting with Mr Anwar
22 and I can't remember just precisely when
23 Stephen McGowan's role, you know, he was involved at
24 some point, but, you know, there were senior
25 Crown Office staff.

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1 Q. We've heard he was involved from the beginning.

2 A. And I think I mentioned this earlier, my experience of
3 Crown Office was that it was an organisation that was
4 exceptionally engaged with issues generally of equality,
5 inclusion and exclusion, which is the other side of
6 inclusion. I saw that, you know, that commitment myself
7 at my attending the internal staff equalities
8 conferences which brought together staff from across the
9 whole service who were champions or ambassadors -- I
10 cannot remember the term -- within the organisation for
11 equalities and inclusion. There were various staff
12 networks. You know, but the whole ethos of the
13 organisation was extremely, in my experience, engaged
14 with those issues. And externally, there was engagement
15 with external organisations and also a strong
16 commitment, for example, in relation to hate crime,
17 which was both expressed publicly and, so far as I could
18 see, was the reality of the way the organisation
19 approached issues.

20 So in a sense I had a -- I can't say this played
21 into my thinking at the time, but in terms of making --
22 to the extent that I'm relying on -- relying on the
23 professionalism of highly experienced professionals in a
24 context of a case that raises issues about race, I'm
25 doing so in the context of an organisation that I am

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1 experiencing as an organisation that is across the board
2 interested in, committed to doing -- taking active steps
3 to promote internally and externally an inclusive and
4 thoughtful approach led at that time I think by, as I
5 recall, it by John Dunn, who was the Senior Deputy Crown
6 Agent.

7 Q. And having made these assumptions, did you personally
8 take any active steps to check, to reassure yourself
9 that the issue of race and racial motivation was being
10 properly considered by those members of staff that had
11 been appointed?

12 A. No, I didn't, I mean I think I made the point before we
13 broke that, you know, I received, as it were, reports on
14 progress. I, in this case as in other cases, expected
15 that if there was an issue, a particular issue that
16 required law officer personal engagement that that would
17 be brought to me and there were various different points
18 in the system where that might -- where that might be
19 triggered, but I didn't proactively take any steps to
20 ask that question.

21 Q. Thinking about the processes and procedures, policies
22 that may have been available within Crown Office when
23 you were Lord Advocate, are you aware of any policies
24 which would have prompted staff in some way who were
25 involved in this period of investigation to considered

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1 issues of racism or racial motivation? Now, I'm
2 thinking either of templates or some sort of other
3 prompt?

4 A. I'm simply not aware or certainly don't recall.

5 Q. Can I move on to a separate issue, in particular the
6 Health and Safety Executive. Could we look at paragraph
7 55, please. Now, we have heard some evidence about the
8 Health and Safety Executive from witnesses to
9 the Inquiry and here you talk about:

10 "HSE is the agency with general responsibility for
11 the regulation of health and safety at work, including
12 investigating potential breaches of the
13 Health and Safety at Work etc Act 1974 and/or health and
14 safety regulations. It is a specialist reporting
15 agency, ie it may itself report cases to Crown Office
16 for consideration or prosecution. Generally speaking,
17 it would be for HSE to determine its regulatory approach
18 to breaches of health and safety law, including the
19 balance to be struck between enforcement through
20 reporting cases for prosecution and other regulatory
21 mechanisms available to it. However, there is nothing
22 in principle to prevent Crown Office itself from
23 investigating a potential breach of health and safety
24 law, even though usually Crown Office would leave the
25 investigation of such cases to the Health and Safety

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1 Executive. By contrast with the position with the
2 police and the PIRC, the prosecutor has no power to
3 direct HSE to investigate a particular matter and,
4 accordingly, if HSE declines to take up a case,
5 Crown Office requires to rely on the police, the PIRC or
6 work undertaken by Crown Office itself to undertake the
7 investigation. I note that in this case there was in
8 fact a supplementary report to Crown Counsel addressing
9 the question of whether there had been breaches of
10 health and safety law, so I cannot say that the
11 involvement of HSE would have made a difference in this
12 particular case."

13 I'm less interested in what the potential outcome
14 may have been, but I'm in the set-up which existed
15 between the crown and HSE. And in particular the idea
16 that the prosecutor within the Crown Office does not
17 have the power to direct what you recognised were
18 specialists in this field to carry out an investigation.

19 Now, we have heard evidence and there is other
20 evidence available to the Chair that I think PIRC would
21 have welcomed the involvement of HSE in relation to the
22 death of Mr Bayoh and my understanding is that the crown
23 also would have welcomed the involvement of HSE, but HSE
24 declined to become involved and, as Lord Advocate, you
25 did not have the power to require them. And I'm

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- 1 interested in any reflections you have on that and
2 obviously thinking would it have been helpful to have
3 had the power to involve them?
- 4 A. This isn't the only case where I would have welcomed the
5 power to directed the HSE or to require their
6 involvement. I mean there is a constitutional context
7 of course where the police for historical reasons act
8 ultimately under the direction of the crown and that's
9 been replicated in the PIRC and also in, so far as the
10 National Crime Agency operates in Scotland, but it
11 doesn't extend to specialist agencies across the piece,
12 of which there are many, the HSE is only one.
- 13 So there's a particular constitutional context, but
14 it certainly, you know, it would be -- I mean from the
15 perspective of the Lord Advocate as head of the system,
16 as I say, this is not the only occasion where it would
17 have been useful to be able to require the HSE to be
18 involved.
- 19 Q. And in relation to obviously the Crown Office, we've
20 heard that there is now a health and safety unit which
21 specialises in health and safety matters.
- 22 A. Yes, and I think there was in my time.
- 23 Q. In your time?
- 24 A. And I think Mr MacLeod, certainly later on, was head of
25 that unit, if I remember correctly.

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1 Q. I think Mr McGowan gave evidence that that unit existed
2 and certainly there was a supplementary precognition in
3 relation to the issue of health and safety.

4 A. Yes, and indeed -- sorry -- and indeed when we looked at
5 the interactions between myself and APCC, I think one of
6 the points which I had asked for further work to be done
7 on was the question of whether there was a health --
8 potential health and safety at work breach which was not
9 causally connected to the death of Mr Bayoh.

10 I suspect, again I haven't been able to -- I haven't
11 gone back to the original documents. I suspect the
12 initial consideration of this was very focused on a
13 potential health and safety at work breach causally
14 connected to the death and I think, if I read the
15 documentation I saw correctly, I had asked for some work
16 to be done to look at, you know, whether the
17 circumstances disclosed a health and safety at work
18 breach which didn't necessarily have a provable causal
19 connection to the death, but which nevertheless emerged
20 from the evidence the crown had.

21 Q. You've clearly said you would have welcomed their
22 involvement in this matter. I wonder can you assist the
23 Chair by explaining or giving an example of the type of
24 things that caused you to welcome -- to form the
25 conclusion that it would have been welcome to have the

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1 HSE involved?

2 A. Well, it's there in the statement. They're an agency
3 with statutory responsibility for regulating health and
4 safety at work issues. It follows that they have a body
5 of internal experience and expertise and also, and this
6 is why I think there is probably a question which, you
7 know, a power of direction would raise, you know,
8 because they are a regulator of health and safety at
9 work obviously across the piece and they have a variety
10 of regulatory powers, it's the nature of a regulatory
11 body that they calibrate the use of their powers and
12 their intervention according to their own judgment. So,
13 you know, and I don't know whether this applies
14 particularly to the HSE, but I'm conscious in other
15 regulatory contexts that one might -- one has to make a
16 judgment about how far to use prosecution and
17 enforcement and how far to use what one might call
18 encouragement and more soft approaches to regulation.

19 And, you know, it is the HSE that across all areas
20 of health and safety at work is statutorily charged with
21 making those judgments. The Lord Advocate's interest is
22 obviously a very particular one in relation to the
23 investigation or prosecution of crime and the
24 investigation of deaths.

25 Q. So in relation to that Crown Office health and safety

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1 unit, the Chair should not consider them to be in the
2 shoes of or in the same position as the HSE, because
3 that's full of lawyers, not investigators, there's no
4 regulatory powers within that unit, and there's no
5 enforcement powers available within that unit?

6 A. Well, other than prosecution ultimately.

7 Q. Other than prosecution.

8 A. Or in a death case to hold a fatal accident inquiry. Of
9 course, you know, the crown has available to it the
10 power to direct the police and I can't remember which
11 case it was, but I do have a recollection of a case
12 where the HSE had been -- declined to be involved and I
13 can't remember whether I directed it or I was certainly
14 aware of it where the crown basically was directing the
15 police to carry out an investigation, but of course the
16 police are, as it were, investigators of crime across
17 the whole piece and are not specialists in the specifics
18 of health and safety regulation.

19 Q. That's something in the hands of the HSE.

20 A. Yes.

21 Q. We touched on something yesterday in relation to
22 disclosure and the approach taken to disclosure and
23 I would like to go back to that briefly to task one
24 matter. Could we look at paragraph 64, and I think it's
25 halfway down the paragraph. You say:

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1 "Although I had reservations."

2 Do you see that in the middle of the screen?

3 A. Yes.

4 Q. "Although I had reservations as to whether the earlier
5 disclosure had been sound, I accepted Mr Brown's advice
6 that the existing commitment or understanding should be
7 honoured and that if there were any further reports
8 falling into that category which had not yet been
9 disclosed, these should also be disclosed."

10 So this related to the issue of the disclosure to
11 the family?

12 A. Yes.

13 Q. And the comparison between the approach taken by
14 Frank Mulholland when he was Lord Advocate and the
15 approach taken by you and I think you explained that.

16 But can I ask although -- where you say "Although
17 I had reservations as to whether the earlier disclosure
18 had been sound", can you explain what those reservations
19 were?

20 A. I think, so far as recall it, I was told that a view had
21 been taken that Article 2 required disclosure and I
22 wasn't convinced that that was correct in the context of
23 a criminal investigation, at least where there was any
24 risk of prejudicing future criminal proceedings, but
25 there was no -- at the point where I was considering the

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1 question that came to me in February or March, I can't
2 remember precisely when, there was they do not point in
3 me, as it were, revisiting that. You know, that had
4 been done. At least at that point I had taken it it had
5 been done. And the only question for me at that stage
6 was what's the appropriate thing to do now with the
7 issue that was before me. And it was only at a later
8 point that the question of the previous understanding or
9 commitment, however, one -- however, it's properly
10 understood, came to the fore in the way that it's
11 described there.

12 Q. When you talk about risks to or your concern regarding
13 risks to future criminal proceedings, could you help us
14 understand what you viewed those risks as being?

15 A. I suppose it goes back to the general point that, you
16 know, the crown is always concerned that the -- about
17 the risk, the potential, for its investigation to or
18 matters that it's looking at in the context of its
19 investigation to, you know, to -- those are disclosed to
20 give rise to possible questions of prejudice. You know,
21 the crown has a responsibility needs to be able to
22 investigate, as it were, in a private space, reach its
23 conclusions, and -- and then take whatever courses is
24 the right course.

25 Q. Were your concerns -- sorry.

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1 A. I mean I suppose one risk, and this I think, you know,
2 I think it would be an interesting and possibly
3 important thing for this Inquiry to reflect on, one risk
4 in the context of a possible criminal prosecution of --
5 of the police officers is questions of the -- you know,
6 the crown has to be independent and demonstrably
7 independent -- questions, you know, one would not want
8 to end up with a position where it could be said or any
9 issue could be raised about the -- the, as it were, the
10 independence of the crown's investigation, regardless of
11 how that might have been affected.

12 And I suppose what one might be concerned about
13 would be that if, for example, it's, you know, the
14 proposition is that there is, you know, let's say one
15 went to a position of very open disclosure to any party,
16 let's take it away from this case and, you know, taking
17 views about how the crown should proceed with its
18 investigation and so on and so forth, issues about how
19 that would be perceived down the line in the context of
20 a criminal prosecution and trial, where that's not been
21 tested out and considered by the courts, so far as I'm
22 aware. So there's an issue about ensuring the
23 independence and integrity, and that's not to cast any
24 aspersions on anyone at all in the particulars of this
25 case, how that might be viewed down the line.

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1 So that's a very general point. As I recall it,
2 there was -- at least when Mr McGowan gave me some very
3 high level advice about this at an early stage, he made
4 a point that some members of the family might well be
5 witnesses and, again, there will be an issue about
6 potential disclosure of information to witnesses. So a
7 set of questions in a context of a background where the
8 crown is I think for good reason always been pretty
9 careful about the way that it approaches investigations.

10 And I think I also, you know, to some extent I'm
11 having to reconstruct my thinking, I would be alive to
12 the need to not take a step that couldn't be generalised
13 appropriately to other cases. So however, you know, in
14 a sense whatever -- leaving aside this case, if we were
15 to take the same approach, if one were to take the view
16 that it was an obligation under either Article 2 or
17 potentially Article 3 to disclose the crown
18 investigation on an ongoing basis to the victim of a
19 potential crime, the complainant in a -- complainer in
20 an Article 3 case or the family in Article 2 case, you
21 know, where -- how does one draw a line? I think
22 I would be conscious that to take that step is to create
23 a, you know, a system which would very different from
24 the system that we currently have and that one had to be
25 careful not in a -- in perhaps a very sympathetic case

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1 to take a step that would pose challenges in other
2 cases.

3 Q. So the concern or part of the concern was around
4 disclosure to the family, an ongoing disclosure to the
5 family, may have an impact on how the crown's
6 independence was subsequently viewed at later
7 proceedings?

8 A. Potentially.

9 Q. And was that explained to the family that that was part
10 of this reasoning behind the changed approach to
11 disclosure?

12 A. You'll be able to take me to the letter. There was an
13 exchange of correspondence with Mr Anwar and I'm pretty
14 sure that explained that there was a general concern
15 about the potential of prejudice to future proceedings,
16 it may not have gone into more detail, and I have
17 already reflected in the -- in my statement that I think
18 there was again perhaps a missed opportunity in terms of
19 just the way that the issue unfolded in relation to
20 meetings with the family and be able to explain why that
21 particular decision was taken in a way that was, you
22 know, as better able to be a constructive exchange than
23 I fear proved to be the case.

24 Q. I would like to move on actually to your involvement
25 with the family, if I may.

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1 A. Yes, of course.

2 Q. Could we begin by looking at paragraph 58 in your
3 statement. You were asked about your involvement and
4 you said:

5 "I had two meetings with members of Mr Bayoh's
6 family. I can see from the documents provided to me
7 that the first of these meetings took place on
8 8 February 2017, and the second on 3 October 2018. I
9 refer to these meetings further below. I was from time
10 to time made aware that prosecutors involved in the
11 investigation were meeting with Mr Anwar and the members
12 of Mr Bayoh's family, but these meetings took place
13 without reference to me. I explain my involvement in
14 deciding what to disclose to Mr Anwar below."

15 We touched on that.

16 A. Yes.

17 Q. So you had two meetings. We've heard that the
18 3 October 2018 meeting was the one after the decision
19 had been taken -- the prosecutorial decision had been
20 taken. Was the first time you met the family on
21 8 February 2017? I think you mentioned this yesterday.

22 A. So far as I can recall, that's the first time I met with
23 them and, in fact, I'm confident from looked at the
24 documents that that was the case.

25 Q. Thank you.

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1 A. And I think looking at the documents that and I'm not
2 sure if I was -- I suppose they're documents that were,
3 if I have seen them, came up to my office, but I'm not
4 sure I would have been particularly picking this up at
5 the time that there had been discussions between
6 Ms Miller and Mr Anwar about, you know, when would be an
7 appropriate good time for me to be introduced to the
8 family.

9 Q. Right. Let's look at paragraph 109. I think this is
10 the part of your statement where you address this
11 meeting. So that's 109. Here we are:

12 "With hindsight and with the benefit of experience,
13 including my experience of this case, there are a number
14 of steps which I could have taken which might have
15 mitigated the position. The meeting in February 2017
16 could have been better managed, expectations about
17 timescales, roles and responsibilities, process, and
18 access to information. I could have asked,
19 subsequently, for a meeting in order to explain why
20 I had decided not to disclose the product of the crown's
21 investigation as the investigation was ongoing, rather
22 than dealing with the matter in correspondence. The
23 February 2017 meeting was, as I understand it, set up
24 following discussion between Mr Anwar and Crown Office
25 staff and so far as I can recall, there were no requests

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1 from Mr Anwar for further meetings except to advise the
2 family of the outcome of the investigation. But
3 I could, particularly as the duration of the
4 investigation became much longer than I had initially
5 anticipated, have been more proactive in seeking to
6 ascertain what the family, advised by their solicitor,
7 would wish by way of interaction with the crown,
8 including further meetings with myself. Whilst none of
9 these steps would necessarily have mitigated the
10 family's disappointment about the outcome of that
11 investigation, they could perhaps have made a difference
12 to the family's confidence in the process."

13 So February 2017 is the first meeting. You have
14 been in post since 1 June 2016. Why did it take that
15 period of time to have a first meeting with the family?

16 A. I'm not sure that I can -- I'm not sure that I know the
17 answer to that. I mean, as I say, I was aware of --
18 I think there may have been two issues. Well, actually
19 I'm not sure I can answer that in any great -- with
20 anything concrete. I certainly have no recollection
21 from the time. From the documents, there was clearly
22 some engagement between Mr Anwar and Crown Office and
23 this was back in -- at some point late in 2016, I think
24 on the back of an exchange of correspondence where
25 Mr Anwar had written to me, you know, in effect inviting

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1 a potential meeting and I wrote back and then there
2 was -- if I read the documentation correctly there was
3 then some discussion between him and Lindsey Miller
4 about timing. Mr Anwar asked for a particular date,
5 which for particular reasons were, you know, wasn't the
6 date that was fixed on, but the meeting that was held
7 around the date that he had requested.

8 I'm sorry. I'm not trying to suggest that it's --
9 it should be solely for Mr -- you know, ultimately I
10 should one might say be thinking about this, but I
11 suppose there had been an exchange of meeting --
12 exchange of correspondence, an acknowledgment on my part
13 that, you know, it would be appropriate to meet the
14 family at a certain point and then a discussion between
15 Mr Anwar and the crown about when that point would be is
16 how I read the material.

17 Q. All right. I think we'll come back to this later, but I
18 wonder if that would be?

19 LORD BRACADALE: We will stop for lunch now and sit at
20 2 o'clock.

21 (1.02 pm)

22 (Luncheon adjournment)

23 LORD BRACADALE: Ms Grahame.

24 MS GRAHAME: Thank you. Before lunch I was asking you about
25 the first meeting with the family which took place on

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1 7 February 2017 and -- or around about that time and
2 I had asked why you had come into post as Lord Advocate
3 on 1 June 2016 and why the first meeting took until the
4 February.

5 Now, I think before lunch you said you couldn't
6 quite recall. Can I ask you to look again at something
7 we looked at yesterday.

8 A. Of course.

9 Q. Which was Frank Mulholland's Inquiry statement,
10 SBPI 00476, and I'm interested in paragraph 124 of this
11 and it's a short paragraph. It says:

12 "I spoke to James Wolffe by telephone and reiterated
13 the importance of this inquiry [and this is a reference
14 to the inquiry into the death of Mr Bayoh] including the
15 need to maintain good and regular liaison with the
16 family."

17 And we spoke about this yesterday, but do you
18 remember now that conversation with Frank Mulholland
19 where the liaison with the family was discussed?

20 A. I have no recollection of it. As I say, I have no
21 reason to doubt it. I suspect this was a call in the
22 context of my appointment and, you know, it would be
23 relatively briefly, which is not to trivialise it at
24 all.

25 Q. Did you -- in that period between 1 June 2016 and the

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1 beginning of February 2017, did you personally take any
2 proactive steps or ask your Crown Office staff to
3 organise a meeting with the family of Mr Bayoh?

4 A. Well, I don't recall. It's fair to say it's now quite
5 hard to, as it were, reconstruct the sort of taking up
6 office, the induction into the range of
7 responsibilities, issues, the immediate flow of work and
8 so on that -- that arose, so, you know, I think the
9 answer is, no, I didn't, and I probably assumed that,
10 you know, as I was getting my feet under the desk
11 dealing with that flow of work, seeing the sort of
12 issues being brought to my attention, that, you know,
13 the system would, you know, deal with that
14 appropriately.

15 I mean I see in the previous paragraph my
16 predecessor's observation that a full briefing would be
17 carried out as with the appointment of all new law
18 officers and certainly I was going through a series of
19 briefings on a wide range of issues during that initial
20 period and I can't remember whether this case
21 specifically featured or not. We've seen the
22 documentary record, but, as I say in my statement, there
23 may well have been oral discussion.

24 Q. Right.

25 A. Which I simply can't remember.

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1 Q. And in terms of the Article 2 obligations on the crown,
2 in relation to the next of kin and the family of
3 Mr Bayoh, do you have any recollection now of how those
4 obligations were being met in relation to the family
5 during that period from you taking up office on 1 June
6 2016 up to that moment where you had your first meeting
7 with them?

8 A. Other than that I have seen some information about a
9 meeting between I think it was -- I think it's a meeting
10 between Ms Miller and Mr Anwar.

11 Q. You understood there was a meeting between the two of
12 them that was --

13 A. Yes, I think there was an exchange of correspondence
14 between Mr Anwar and myself which, you know, that's sort
15 of in a sense entirely to be expected, part of which
16 was, you know, to -- there should be a meeting and then
17 I think the sequence is that there was then a discussion
18 between Ms Miller and Mr Anwar about the suitable timing
19 of a meeting.

20 Q. All right.

21 A. And I would have been, you know, open to being advised
22 about when was a good point for me personally to be --
23 to have that introductory meeting.

24 Q. Thank you. I would like to move on to ask you some
25 specific questions about evidence that we've heard in

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1 the Inquiry. It will not come up on the screen. We
2 don't have that capacity. But you to some extent have
3 dealt with issues about this in relation to -- with
4 regard to your Inquiry statement so I will at the end
5 put up paragraph 114 of your Inquiry statement which
6 deals with the two meetings --

7 A. Yes.

8 Q. -- that we'll be addressing and I'll have that brought
9 on the screen shortly, but the first evidence I would
10 like to ask you about relates to evidence we've heard
11 from Kadi Johnson who is Mr Bayoh's sister?

12 A. Yes.

13 Q. And she gave evidence to the Inquiry on 31 January 2023,
14 Day 34 of the Inquiry, and she was asked some questions
15 by myself regarding the meetings that she'd had with you
16 and she said:

17 "When we met the other Lord Advocate [that's a
18 reference to you] we felt like he was not interested at
19 all. He didn't give us much information. We had to
20 hear things from the media, you know, so it wasn't -- we
21 didn't feel any engagement with him. Yes, I think if we
22 had carried on in the same manner as we were carrying on
23 with Frank [that's a reference to Frank Mulholland] we
24 would have had a different perspective of him.

25 "So the difference was very much amount of

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1 information you were receiving?"

2 And her answer was:

3 "The lack of engagement he had with us as well".

4 And I asked her:

5 "When you say the lack of engagement, is that fewer
6 meetings or fewer point of contact?"

7 And she answered:

8 "Well, apart from the meetings with Frank, whatever
9 he was going to do or wherever he was going to do his
10 investigation, he was keeping us informed and, you know,
11 we will have a discussion about it and he will listen to
12 our concerns and follow that up, but we didn't have that
13 with the other Lord Advocate."

14 That's yourself.

15 Do you feel that's a fair reflection of the
16 difference of approach between you and the now
17 Lord Mulholland?

18 A. I mean I can't speak directly to the detail of
19 engagement that he had with them. I mean certainly
20 reflecting back on it, you know, that's intelligible to
21 me and I very much regret that that's the view that
22 Ms Johnson formed. It's fair to say that first meeting
23 in the terms in which, you know, I understood that the
24 purpose of that meeting, I felt that had been, you know,
25 a good meeting, as far as I can now remember. I

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1 certainly don't remember a feeling that it had gone --
2 gone badly in any particular way.

3 Looking back as I have already -- we discussed this
4 at the beginning of my evidence yesterday, again, one
5 could see there is a missed opportunity to have been --
6 taken a more sort of strategic long-term view. At the
7 time, the purpose as I saw it was to introduce me to the
8 family against the background when they had met my
9 predecessor, as I understood it, for me to give them my
10 own commitment to a thorough investigation. The
11 subsequent letter from Mr Anwar suggested that that
12 commitment had been received and welcomed.

13 Again, with the benefit of it's fair to say much
14 work and engagement at a later stage that I had with
15 victims of crime and reflecting back, you know, I
16 suspect I could have been much more proactive in terms
17 of, you know, trying to understand what the family would
18 like to have by way of engagement, what would be helpful
19 to them, and then to considered how, you know, how best
20 that could be afforded and accommodated. It's also fair
21 to say I suspect at that stage, even at that stage,
22 I didn't anticipate that things would take quite as long
23 as they did and if, you know, things had come to a
24 conclusion more quickly then, you know, the -- what with
25 hindsight we can certainly see is a long gap wouldn't

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1 have -- wouldn't be there.

2 I would have been entirely open to further meetings
3 had those been requested.

4 Q. Right.

5 A. But I can well see that I could have been more proactive
6 in terms of, you know, myself finding out what would be
7 useful and helpful to the family, advised by their
8 solicitor, of course.

9 Q. Thank you. We also heard from Kadi in relation to the
10 final meeting with you. We've heard that this was on
11 3 October. And the evidence that Kadi Johnson gave to
12 the Inquiry was -- she was asked:

13 "Can you tell the Chair what the impact was for you
14 and your family when you heard about the
15 non-prosecutorial through the media?"

16 And she talked about there being a knock on the
17 door, a journalist had approached them to tell them.

18 This is her response:

19 "Obviously we were upset because the Lord Advocate
20 had promised to engage us, but again that wasn't the
21 case, so we felt betrayed there as well."

22 I asked her:

23 "Do you remember who the Lord Advocate was at this
24 moment?"

25 And she said it was you.

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1 And we then went on to the subsequent meeting and
2 she said:

3 "Yes, we had a meeting with him and we raised that
4 concern with him and he said he will look into it to
5 find out how that happened, because he had promised that
6 he would let us know first before anything else, but
7 I don't know if that was followed up."

8 And I asked her:

9 "What explanation were you ever given as to why the
10 media had that information before the family?"

11 And she answered:

12 "He said he doesn't know how, but he will
13 investigate it, but I don't know what the outcome is
14 with that. He will investigate how the media got to us
15 before him, you know.

16 "And what did you hear about the outcome of that
17 investigation?"

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

19 And I said:

20 "Have you ever been given an explanation?"

21 And she said:

22 "No. We may hear from Ade at some point in the
23 future and he points out that you've never been given a
24 written or an oral apology from the crown about the fact
25 that information went to the media before it went to

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1 you."

2 And she said "that's right yes." And she said that
3 was also her position. And she explained that it had
4 been very hurtful to hear from the media:

5 "Everyone else is hearing information other than us
6 who are really affected."

7 Now, I think if we can have your paragraph 114 on
8 the screen and from your Inquiry statement, you do
9 specifically address this meeting. Here we are:

10 "I recall meeting Ms Johnson in October 2018 and I
11 believe that she was also present at the February 2017
12 meeting. The purpose of the 2017 meeting was to
13 introduce me to the family and to allow me to give them
14 my own commitment to a thorough investigation, rather
15 than to go into detail about the case. I very much
16 regret if that left the family with an unfavourable
17 impression. I entirely accept that the fact that the
18 decision was reported in the media before I met the
19 family in October 2018 was upsetting and distressing.
20 I was personally horrified by it."

21 Would you wish to elaborate on that?

22 A. Yes, I mean it was --

23 It was plainly going to be devastating for the
24 family to see this headline. You know, they were
25 entitled to hear what would be -- you know, I could

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1 anticipate would be unwelcome news from myself and from
2 the prosecutors who had been working on the case and
3 that was the intention and it's fair to say this report
4 in the press, you know, clearly -- was clearly going to
5 be upsetting for them and, you know, make, you know,
6 that -- conveying that information to them, you know,
7 all the more -- all the more difficult.

8 Q. In relation to the aspect of evidence that we've heard
9 that they never heard about the outcome of the
10 investigation into how the information was leaked, do
11 you remember what was done in relation to that
12 investigation?

13 A. Well, there was internal work, and I've covered this in
14 my statement, you know, I -- Lindsey Miller advised me
15 what the crown was intending to do. Mr Logue later came
16 and gave me in effect a report on that, gave advice that
17 what was possible and proportionate had been done and --
18 and I accepted that advice. I understood that Mr Logue
19 was going to convey information to Mr Anwar.

20 I have to confess I don't -- I mean I haven't
21 checked whether that was done or not and I probably
22 don't have the information available to be able to check
23 that.

24 Q. Right. But it was your understanding that the family
25 would be given an explanation, such as it was --

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- 1 A. Yes.
- 2 Q. -- in relation to that?
- 3 A. Yes, which was, you know, we haven't found anything and
4 we've undertaken the -- what Mr Logue advised me was the
5 appropriate investigation in the circumstances and I
6 know there's a set of issues about -- about that, so --
7 but certainly I'm pretty sure in the documents I saw
8 Mr Logue indicated that he would be advising Mr Anwar
9 and I would -- yes, I would not have any reason to -- to
10 think that wasn't done.
- 11 Q. Thank you. And looking back at the -- those meetings
12 that you had with the family, you've obviously made
13 comments in your statement which we've looked at, but
14 looking back and reflecting on how those meetings were
15 handled, do you have any further thoughts you would wish
16 to share with the Chair about how this could have been
17 handled better?
- 18 A. Well, as I say, I have had the benefit of meetings with
19 Mr Bayoh's family and then, you know, as I went on my
20 incumbency meetings with victims of crime more
21 generally, not in the context of ongoing cases, but in
22 the context of work being done across the system in
23 relation to victims and it is fair to an appreciation of
24 the desirability of institutions being sensitive to the
25 needs and wants of victims in terms of engagement with

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1 the system.

2 Now, there obviously institutional constraints and,
3 you know, and also practical restraints of various sorts
4 that apply, but I think that starting point of being,
5 you know, starting with seeking to ascertain from
6 victims themselves what would be of value and benefit to
7 them and then thinking about how that can be met and, if
8 it can't be met, to be able to explain that is something
9 I have become, you know -- became appreciative of and
10 came to understand and I came to also appreciate across
11 the, as it were, the system as a whole just how
12 challenging the criminal justice system can be and is
13 for many victims of crime and the need to try and work
14 in different ways across the system to try and address
15 those issues so that victims have confidence in the
16 system.

17 And it's one of the deep regrets I have about, you
18 know, reflecting back on this case that Mr Bayoh's
19 family were left with a lack of confidence in the crown
20 and what the crown had been doing and disappointment
21 personally in, you know, the extent to which I
22 contributed to that lack of confidence.

23 Q. Thank you. So can I say to sum up that now, with the
24 benefit of further experience and on reflection, you
25 would begin by identifying what the family needed?

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1 A. Yes.

2 Q. And then see how that could be accommodated within the
3 practical and institutional constraints within your role
4 as Lord Advocate?

5 A. Absolutely, and I mean the other feature of it, which I
6 think I reflected in the paragraphs that you -- we
7 discussed at the beginning of my evidence yesterday at
8 the end of my statement is that I think it was really
9 unfortunate, again looking back with 20/20 hindsight,
10 really unfortunate, that in a sense that I approached
11 that meeting in the context of the purpose of it being
12 simply, as I understand it, to introduce myself, to give
13 a high-level commitment and not to have thought forward
14 to issues of, you know, a future process of engagement,
15 the need to communicate and introduce the way the crown
16 investigation was proceeding and would proceed, because
17 I think one of the challenges, as I have reflected back
18 on this, was a process in which, as I have explained,
19 and for reasons which were, you know, entirely normal in
20 terms I relied on a very experienced team who were
21 undertaking the investigation and doing the work and
22 very experienced Crown Counsel and my own role was only
23 ever going to be one at a sort of supervisory level,
24 accepting that, you know, there may be missed
25 opportunities in terms of asking questions at particular

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1 points.

2 And I think one of the -- I think I pointed in my
3 statement to an exchange of emails where APCC wasn't
4 available but, you know, the decision was made that she
5 didn't need to be at the meeting. I don't think it was
6 a view that it wasn't appropriate for her to be there.
7 I think it was really unfortunate she wasn't, because
8 that would have been an opportunity to introduce and
9 explain the way that the crown investigation would go
10 forward and to perhaps set up an appropriate --
11 appropriate liaison and to think about family liaison
12 across the, you know, the range of those involved with
13 myself coming in, you know, at the appropriate -- at the
14 appropriate points, because I think the reality of the
15 role that I held was that, you know, my active
16 engagement was always going to be constrained by the
17 range of demands on the office.

18 Q. And are those examples of the types of issues that could
19 have been covered within the strategy, if there had been
20 such a strategy, that you have mentioned yesterday and
21 today?

22 A. Yes, one could have thought, you know, as I say
23 thought -- and again, I suspect at that very early
24 stage, you know, did I think it would take as long as it
25 did? You know, I think time has a deeply corrosive

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1 impact on those affected by the criminal justice system
2 and that's of course the accused persons as well as
3 victims of crime. And I became, you know, in the course
4 of my time deeply concerned about -- engaged with that
5 corrosive impact that time and the passage of time can
6 have on people. It didn't help that things took as long
7 as they did and as things were taking the time that they
8 did, then, again reflecting back, you know, one can't
9 help but think it would have been a good idea to have
10 been more proactive in terms of thinking about how to
11 engage, you know, through Mr Anwar, of course, because,
12 you know, he's representing the family, with them.

13 Q. Right. Thank you.

14 A. I don't know if that's helpful.

15 Q. Thank you very much. I would like to move on and ask
16 you about some evidence that we've heard in the Inquiry
17 from Collette Bell, who was Mr Bayoh's partner, and the
18 mother of one of his children. She gave evidence to the
19 Inquiry on Day 40 on 9 February last year, and she spoke
20 about a meeting with yourself. She said:

21 "But I remember in particular that meeting and I
22 think it was the newer Lord Advocate [which again was
23 you] and he had said something like [and this is in
24 quotation marks] 'He's done it to himself. If he was
25 responding to the arrest, he wouldn't have sustained his

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1 injuries' or I'm sure he used words like that. [Again in
2 quotations] 'If he wasn't flailing around or fighting
3 against it, then this wouldn't have happened' and I
4 remember thinking are you kidding me on? There's like
5 nine officers or six officers on top of him. How do you
6 want him to react? And I just remember thinking you're
7 not have anymore of my time if that's your opinion and I
8 certainly don't think that you're going to be doing
9 anything in our best interests to help us."

10 And then I think at paragraph 116 of your Inquiry
11 statement, you address the issue of whether a member of
12 the family had become angry and you'll see at line 2:

13 "I regret that I cannot specifically recall now if
14 she was present. I have no memory of any member of
15 Mr Bayoh's family becoming angry at that meeting.
16 Mr Anwar's letter following the meeting suggested that
17 Mr Bayoh's family had appreciated my commitment to a
18 thorough investigation and does not indicate that there
19 was at that stage unhappiness or concern about anything
20 which had been said by me or by anyone else. I would
21 never suggest that Mr Bayoh 'brought it on himself' or
22 otherwise used language to that effect."

23 And I would like to again asked ask you if you would
24 like to comment on this suggestion that you said "he's
25 done it to himself", "if he was responding to the

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1 arrest, he wouldn't have sustained his injuries". Do
2 you remember saying anything along those lines at that
3 meeting?

4 A. I mean it's fair to say I've got very little specific
5 recollection of that meeting. I mean I've a picture in
6 my mind of it, but I don't remember what was discussed.
7 It's fair to say it's not language I would use. It's
8 not a sentiment I would express. I think if I had done,
9 it would have -- it would have stuck in people's mind --
10 in the minds of everyone who was there and I don't -- I
11 certainly have no memory of any member of Mr Bayoh's
12 family becoming angry or upset at that meeting.

13 Q. And insofar as she said:

14 "If he wasn't flailing around or fighting against
15 it, then this wouldn't have happened."

16 Do you remember saying anything like that?

17 A. I think it's unthinkable and at that stage of the
18 investigation, you know, we're at a point where the PIRC
19 report has been received, the crown is engaged in an
20 investigation of what happened, and if I look at the
21 briefing that I received, I think it's a fair comment
22 from one another comment that I have seen that, you
23 know, at that stage my, you know, my knowledge of the
24 case was at a fairly sort of high level, you know, that
25 there was an ongoing investigation which was to find out

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1 what had happened.

2 I think it highly unlikely that I would have
3 embarked on any sort of comment, you know, leaving aside
4 whether it's likely I would make that comment, I think
5 in any comment about that would sort of prejudge where
6 the investigation would come to.

7 Q. Can you think of perhaps anything that could have been
8 mistaken for a comment with those sentiments that you
9 may have uttered?

10 A. I think the difficulty is I have got no specific
11 recollection of what was said at the meeting. I can say
12 what I think it's, you know, likely and what's unlikely,
13 and, you know, I can say I don't remember, as it were, a
14 difficult exchange at that meeting.

15 Q. Right, thank you. Could you give me a moment, please?

16 A. Yes, of course.

17 Q. Thank you very much, I have no further questions.

18 A. Thank you.

19 LORD BRACADALE: Are there any Rule 9 applications,
20 Ms Mitchell?

21 Mr Wolffe, would you mind withdrawing to the witness
22 room while I hear submission.

23 Submission by MS MITCHELL

24 LORD BRACADALE: Just give me a moment, Ms Mitchell, until I
25 find the live transcript again. Yes, thank you.

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1 MS MITCHELL: Thank you.

2 The first issue I would like to explore is the
3 question of complying with Article 2 and Article 14 in
4 relation to having an effective thorough investigation.

5 In evidence, it was stated by Mr Wolffe that the
6 starting point, and I use that as a quote:

7 "The starting point for that is a skilled and
8 experienced team who undertake that investigation."

9 We heard from Mr Wolffe in evidence that key
10 performance indicators were unlikely to have addressed
11 Article 2 and Article 14. So it's to ascertain if there
12 was anything else done in respect of ascertaining
13 whether or not the crown was complying with Articles 2
14 and Article 14. In particular, was there any process of
15 review? My learned friend asked whether or not there
16 were any practices or procedures or protocols in
17 relation to assessing whether or not Article 2 and 14
18 had -- had been complied with, but was there any process
19 of review and if -- The reason that I ask that question
20 is would the trigger for an assessment at Crown Office
21 at that time as to whether or not Article 2 or
22 Article 14 been complied with only triggered by a
23 complaint by a family.

24 The second issue is in relation to a tension between
25 the Lord Advocate Mullholland in respect of the handover

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1 and Mr Wolffe.

2 At Lord Mulholland's statement SBPI 00467 you will
3 recall from my learned friend speaking to Mr Wolffe that
4 he says that he spoke to Mr Wolffe by telephone and the
5 phrase is "and reiterated the importance of this
6 inquiry, including the need to maintain good and regular
7 liaison with the family."

8 Now, the reason why he says "reiterated" is in the
9 paragraph before at paragraph 123 under the heading
10 "Handover investigation into Sheku Bayoh's death to
11 Mr Wolffe KC" Lord Mulholland statements:

12 "As with the appointment with all new law officers,
13 a full briefing would be carried out by Crown Office
14 officials and SGLD, Scottish Government Legal
15 Department, senior lawyers."

16 So it's to ask was there such a briefing by
17 Crown Office officials in relation to this case and was
18 there such a briefing by Scottish Government Legal
19 Department if Mr Wolffe clearly doesn't recall the
20 telephone call, but were those things in place and it
21 seems that given the evidence on this where he says that
22 he thinks that a formal handover would have been a good
23 idea, it's clear had a Mr Wolffe believes that such a
24 formal handover procedure is something which is actually
25 in place, if one can call it that, to have briefings

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1 from those two groups of people.

2 The third issue which I would like to raise is in
3 relation to the decision taken by Mr Wolffe and his
4 explanation for not handing documents over to the family
5 and I think we've heard, first of all, in evidence that
6 he wasn't convinced that Article 2 required disclosure
7 and he said he wasn't convinced it was correct in the
8 context of criminal investigation, at least where there
9 wasn't any risk of prejudice in future criminal
10 proceedings.

11 And what I would like to put to him is
12 Lord Mulholland's statement, SBPI 00476, and what
13 Lord Mulholland says in relation to the disclosure of
14 reports at paragraph 97 is:

15 "I cannot remember it, but if I did give an
16 undertaking for disclosure of reports then that would be
17 fine. There is no reason not to disclose the reports.
18 The case would go to a criminal prosecution or at least
19 an FAI. They would receive disclosure of these reports
20 in the course of those proceedings. This would include
21 the PIRC report and the expert reports. This is not an
22 exceptional undertaking."

23 So it's to ask if he might reflect upon that and
24 explain his view on the matter and perhaps in particular
25 with the view that any disclosure of these reports might

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1 impact upon the family of Sheku Bayoh if they were
2 witnesses, given the fact that any witnesses evidence
3 they were likely to give would be unrelated to any of
4 the types of evidence that was contained in these
5 reports.

6 The next issue, number 4, is made with reference to
7 COPFS 01353A, which I think has been made available and
8 that's a letter from Mr Wolffe to Mr Anwar in respect of
9 his explanation that no more reports would be provided
10 to Mr Anwar, other than the ones that he had been told
11 that he was going to get and the reason I want to take
12 him to that document is because the document indicates
13 that Mr Anwar would get these reports and in due course
14 and when it was the appropriate time would be disclosed
15 to him and what I'm wanting to find out is did he ever
16 sanction those reports to be made available, if not, why
17 not, and ought these to have been disclosed in advance
18 to the family of the VRR procedure.

19 Number 5, in the course of giving evidence,
20 Mr Wolffe talked about the structural independence that
21 was required between investigators and those being
22 investigated. And I would like to take him to a
23 document, COPFS 02214, where it is stated in a meeting
24 that he appeared to have attended that the line of
25 inquiry on restraint communicated by the PIRC to the

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1 police caused Police Service of Scotland to express
2 disquiet and I would like to ask him whether or not did
3 the fact the PIRC was communicating in advance this line
4 of inquiry to the police cause him concern.

5 I should say these documents were disclosed after
6 the Rule 9s, my Lord, just to be clear on that. They
7 were disclosed, I think, Thursday and Friday of last
8 week.

9 Number 6, again, from disclosure it appears on
10 21 September 2018 the crown knew that the newspapers
11 were intending on publishing a report that a decision
12 not to prosecute had been taken and presumably the
13 Lord Advocate was aware of that or had been made aware
14 of it, so I suppose properly that will be the first
15 question I want to ask him but, secondly, what I would
16 like to ask was, was there any consideration given in
17 those circumstances to advising the family before the
18 matter came out in the newspapers, either to the fact
19 that there was newspaper reports on this or to give the
20 decision, rather than the family finding out via the
21 newspapers?

22 The seventh issue is to explore when the crown had
23 considered Article 2 and Article 14, the former
24 Lord Advocate Mr Wolffe said that he was acutely
25 conscious that there were other considerations in

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1 respect of Article 2 and Article 14 than criminality.
2 What I would like to know was at the end of the crown
3 inquiries was consideration given to reporting to the
4 police in respect of any disciplinary matters and at the
5 end of the crown inquiries was consideration given to
6 the reporting to health and safety in relation to any
7 issues arising falling short of prosecution.

8 Number 8, as the Inquiry has heard there has been --
9 there was data held in respect of Mr Anwar that caused
10 PIRC disquiet and investigations were made in that
11 regard and reported back to the Crown Office. Once the
12 Crown Office were in receipt of that information was
13 there any consideration given to informing Mr Anwar of
14 that breach of data compliance.

15 And finally, and touching upon what my learned
16 friend's last questions to Mr Wolffe were, Mr Wolffe has
17 clearly not a strong recollection of what happened with
18 the family in meetings which he had with them, but it's
19 to put to him whether or not at the meeting which was
20 discussed with my learned friend, or perhaps a
21 subsequent meeting, whether or not he remembers using
22 the term "like a toddler" in respect of Mr Bayoh and
23 whether or not he remembers that having an effect on the
24 family.

25 Those are my questions.

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1 LORD BRACADALE: Thank you. Well, we'll take the 15-minute
2 break now and we'll sit as soon after that as I can when
3 I'm ready.

4 (2.48 pm)

5 (A short break)

6 (3.15 pm)

7 LORD BRACADALE: I'm going to allow Ms Mitchell to examine
8 Mr Wolffe on the following issues: issue number 6,
9 whether the crown could have advised the family once the
10 crown became aware that the prosecutorial decision was
11 going to be published in the press. Number 7, whether
12 consideration was given at the end of the crown
13 investigation to disclosing for the purposes of
14 disciplinary proceedings and health and safety, and
15 number 8 in relation to the data held on Mr Anwar.

16 As to issue number 5, which raises certain concerns
17 on the part of Police Scotland I considered that this
18 requires further exploration by the Inquiry, so that
19 should be developed, but it will not be explored today.

20 As to the remaining issues, number 1, 2, 3, 4 and 9,
21 I do not consider that I would be assisted by further
22 examination of these issues with this witness.

23 So I shall allow Ms Mitchell to examine on issues
24 number 6, 7 and 8.

25 Can we have the witness back, please.

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1 Mr Wolffe, Ms Mitchell who's senior counsel for the
2 family of Sheku Bayoh has some questions.

3 A. Thank you.

4 LORD BRACADALE: Ms Mitchell.

5 MS MITCHELL: Thank you.

6 Questions by MS MITCHELL

7 MS MITCHELL: We understand from the evidence that's already
8 been heard that the crown were contacted by the press in
9 advance to explain that they were going to run a story
10 indicating what the prosecutorial decision was. I take
11 it that you were aware of that at the time when that was
12 intimated and before the actual statutory came out in
13 the papers?

14 A. Well, I was made aware of it. In looking at the
15 documents that I was able to see before the preparing my
16 statement, there was a minute from someone in
17 Crown Office comms to me basically seeking an approval
18 of a line, which I suspect had already been approved by
19 I would guess Lindsey Miller but that's a guess on my
20 part.

21 Q. Indeed, and I think that note might have been probably
22 on or around 21 September. I think that's around about
23 the time.

24 What I would like to ask you is, when you received
25 that information, was any consideration given at that

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1 stage to the crown proactively contacting the family to
2 make them aware that this was going to be in the press
3 and/or, for example, bringing forward the meeting in
4 order that the family could have the meeting, the
5 decision with you in advance of that time and if it was
6 considered and refused -- or if it was considered and
7 that was decided not to happen, why was that?

8 A. Yes, I don't remember any consideration that reached me
9 and, as you put that point to me, I can well see that
10 that would have been the right thing to do at that
11 point. I can't say whether it was considered, you know,
12 as it were by others in the system. Certainly when the
13 story appeared, again I'm relying on the documentary
14 record, there's an email from me to I think certainly
15 the crown agent and possibly also to Ms Miller saying a
16 number of things, one of which was, you know, can we --
17 and it will be in the documents, but I think I was
18 inviting contact with Mr Anwar to accelerate the meeting
19 if that was possible. And I can't now remember I'm
20 afraid what then happened in terms of the timing of the
21 meeting.

22 Q. I think from what you've said then, although you weren't
23 aware that anyone lower down the chain, as it were,
24 considered that, would it be fair to say that you didn't
25 consider that either?

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1 A. I didn't consider it and, you know, frankly I hadn't,
2 you know -- now you've put it to me, I can well see that
3 that would have been a courteous thing to have done.

4 Q. Moving on. In your evidence you explained of course
5 that you were acutely conscious that there were other
6 considerations in relation to Article 3 and 14 other
7 than criminality, it wasn't simply an issue of
8 criminality.

9 And what I am wondering was, at the end of the crown
10 inquiries, was there any consideration given to
11 reporting to the police issues in respect of
12 disciplinary matters against police officers?

13 A. I was copied in -- I was asked a question about some
14 correspondence of Mr McGowan's in relation to issues of
15 discipline. I can't myself remember being involved in
16 consideration of intimating any disciplinary matters. I
17 suppose --

18 Q. Were you -- sorry.

19 A. I suppose those issues -- well, would those issues need
20 to await the VRR is one of the things that's in my mind.
21 You know, the crown investigation, the potential for
22 criminal proceedings is not exhausted until the VRR has
23 been completed. Although I step back from the VRR
24 process, you know, that itself took some time and was
25 done with -- my impression was with some care.

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- 1 Q. Can I ask if that's a consideration you're thinking
2 about now as opposed to what you knew or what you
3 considered then?
- 4 A. It's more that at the point where the decision in
5 October or the meeting in October 2018 that, you know,
6 that initial decision not to prosecute, I don't recall
7 there being any consideration given at that point to --
8 that I was party to reporting any misconduct issues. I
9 suppose what I'm reflecting now as you ask me is that it
10 probably wouldn't have been appropriate to think of
11 that. If it hadn't been appropriate earlier, it
12 wouldn't be appropriate until the end of the VRR
13 process. I'm afraid I have no recollection of what
14 happened thereafter.
- 15 Q. Thank you. And can I ask you then whether or not at the
16 end of the crown inquiries was nor consideration given
17 to reporting to Health and Safety Executive in relation
18 to any issues falling short of criminality?
- 19 A. I'm not aware of that.
- 20 Q. Would you have expected to have been made aware of that
21 if that was something that was going on to happen?
- 22 A. I'm not sure is the answer. And on both of those, I'm
23 not sure whether that's something that -- you know those
24 are decisions that would be made by Crown Counsel or by
25 senior staff.

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1 I suspect given the particular profile of this case
2 and given that any reference to Health and Safety
3 Executive would presumably be in relation to
4 Police Scotland, I think it probably would have been
5 brought to my attention but --

6 Q. Because I'm reflecting in that on your view that there
7 were other considerations under Article 2 ask Article 14
8 and I'm just wondering that your being the person that
9 that lands with at the end of the day --

10 A. Yes.

11 Q. -- whether or not -- whether or not you knew of that,
12 but the answer is appears no?

13 A. No, I mean the key thing for me from the outset and my
14 recollection is, you know, relatively limited, I am
15 I think clear in my own mind that from the outset I was
16 acutely conscious that Article 2 required a thorough
17 investigation of the circumstances of Mr Bayoh's death.
18 I mean this was not a case that called for a mandatory
19 fatal accident inquiry, but I certainly took the view
20 that it fell to be treated as if it did for Article 2
21 reasons.

22 I -- we've seen the minute. The initial question
23 was whether criminal proceedings should be brought and
24 that issue was exhausted. I always envisaged that
25 certainly -- certainly if there were no criminal

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1 proceedings that there would need to be a process of
2 inquiry and as things moved on, I came to appreciate
3 that there was going to be an inquiry, should be an
4 inquiry regardless of whether there was criminal
5 proceedings.

6 The shape of that inquiry, you know, I remained in a
7 sense openminded about until quite late in the day and
8 then ultimately took the view that a fatal accident
9 inquiry couldn't adequately deal with the range of
10 issues that fell to be addressed and advised the
11 Government -- recommended to the Government that they
12 should set up this inquiry.

13 But I entirely take your point, there are other
14 processes which are all part of the state's response
15 which, you know, if one is looking holistically at
16 Article 2 and the compliance of the United Kingdom as
17 the contracting state of its Article 2 obligations or
18 those processes, and potential processes are part of the
19 system which responds to Mr Bayoh's death.

20 Q. Indeed. And perhaps you can see that's why I'm
21 asking --

22 A. Indeed.

23 Q. -- whether or not consideration was given to reporting
24 to the police or disciplinary matters or health and
25 safety.

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1 Moving on in respect of the next matter. At some
2 point in time, PIRC became aware that there was certain
3 data held on Mr Anwar that was -- that ought not to have
4 been held at all really. I was going to say "in a way",
5 but at all. And I presume that at some point you were
6 also made aware of this situation. Mr Anwar had written
7 I think both to the crown and to PIRC asking them to
8 investigating these matters.

9 When you became aware of the information being held
10 on Mr Anwar, was consideration given to the -- by the
11 crown to advise him of the fact that that information
12 was held and maybe in breach of the guidelines?

13 A. I think if I recall the sequence correctly, Mr Anwar had
14 raised the question of whether police had been accessing
15 inappropriately records of particular individuals.

16 Q. Indeed.

17 A. I can't remember whether he had included himself in that
18 list and the PIRC then investigated that and
19 Mr McGowan's minute -- I mean it's fair to say I think
20 I was probably made aware of this when the PIRC report
21 came in, but certainly Mr McGowan's minute that we've
22 looked at earlier in my evidence addressed this very
23 specifically, specifically the issue of the -- of the
24 holding of intelligence in relation to Mr Anwar.

25 It's fair to say, perhaps because of my professional

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1 background, I was rather -- well, very exercised by the
2 idea that the police were collecting intelligence on a
3 criminal defence lawyer and if that was -- if that was
4 the position, you know, as a former dean of faculty, I
5 did not view this with equanimity.

6 I had a discussion with the Crown Agent at the time
7 and, as I recall it, I mean I certainly recall having a
8 discussion with him about it, I may not have the
9 sequence exactly right, but, you know, I came to
10 appreciate through advice that, you know, one has to,
11 you know, there are circumstances in which intelligence
12 may appropriately be gathered in relation to lawyers and
13 therefore it's obviously a highly sensitive question. I
14 should say I'm not suggesting that that was appropriate
15 in relation to Mr Anwar.

16 Q. Indeed.

17 A. I think that was the outcome of the Inquiry, but, there
18 are circumstances where it is appropriate. Inevitably
19 the gathering of intelligence itself is something that
20 requires to be handled with some care and disclosure of
21 that needs to be -- well, it needs to be properly
22 investigated, looked at the by those whose
23 responsibility it is to look at these things and, you
24 know, so the judgment can be made.

25 I was advised that the right course, if I remember

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1 it correctly, was to ask the Information Commissioner to
2 examine the question and that, you know, it will be for
3 Police Scotland, as the data controller, to fulfil their
4 obligations and then I think there may have been a
5 question at some point about the crown contact, you
6 know, raising the issue directly with the
7 Chief Constable. I'm not sure just precisely what
8 happened there. But anyway the advice I had from those
9 who were experienced in thinking about these things was
10 that that was at the proper correct process to go
11 through and that, you know, to proactively raise the
12 issue with Mr Anwar before those, you know, those
13 authorities had done their work wouldn't be -- wouldn't
14 be -- wouldn't be appropriate.

15 Q. And what about after the authorities had done their work
16 and responded to that and made you aware of the final
17 outcome, ie that proceedings weren't going to be taken,
18 but yet you still had the information that this breach
19 had occurred, did it occur to you or did you have any
20 discussions with anyone in the Crown Office whether or
21 not Mr Anwar should have been made aware of the
22 situation that had occurred, given after all it was his
23 data?

24 A. Yes, I can't remember. Frankly, I'm afraid, I can't
25 remember whether there was consideration given to it or

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1 discussion about it. I'm not sure if the documents
2 help.

3 I do remember at some point but whether it was then
4 or at a much earlier stage the point being made that the
5 data controller has responsibilities in terms of
6 communication. You know that wouldn't necessarily
7 absolve the crown from an appropriate communication but,
8 you know -- but as I said it was something that caused
9 me concern. It was clearly highly sensitive. It needed
10 to be investigated in the right way. I was given advice
11 about what the appropriate course was. I can't remember
12 then what happened in terms of thinking about
13 communicating it.

14 MS MITCHELL: Those are my questions, my Lord.

15 LORD BRACADALE: Thank you. Mr Wolffe, that concludes your
16 evidence. Thank you very much for coming to give
17 evidence to the Inquiry. I'm very grateful for your
18 time. The Inquiry is about to adjourn for the day and
19 you will then be free to go. So adjourn until
20 10 o'clock tomorrow morning.

21 (3.34 pm)

22 (The hearing was adjourned to 10.00 am on Thursday, 2 May
23 2024)

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