

Transcript of the Sheku Bayoh Inquiry

Tuesday, 16 April 2024.

(10.05 am)

LORD BRACADALE: Good morning and welcome to this hearing in the Sheku Bayoh Public Inquiry. In this hearing we will hear evidence from various witness currently or formally associated with the Crown Office. The terms of reference as they relate to the Lord Advocate are subject to a limitation. The Inquiry is required to examine the post-incident management process and investigation up to but not including the decision by the Lord Advocate as to any prosecution in the case, including the statutory review in respect of his decision.

It is appropriate therefore that at this stage I give an indication as to how the Inquiry should proceed in order to respect that exclusion. The Inquiry will not examine the following: The prosecutorial decision and reasoning of the Lord Advocate, the prosecutorial decision and reasoning of Crown Counsel, the recommendations and advice given by the Procurator Fiscal in reporting the case to Crown Counsel and which particular potential crimes the Lord Advocate Crown Counsel and members of the Crown Office and Procurator Fiscal service considered could be relevant.

Subject to these exclusions, the Inquiry will

Transcript of the Sheku Bayoh Inquiry

- 1 police division.
- 2 Q. Before we go any further, Mrs Carnan, there's a blue
3 folder beside you. Can I invite you to open that up and
4 take a look and I'll talk you through what's inside that
5 folder. There are a number of documents, the first one,
6 and we don't need to bring this up on the screen, but
7 the first document should be a letter from the Inquiry
8 to you dated 29 August of 2023?
- 9 A. No, it's 9 January '24.
- 10 Q. That's the second one. Well, let's begin with that.
11 I understand that the Inquiry sent you two letters, one
12 on 29 August and then more recently on 9 January of
13 2024?
- 14 A. That's right.
- 15 Q. And in both letters which were in accordance with what
16 we call Rule 8 Procedure you were asked to respond to a
17 number of questions in writing?
- 18 A. Yes.
- 19 Q. It sounds as though they're perhaps in the wrong order,
20 but let's begin with the one that's at the front of your
21 folder and that's the request that was made on 9 January
22 2024. We'll bring it up on screen. It has the
23 reference SVPI00436. So I just want to check that this
24 is what you have in the folder in front of you?
- 25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. This is the letter of 9 January that explains that it's
2 a request made under Rule 8 and we don't need to concern
3 ourselves I don't think with the content beyond that.

4 Now, your reply to that Rule 8 request will
5 hopefully be behind the request itself in your folder.
6 It's got a reference number 00462.

7 A. Yes.

8 Q. If we could bring that up on the screen also, please.
9 So this is the response that you gave in writing to the
10 letter that you received on 9 January of this year and
11 if we scroll to the bottom, we'll see that you answer
12 the questions in 32 separate paragraphs and that the
13 response was signed by you on 13 February of this year.
14 Now, your signature has been blacked out in the copy on
15 the screen, but will hopefully appear on the copy in
16 your folder.

17 A. Yes.

18 Q. If we can look at the final paragraph of the statement,
19 please. It reads:

20 "I believe the facts stated in this witness
21 statement are true. I understand that this statement
22 may form part of the evidence before the Inquiry and be
23 published on the Inquiry's website."

24 When you prepared your answers to the questions
25 that were asked of you, did you do your best to provide

Transcript of the Sheku Bayoh Inquiry

1 a full and accurate response?

2 A. I did.

3 Q. Now, this is strictly speaking a response to a Rule 8
4 request, but I will probably slip into the habit of
5 referring to it as your second statement. I'm hoping
6 that next up in your folder might be the first Rule 8
7 request that was made of you and that was by letter
8 dated 29 August of 2023?

9 A. It looks like the next document is SBPI00379 which is my
10 response.

11 Q. Which is your reply. Let's bring that up on the screen,
12 because I think what you did, which I think perhaps
13 makes life a lot easier for everyone, is you copied over
14 the questions --

15 A. Yes.

16 Q. -- and then you appended your answers beneath them?

17 A. Yes.

18 Q. But you can perhaps take it from me that the letter that
19 you were sent was dated 29 August and we see on the
20 screen before us now your reply to this first letter so
21 again I will probably refer to this as your first
22 statement. And if we can scroll to the bottom of this
23 document, it's a longer document, it's 32 pages, that's
24 91 paragraphs, we see that you signed it on 11 October
25 of last year?

Transcript of the Sheku Bayoh Inquiry

1 A. Yes.

2 Q. And again is your signature visible on the copy that's
3 in your folder?

4 A. Yes.

5 Q. The final paragraph is in identical terms to the second
6 statement that we looked at a moment ago and again when
7 you answered the questions did you do your best to do so
8 fully and accurately?

9 A. Yes.

10 Q. Now, also within the folder, there should be a copy of
11 the narrative and analysis from the crown precognition,
12 we don't need to bring these up on the screen, I would
13 just like to know that you have them before you because
14 you can refer to them at any time if you would find that
15 helpful.

16 A. Yes, I can see them.

17 Q. So you have both the narrative and the analysis there?

18 A. I have got the analysis first, then the supplementary
19 report and then behind that it looks like the narrative.

20 Q. All right. So they may be a little bit out of order but
21 they are all there.

22 A. Yes.

23 Q. That's grand. You mentioned a supplementary report that
24 was the report that considered the health and safety
25 aspects of the case so that's in there too and, finally

Transcript of the Sheku Bayoh Inquiry

1 and hopefully, there will also be a document there that
2 you asked to have available today called "Fiona
3 Analysis"?

4 A. Yes, I see that as well.

5 Q. That's there as well.

6 A. Multi-coloured, yes.

7 Q. That's great. So you can refer to these documents at
8 any point in time.

9 A. Thank you.

10 Q. I will bring up on the screen any paragraphs of any of
11 the documents that I want to refer to. If there's
12 anything you want to draw to my attention, just say and
13 we can have it brought up on the screen as well.

14 A. Okay.

15 Q. Mrs Carnan, when did you qualify as a solicitor?

16 A. 1982.

17 Q. And we've already established that you joined the
18 Crown Office in 1986?

19 A. That's correct.

20 Q. And that would have been a procurator fiscal depute?

21 A. That's right.

22 Q. When were you promoted to senior depute?

23 A. Well, I was on a temporary promotion, I'm not sure the
24 year, maybe 2017, 2018, and then made to permanent in
25 2021 I think.

Transcript of the Sheku Bayoh Inquiry

1 Q. You said earlier in your evidence that you're currently
2 a principal depute. That is a grade above a senior
3 depute.

4 A. That's right.

5 Q. And when were you promoted to principal depute?

6 A. About so as I say 2017 or '18 on a temporary basis and
7 '21 on a permanent basis.

8 Q. I beg your pardon. I though you had been promoted to
9 senior depute and then principal depute?

10 A. Senior depute, I can't remember when that was. I was a
11 senior legal assistant from about 1991 and I think that
12 was then regraded or renamed as a senior depute so
13 I don't think there was any actual promotion involved in
14 that. I might be wrong, but I think so.

15 Q. It may not matter at all. I'm just trying to understand
16 your career progression within the Crown Office and, as
17 you say, certain of the bands have been re-branded --

18 A. Yes.

19 Q. -- along the way which perhaps makes it for complicated.
20 But in any event during the period of time that we're
21 concerned with, which is sort of 2017 into 2018, you
22 would have been a senior depute.

23 A. Yes.

24 Q. At some stage you had a temporary promotion to principal
25 depute and that has since been confirmed --

Transcript of the Sheku Bayoh Inquiry

1 A. Yes.

2 Q. -- on a permanent basis. I wonder if we can bring up
3 the first of your statements or Rule 8 responses on the
4 screen, please. And in your response to the first
5 question, you explain that during your involvement in
6 the investigation of recognition process in the Sheku
7 Bayoh case you were a senior depute in the Criminal
8 Allegations Against the Police Division. You had been
9 in the same grade and role since the end of 2012 when
10 that specialist division was set up and you explain:

11 "My duties and responsibilities were to investigate
12 reports of allegations of criminality by serving police
13 officers and members of police staff and, where
14 appropriate, to report to Crown Counsel to obtain
15 instructions as to whether to prosecute or not."

16 A. Yes.

17 Q. Am I right to understand that that investigative process
18 is known as "precognition"?

19 A. Yes, it can be.

20 Q. And the person who carries out that process is sometimes
21 referred to as a "precognoscer"?

22 A. Yes.

23 Q. Now, there's evidence before the Chair that the
24 Lord Advocate is the ministerial head of the system of
25 prosecution in Scotland and he or she is also

Transcript of the Sheku Bayoh Inquiry

1 responsible for the investigation of all sudden,
2 suspicious and unexplained deaths, including deaths in
3 police custody; would that be correct?

4 A. Yes.

5 Q. Now, the Lord Advocate cannot personally prosecute every
6 case that proceeds in the High Court and so she appoints
7 Crown Counsel, also known as "advocate deputes", who
8 conduct prosecutions in the High Court in her name?

9 A. Yes.

10 Q. And Crown Counsel also take decisions on the
11 Lord Advocate's behalf; is that right?

12 A. Yes, that's right.

13 Q. And in more serious cases it would be Crown Counsel who
14 would decide whether or not there should be a
15 prosecution?

16 A. That's right.

17 Q. That would include, for example, a death in police
18 custody or following police contact?

19 A. Yes.

20 Q. And that decision would be taken by Crown Counsel after
21 they had considered the precognition report --

22 A. Yes.

23 Q. -- made by the precognoscer.

24 Now, am I right to understand that when the matter
25 under investigation involves a death, the precognition

Transcript of the Sheku Bayoh Inquiry

1 would ordinarily be carried by the Scottish Fatalities
2 Investigation Unit?

3 A. I think that's right, yes.

4 Q. Where there's a death in custody however which raises
5 the possibility of criminality on the part of police
6 officers then the precognition process may be carried
7 out by the Complaints Against the Police Division or
8 CAAPD?

9 A. I think this was the first such case so I'm not sure
10 there was any precedent for it, but certainly that's
11 where this investigation sat.

12 Q. In either case at the conclusion of the precognition
13 process, a report is submitted to Crown Counsel?

14 A. Yes.

15 Q. And Crown Counsel will then issue an instruction as to
16 whether there should be criminal proceedings brought or
17 not --

18 A. Yes.

19 Q. -- as the case may be.

20 Now, the investigation of a death of course is not
21 just about whether there should be a prosecution,
22 consideration will also have to be given to whether
23 there should be a fatal accident inquiry?

24 A. Yes.

25 Q. And such inquiries can be mandatory or discretionary

Transcript of the Sheku Bayoh Inquiry

1 under the relevant legislation and a death in custody
2 would be a mandatory fatal accident inquiry?

3 A. That's right.

4 Q. A death can also in certain circumstances lead to a
5 public inquiry, as has happened here.

6 So should we understand that at the conclusion of an
7 investigation into a death Crown Counsel may instruct
8 that there should a prosecution or a fatal accident
9 inquiry or they might instruct that there should be no
10 proceedings at all?

11 A. That's right.

12 Q. I would like to ask you a few questions about the
13 precognition process, just to set the scene for the
14 benefit of anyone listening to this chapter of evidence.
15 Can you help me to understand what the precognition
16 process involves?

17 A. I think it will vary from case to case, but the actual
18 act of precognosing witnesses is often involved and
19 that involves seeing witnesses and taking a statement
20 from them.

21 Q. What does the act of reporting to Crown Counsel involve?

22 A. It involves essentially a narrative of what happened, a
23 setting out the circumstances, and a legal analysis in
24 terms -- for criminality and a legal analysis of whether
25 there's sufficient evidence for proceedings. There

Transcript of the Sheku Bayoh Inquiry

1 would also be ancillary information about an accused
2 person, or a potential accused person, and in this
3 particular case the potential accused were what we would
4 call the "subject the officers", the officers who were
5 potentially subject to criminal proceedings so those
6 that might have in some way acted in a criminal way.

7 Q. The report will comprise a narrative of the facts, an
8 analysis of the evidence, and is there also a
9 recommendation at the end of the analysis section?

10 A. Yes, and that will depend on what the analysis of
11 evidence is.

12 Q. And these documents or these chapters of the report are
13 drafted by the precognoscer?

14 A. Yes.

15 Q. And signed by the precognoscer and by countersigned by
16 the solemn legal manager?

17 A. That's right.

18 Q. Now, what is the purpose of the narrative section in the
19 report?

20 A. To set out the facts as known.

21 Q. And what is the purpose of the analysis?

22 A. To apply the law to those facts and to -- in particular
23 in relation to a CAAPD recognition it would be to
24 identify criminality if there was criminality and to
25 consider whether there's a sufficiency of evidence in

Transcript of the Sheku Bayoh Inquiry

1 relation to any matters.

2 Q. And what would be the purpose of the recommendation
3 section?

4 A. To -- it's almost a conclusion. It follows on from the
5 analysis. It's a conclusion and recommendation as to
6 whether there ought to be or not criminal proceedings.

7 Q. Are the witness statements and precognitions appended to
8 the precognition report?

9 A. So the witness statements taken by the investigator
10 agency plus any precognitions taken by precognosers
11 would be included in that report.

12 Q. And any report submitted by an investigative agency?

13 A. Yes, that would be also included.

14 Q. Typically the police, but in this case it was the PIRC
15 that was the investigative agency?

16 A. That's right.

17 Q. That would be included too?

18 A. That's right.

19 Q. And copy productions are they also appended?

20 A. Yes.

21 Q. I want to touch on compliance with the ECHR before we go
22 any further. The Lord Advocate's investigation into a
23 death which is sudden, suspicious or unexplained has to
24 be Article 2 compliant, and we'll look shortly at what
25 that means, and that would include a death in police

Transcript of the Sheku Bayoh Inquiry

1 custody or a death following police conduct. And where
2 there's the possibility of racial discriminations the
3 Lord Advocate should have to Article 14 of the ECHR; is
4 that right?

5 A. Yes.

6 Q. And just as the Lord Advocate cannot personally
7 prosecute every case that proceeds in the High Court
8 herself, nor can she personally investigate every
9 sudden, suspicious or unexplained death and she
10 discharges her duty to conduct an Article 2 compliant
11 investigation through the process of precognition and
12 reporting Crown Counsel. Do I understand the mechanisms
13 correctly?

14 A. Yes.

15 Q. I want to ask you a few questions about your experience
16 as at 2017 when you became involved in this particular
17 investigation.

18 As at 2017 what experience did you have of preparing
19 precognitions for Crown Counsel?

20 A. Quite considerable experience. Over the period of my
21 service I was involved in preparing solemn cases,
22 High Court precognitions, some death precognitions, not
23 that many, and I had from 2012 experience in CAAPD
24 precognitions.

25 Q. Could you put a number of how many precognitions you

Transcript of the Sheku Bayoh Inquiry

1 prepared?

2 A. I don't think so. I would be guessing. Probably
3 hundreds but I don't know.

4 Q. All right. And what experience did you have of
5 investigating deaths? You mentioned having done some
6 precognition work and having been in CAAPD since 2012,
7 what was your deaths experience?

8 A. It was varied. I remember starting as a young depute in
9 Linlithgow and I would have some death investigations
10 then. When I moved to Glasgow in 1998, I was in
11 different units depending so I would be in summary or
12 solo criminal units. Probably my experience then in
13 relation to deaths was late nineties, early 2000, when I
14 was in Hamilton and I was certainly working in deaths
15 for a period.

16 Q. Did you have any previous experience of investigating a
17 death in custody?

18 A. No, not at that time.

19 Q. And I think you make that clear at your answer to
20 question 4 in your statement where you say that:

21 "Prior to the date [you] became involved in this
22 matter, I had no previous involvement in the
23 investigation of deaths in police custody or deaths
24 following police contact."

25 A. That's correct.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. What experience did you have of investigating whether
2 race was relevant to the circumstances of a death?
- 3 A. Quite little, because I don't recall.
- 4 Q. Yes. I think you say in answer 5, if we can scroll down
5 just a little bit, that you don't -- the final sentence
6 you say you do not specifically recall any deaths when
7 race was a factor, although there may well have been
8 during the course of your career?
- 9 A. I have no recollection of dealing with deaths in which
10 race was a factor.
- 11 Q. All right. Did you have any experience of through your
12 time in CAAPD investigating allegations of excessive or
13 unlawful use of force by the police?
- 14 A. Yes.
- 15 Q. Can you share with us the range of experience that you
16 had in relation to that type of investigation?
- 17 A. I would say probably the majority of complaints made
18 against police officers involve excessive force. They
19 would be reported to -- they would be reported to the
20 Criminal Allegations Against the Police Division if
21 there was an inference that the officers had committed
22 an assault and the assessment would be made as to
23 whether there was evidence of that.
- 24 Q. Okay. Did you have experience of instructing experts on
25 the use of force?

Transcript of the Sheku Bayoh Inquiry

1 A. Yes. It was commonly the case that either professional
2 standards or PIRC would instruct an officer safety
3 trainer to provide an opinion and if they didn't, it was
4 the practice of myself or my colleagues to do that so
5 that we had an opinion on those matters.

6 Q. How many previous occasions had you instructed a use of
7 force expert, can you say?

8 A. Many, but again, I would be guessing to give you a
9 figure, I'm sorry.

10 Q. That's all right. Let me ask you about the training
11 that you received during your time in Crown Office up to
12 2017. Had you received training on the precognition
13 process, the nuts and bolts of what was required?

14 A. I think it was very much an in-office training. I
15 certainly don't recall going to a formal training course
16 on precognition. I think my reference to training --
17 I think you have asked me at some point and I think I've
18 said I recall attending a child precognition training
19 course, but my training was given by senior colleagues.
20 So when I first started, my boss would have shown me a
21 precognition, this is how you do it, this is how you
22 produce the report.

23 Q. What training had you received on investigating deaths
24 in police custody, if any?

25 A. Specifically deaths in police custody?

Transcript of the Sheku Bayoh Inquiry

1 Q. Mm-hm.

2 A. I don't recall any training specifically on that.

3 Q. Had you received training on the investigation of deaths
4 more generally?

5 A. Again, my training record, I think I look back at that
6 to answer these questions and I think I attended a
7 course in the year 2000.

8 Q. Do you recall what that covered in this instance?

9 A. No, frankly, no.

10 Q. Had you had any training on the requirements of an
11 Article 2 compliant investigation?

12 A. I don't recall specifically, no.

13 Q. Had you had any training on investigating whether race
14 played a part in the commission of a crime?

15 A. I don't remember training in that regard, no.

16 Q. Had you had any training on instructing expert
17 witnesses?

18 A. No, I don't think so, but again learned through
19 experience.

20 Q. Had you had any training on ensuring compliance with
21 Article 14?

22 A. I don't recall specific training on that either.

23 Q. Okay. Now, you say in your statement at paragraph 47,
24 please -- you say that prior to your involvement in this
25 case you had no awareness of investigations by the

Transcript of the Sheku Bayoh Inquiry

1 police or CPS into race in England and Wales other than
2 what had been reported in the press or what you had read
3 in relation to reports of English cases, although you
4 also say in paragraph 48 that you had read the report of
5 the IPCC investigation into Sean Rigg's death before
6 submitting the precognition report in May 2018 and you
7 go on to set out what you understood the learning points
8 were from that report and you say that you took them
9 into account in the work that you did in connection with
10 the death of Sheku Bayoh?

11 A. Mm-hm.

12 Q. I wanted to ask how did the Sean Rigg report come to
13 your attention?

14 A. I think Mr Brown, who's my line manager, brought it to
15 my attention.

16 Q. Did you consider any other reports?

17 A. I don't remember. I think Thomas Orchard might have
18 been another one, I'm not sure. Sean Rigg certainly was
19 brought to my attention.

20 Q. We can scroll down to paragraph 49, please. You say
21 that you understood that Mr Brown, that's Les Brown, who
22 you explain was your line manager at the relevant time,
23 and Ms Edwards KC consulted with the CPS about their
24 approach to deaths in custody but you weren't involved
25 in that exercise?

Transcript of the Sheku Bayoh Inquiry

- 1 A. That's right.
- 2 Q. Was there learning from that exercise shared with you?
- 3 A. I saw the notes of the consultation afterwards.
- 4 Q. What sources of guidance and information were available
5 to you in terms of how to investigate a death in
6 custody?
- 7 A. My experience probably, but the knowledge bank which is
8 available on the intranet in Crown Office contains a
9 range of materials.
- 10 Q. Tell us more about the knowledge bank?
- 11 A. The knowledge bank lots of case law, case marking
12 guidance about particular offence. Back when I started,
13 it would have been Book of Regulations. That was, if I
14 can call it, it's almost like the bible or the kind of
15 the standard and that would be your first port of call,
16 but since then many other manuals, for example I think
17 there's a solemn case manual. There are all sorts of
18 different pieces of guidance.
- 19 Q. The knowledge bank I think you said was accessible on
20 the intranet?
- 21 A. That's right.
- 22 Q. Was it available as a hard copy document?
- 23 A. No.
- 24 Q. What sources of guidance and information were available
25 to you as to how to approach the question of race?

Transcript of the Sheku Bayoh Inquiry

1 A. Well, the question of race was one that was a matter --
2 well, what I was looking at was criminality, so race
3 didn't really feature in that because criminality hadn't
4 been identified.

5 Q. If you can hold that thought, because I would like to
6 ask you about your approach to race and how that fitted
7 with criminality in quite a lot of detail, but we'll
8 perhaps come back to that after we have considered a
9 number of other issues and, for now, I'm really just
10 trying to get a feel for the range of materials,
11 guidance and information that were available to you.

12 So you've explained that race didn't really feature
13 in your analysis in this case?

14 A. Yes.

15 Q. Had you ever required to consider race in connection
16 with any other case?

17 A. I'm sure I did.

18 Q. And can you help us to understand what resources and
19 guidance and information were available to you that
20 might help you as a precognoscer if you were looking at
21 race?

22 A. Well, it would -- in relation to criminality it would be
23 the provisions of, I think, the 2015 Act. I would need
24 to go and check what act it was, but there are
25 provisions under two sections in relation to racial

Transcript of the Sheku Bayoh Inquiry

- 1 harassment and acting with racial prejudice.
- 2 Q. Okay. So there's the legislation, but in terms of
3 guidance as to the approach that a precognoscer might
4 take when investigating race, where might you look?
- 5 A. Again, there would be -- I'm sure there would be
6 documents on the intranet.
- 7 Q. Okay, what sources of guidance and information were
8 available to you on how to ensure that the precognition
9 process was compliant with Articles 2 and 14?
- 10 A. I think as far as Article 2 is concerned, it would be
11 the basic provisions about carrying out a thorough and
12 timely investigation that would apply to all these
13 cases. Article 14, I'm not quite sure.
- 14 Q. And if a precognoscer, for example, were looking at race
15 for the first time, where would they go to find guidance
16 and information?
- 17 A. I suspect the knowledge bank.
- 18 Q. Okay. Now, you mentioned the Book of Regulations, the
19 fiscals' bible, what's the purpose of the Book of
20 Regulations?
- 21 A. The Book of Regulations was a manual provided to say way
22 back when I first started. It was simply guidance. It
23 was guidance on all manner of activities that a fiscal
24 would have to look into, so deaths, criminal
25 investigations.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. You're using the past tense when you speak about the
2 Book of Regulations?
- 3 A. I'm not sure if it's still in existence or whether --
4 certainly some chapters have certainly been superseded.
5 I'm not sure if there are some chapters of the Book of
6 Regulations that still apply.
- 7 Q. I wonder if we can look at one chapter and it's chapter
8 4.6 which deals with the precognition and the reference
9 is COPFS05648. So this is a section of the Book of
10 Regulations headed "Effectiveness. Chapter 4.
11 Precognition and management of solemn business":
12 "Generally precognition and investigation must be
13 focused on the main issues of the case and the evidence
14 against each accused actively represented and properly
15 evaluated. All relevant legal issues, including those
16 relating to convention rights, must be properly
17 addressed, considered and recommendations made to allow
18 informed decision as to further proceedings."
19 So this chapter seems to be focused on the nuts and
20 bolts of the precognition process. Is this a sort of
21 information that nowadays you would find on the
22 knowledge bank or is the knowledge bank more about case
23 marking guidelines, legal tests, case law that sort of
24 thing?
- 25 A. This should be, and I suspect it is, in the knowledge

Transcript of the Sheku Bayoh Inquiry

1 bank. The knowledge bank is the place where all of this
2 is -- all guidance is stored.

3 Q. Okay.

4 A. So I suspect this is in the knowledge bank.

5 Q. So as 2024 the knowledge bank is a single --

6 A. It's a library almost.

7 Q. It's a library. It's the place that you would go to
8 look for information?

9 A. Yes, electronically.

10 Q. Electronically, and that's where a fiscal would look for
11 information about case marking guidelines?

12 A. Yes.

13 Q. The law?

14 A. Yes.

15 Q. Case law?

16 A. Yes.

17 Q. And also the procedural aspects of their job?

18 A. Yes.

19 Q. What was the position back in 2017, where would one have
20 looked back then, would it have been the Book of

21 Regulations or the knowledge bank or somewhere else?

22 A. The knowledge bank would contain the information.

23 Q. Okay. We don't have the knowledge bank but we do have
24 some chapters from the Book of Regulations. Let's look

25 through this chapter and if anything in this appears to

Transcript of the Sheku Bayoh Inquiry

1 you to be outdated or has fallen by the wayside, please
2 let me know. Is there anything in the first paragraph
3 that we've looked at that to your mind seems to be out
4 of date?

5 A. No.

6 Q. Okay. If we scroll down, the next heading deals with
7 the responsibility of the fiscal:

8 "Area fiscals, together with the district fiscal..."

9 And perhaps that language will be out of date.

10 Again there will be the re-branding in terms of --

11 A. The structure of the organisation.

12 Q. "... are responsible for ensuring that the precognition
13 process is managed to ensure that all cases falling
14 within their jurisdictions are investigated effectively
15 in accordance with the Precognoser's Handbook."

16 So there's a reference there to another document
17 that we haven't discussed yet called the "precognoscer's
18 Handbook"; is that one you know about?

19 A. I do know about it, yes.

20 Q. And is it still in existence?

21 A. As far as I know, yes.

22 Q. And again, the information that's within the
23 Precognoser's Handbook, would you expect nowadays to
24 find that information on the knowledge bank as well?

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. Let's see what it says about the Precognoser's Handbook.

2 We're told:

3 "It contains best practice guidance in the following
4 areas of work which are relevant to effective
5 investigation"

6 And there then follows a detailed list that includes
7 things like management of precognition, taking
8 precognitions, sufficiency of evidence, format, expert
9 witnesses and racially aggravated offences is near the
10 bottom of the list I think and so on and so forth. And
11 if we carry on beyond the bottom of that list, there's a
12 reference made to a number of annexes which provide
13 proforma documents to assist solemn legal managers and
14 precognosers and there's a statement that:

15 "All relevant legal issues including all those
16 relevant to Convention... "

17 Sorry:

18 "... departure from at the guidance set out in the
19 Precognoser's Handbook must be fully justified in each
20 case either to the area fiscal or if reported to
21 Crown Office, to Crown Counsel."

22 So there's a statement there that requires
23 compliance with the Precognoser's Handbook and if we
24 scroll just a little further, we'll see that this advice
25 in the Book of Regulations is dated November 2003.

Transcript of the Sheku Bayoh Inquiry

1 As you've explained, nowadays if you were looking
2 for guidance on how to carry out a precognition, you
3 would look to the knowledge bank rather than the Book of
4 Regulations?

5 A. Yes.

6 Q. But beyond the restructuring and re-branding of job
7 titles and descriptions that we've identified, is there
8 anything in that document to your mind that appears to
9 be out of date or out of step with current practice?

10 A. No.

11 Q. So the Precognoser's Handbook it's another document that
12 you're familiar with. To the best of your knowledge it
13 is still in existence and probably also accessible in
14 the knowledge bank?

15 A. Yes.

16 Q. What would be the purpose of the Precognoser's Handbook?

17 A. To provide guidance on how to carry out and report
18 precognition.

19 Q. And we see from the Book of Regulations that there's an
20 expectation a precognosers should follow any guidance in
21 the Precognoser's Handbook and that departures from that
22 guidance should be justified.

23 Are you familiar with another Crown Office
24 publication called the Deaths Manual of Practice?

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. Can you tell us about it?
- 2 A. It's a manual. I think as probably the title suggests,
3 it's a manual which gives guidance on the investigation
4 of deaths.
- 5 Q. And again, would you now find the information that's in
6 the Deaths Manual on the knowledge bank?
- 7 A. Yes.
- 8 Q. Does it exist as a separate stand-alone manual?
- 9 A. As a printed document?
- 10 Q. Mm-hm.
- 11 A. No idea. We're talking many, many years ago when in
12 many of the offices what we call the hardcopy books
13 started to disappear and everything was available online
14 and that was the way we were directed.
- 15 Q. Okay. Do you recall at this distance back in 2017,
16 2018, when you were involved in this investigation,
17 whether you at any point drew on information and
18 guidance that was contained within the Deaths Manual?
- 19 A. No, I don't think I did.
- 20 Q. Or the Precognoser's Handbook?
- 21 A. I don't think I did.
- 22 Q. Or the Book of Regulations?
- 23 A. I don't think I did.
- 24 Q. Did you go to the knowledge bank at all?
- 25 A. In relation to the -- this is likely to be in relation

Transcript of the Sheku Bayoh Inquiry

1 to the case law in relation to assault and culpable
2 homicide and health and safety legislation.

3 Q. And were there any other sources of information and
4 guidance available to you in 2017 that we haven't
5 discussed?

6 A. Very likely, but I don't know what they are. The
7 knowledge bank contains many different pieces of
8 guidance.

9 Q. Tell me about the role of the solemn legal manager or
10 the line manager in providing guidance and direction to
11 a precognoscer?

12 A. I think it would depend. I'm thinking of solemn legal
13 managers in Sheriff and jury team where the precognosers
14 might be more legal, so might be paralegals,
15 precognition officers, and that might be an entirely
16 different experience to a solemn legal manager dealing
17 with procurator fiscal depute or a senior depute so I
18 suppose it would depend on the relationship and the
19 knowledge and experience of each of the parties.

20 Q. A fiscal depute or a senior depute would be qualified
21 solicitors and they would have a law degree?

22 A. Yes.

23 Q. Whereas a precognoscer wouldn't necessarily have that
24 background?

25 A. That's correct.

Transcript of the Sheku Bayoh Inquiry

1 Q. Okay. Now, the Precognoser's Handbook includes as an
2 annex a guidance document and I wonder if we can look
3 briefly at this. It's COPFSO6454. Is this template
4 familiar to you?

5 A. No, not particularly.

6 Q. Let's look at it very briefly:

7 "Precognition guidance note. Case against ... "
8 I presume you would put in the name of the accused
9 or potential accused there.

10 "Reference number. Identification of the
11 precognoscer and their manager. Likely prosecution
12 forum."

13 That might be High Court or sheriff and jury.

14 "Provisional date for the case."

15 And then internal target dates for completion of
16 certain stages of the work.

17 If we scroll down it says:

18 "Guidance. The following directions are for your
19 assistance. Please revert to your supervisor if there
20 are problems in carry out the instructions and if any
21 problems arise in the case. Further, if during the
22 precognition process it becomes clear that the case
23 should be reduced to summary or that the likely forum
24 specified above should be changed, please speak to your
25 supervisor."

Transcript of the Sheku Bayoh Inquiry

1 So this appears to be the document drafted by the
2 management for the benefit of the precognoscer; would
3 that seem to be correct?

4 A. Yes, and I have seen this document, but it's not a
5 document that I would have used myself or it was used in
6 CAAPD Division certainly, so it would be used in solemn
7 teams in terms of preparation of sheriff and jury and
8 High Court work.

9 Q. I see so this wouldn't be relevant to CAAPD?

10 A. It wasn't used in CAAPD.

11 Q. Did CAAPD have an equivalent template?

12 A. CAAPD when it first started had some kind of instruction
13 note issued by legal managers to precognosers. Not
14 necessarily all of the headings there would be included,
15 but there would be something about factual issues, legal
16 issues to be addressed and the amount of detail that
17 would be included in that would very much depend on who
18 it was being issued to I would say.

19 Q. I see. So this template is for solemn criminal work,
20 not for CAAPD, but something similar to this was in use
21 and I can see straight away that some of the headings
22 simply wouldn't be relevant in the context of a
23 complaint against a police, but you say that something
24 similar would be prepared and it would cover things like
25 factual issues to be addressed and legal issues to be

Transcript of the Sheku Bayoh Inquiry

1 addressed?

2 A. Yes.

3 Q. CAAPD had its own version of this form?

4 A. Yes.

5 Q. And you say that the amount of detail that might be
6 included on the form would very much depend on who was
7 on the receiving end of the form?

8 A. Yes.

9 Q. And would that in turn depend on whether they were
10 experienced or inexperienced and potentially whether
11 they had a law degree and were qualified solicitors or
12 perhaps had come to precognition work through a
13 different route?

14 A. Yes.

15 Q. Okay.

16 We can take that away from the screen just now and I
17 want to speak to you about the investigation of Article
18 2 deaths. So I'll give you a moment just to pour some
19 water.

20 I want to read to you a very short extract which I
21 anticipate will be familiar to you from a case called
22 De Silva which sets out what is required for an
23 investigation to be Article 2 compliant:

24 "The court has in its case law established a number
25 of requirements for an investigation into the use of

Transcript of the Sheku Bayoh Inquiry

1 lethal force by state agents to be effective. In
2 summary, those responsible for carrying out the
3 investigation must be independent from those implicated
4 in the events, the investigation must be adequate, it's
5 conclusions must be based on thorough, objective and
6 impartial analysis of all relevant elements, it must be
7 sufficiently accessible to the victim's family and open
8 to public scrutiny and it must be carried out promptly
9 and with reasonable expedition."

10 Is that quotation familiar to you?

11 A. Yes.

12 Q. Would you disagree with anything that's in it?

13 A. Absolutely not.

14 Q. And I wonder if we can look briefly at the Deaths Manual
15 of Practice, COPFS06186 at page 2 where there is a
16 summary which I think perhaps draws on De Silva, and you
17 can take it from me that identical language appears in
18 the Book of Regulations in chapter 12.01 which is the
19 investigation of deaths.

20 So let's look at this because this is in guidance
21 that was available and perhaps would also have been on
22 the knowledge bank:

23 "Article 2 of the European Convention of Human
24 Rights provides that everyone's right to life shall be
25 protected by law, no one shall be deprived of his life

Transcript of the Sheku Bayoh Inquiry

1 intentionally save in the execution of a sentence of a
2 court following his conviction of a crime for which this
3 penalty is provided by law. The right to life implies
4 certain obligations on the State to undertake an
5 effective investigation, which is independent,
6 effective, reasonably prompt, open to a sufficient
7 element of public scrutiny and one in which the next of
8 kin must be involved to an appropriate extent. These
9 considerations should be central to all deaths
10 investigations undertaken by COPFS and all
11 decision-making and reporting should demonstrate how the
12 Article 2 requirements of an effective investigation
13 have been taken into account. Further guidance on
14 Article 2 and its requirements is available on the
15 knowledge bank and work is underway to mainstream
16 Article 2 requirements throughout COPFS policy, practice
17 and guidance."

18 So were you familiar with this sort of statement
19 within Crown Office policy and procedure?

20 A. Yes.

21 Q. And in particular, were you aware of the requirements
22 that Article 2 considerations should be central to all
23 deaths investigations and all decision-making and
24 reporting should demonstrate how the Article 2
25 requirements of an effective investigation had been

Transcript of the Sheku Bayoh Inquiry

1 taken into account?

2 A. Yes.

3 Q. We can take that away from the screen. Thank you. So
4 we see then for an investigation into a death by Crown
5 Office to be Article 2 compliant it requires to be
6 effective.

7 A. Yes.

8 Q. Would you agree with that?

9 A. Yes.

10 Q. Yes, and to be effective the investigation must be
11 adequate?

12 A. Yes.

13 Q. Okay. Now, where a death follows the use of force by
14 State agents an adequate investigation must be capable
15 of leading to a determination of whether the force used
16 was or was not justified?

17 A. Yes.

18 Q. And the standard to be applied is that of no more than
19 absolutely necessary?

20 A. Mm-hm.

21 Q. Are you agreeing with that too?

22 A. Yes.

23 Q. And further, when the death is at the hands of state
24 agents, and taking Article 14 in conjunction with
25 Article 2, the authorities have an additional duty to

Transcript of the Sheku Bayoh Inquiry

1 take all reasonable steps to unmask any recess motive
2 and to establish whether or not ethnic hatred or
3 prejudice may have played a role in the events; would
4 you agree?

5 A. Yes.

6 Q. And would you agree that where there's a suspicion that
7 racial attitudes have induced a violent act, it's
8 important that the official investigation is pursued
9 with vigour and impartiality?

10 A. Yes.

11 Q. I want to turn now to ask you about your involvement in
12 the investigation within the Crown Office that followed
13 the death of Sheku Bayoh.

14 So Mr Bayoh died on 3 May, 2015. The crown
15 instructed the PIRC to investigate and the inquiry has
16 heard some evidence about that already and the PIRC's
17 final report was submitted in August of 2016. And
18 although there was contact between the PIRC and the
19 crown between May of 2015 and August of 2016, am I right
20 to understand that it was only after the final PIRC
21 report was submitted to the crown that the formal
22 process of precognition began?

23 A. I don't think I can really comment, because I wasn't
24 involved until late 2017. I think that's right, but
25 I think others might would confirm better than I.

Transcript of the Sheku Bayoh Inquiry

1 Q. We can ask other people about that, but in the ordinary
2 course of things would you wait until you received a
3 report from the investigating agency before commencing
4 the precognition?

5 A. Yes.

6 Q. You've explained that you didn't become involved until
7 December of 2017.

8 A. That's right.

9 Q. And the precognition report was sent to Crown Counsel in
10 May of 2018?

11 A. That's right.

12 Q. So five or six months later.

13 Now, I understand from reading your statements that
14 your involvement went beyond May of 2018 in certain
15 respects, but I want to focus on that period between
16 December of 2017 and May of 2018 in your evidence today.
17 And we'll also hear evidence later this week from
18 Les Brown who you have mentioned was your line manager.
19 Was he your line manager throughout that period?

20 A. Yes.

21 Q. That he was involved from 2015 until 2009, so both
22 before, during and after your involvement in the case?

23 A. That's right.

24 Q. Can we bring up on screen, please, your second
25 statement, your second relate response. Can we look at

Transcript of the Sheku Bayoh Inquiry

1 paragraph 2, please. You were asked to explain the
2 process that was followed. You were referred to the
3 supplementary report. That's the one that deals with
4 the health and safety aspects?

5 A. Yes.

6 Q. You explain that you drafted that and you did that
7 separately after the precognition report containing the
8 narrative and analysis of the evidence had been
9 submitted to Crown Counsel?

10 A. Yes.

11 Q. Sorry. Bear with me just a moment. I think I have the
12 wrong reference. I'm so sorry. That's my fault. It's
13 second statement but paragraph 1. We may return to the
14 second paragraph.

15 You were asked to explain your involvement in
16 preparing the narrative and analysis?

17 A. Yes.

18 Q. And you say:

19 "I was asked to become involved in the investigation
20 in December 2017. Part of my remit was to assist my
21 colleague Alisdair MacLeod in preparation of an analysis
22 of evidence for the precognition report to
23 Crown Counsel. By that time, Alisdair MacLeod, who had
24 been involved from an earlier stage, had already started
25 to draft a narrative of events which was well progressed

Transcript of the Sheku Bayoh Inquiry

1 by the time I joined the team. He had also prepared a
2 separate timeline which supplemented the narrative.
3 From memory, some parts of the narrative were
4 contributed by me, such as the complaints history of the
5 subject officers, sections on police training and
6 references to Martin Graves' report, results of the
7 analysis of Ashley Wyse's mobile phone and a section
8 about further investigations."

9 A. Yes.

10 Q. "Some parts of the draft narrative contained elements of
11 analysis within it and I proposed, with Alisdair's
12 agreement, that I would remove those parts and work on a
13 separate document, 'The analysis of the evidence'. I
14 adapted some sections of Alisdair's analysis to inform
15 my analysis, but expanded that analysis to the final
16 version that was sent to Crown Counsel. It was an
17 evolving process. We tended to work separately, with
18 Alisdair working chiefly on the narrative and I on the
19 analysis of evidence, although sharing these with each
20 other regularly, discussing and cross-checking with each
21 other at regular intervals. The precognition report
22 comprising the narrative and analysis and of evidence
23 was signed by me, Alisdair MacLeod and Les Brown and
24 submitted to Crown Counsel in hardcopy format, along
25 with the volumes of statements, precognitions and

Transcript of the Sheku Bayoh Inquiry

1 associated copy productions."

2 And then at paragraph 2 which we've already looked
3 at on account of my error, you explain that you also
4 drafted the supplementary report, it was done separately
5 after the precognition containing the narrative and
6 analysis was submitted to Crown Counsel and the draft
7 report consent, potential health and safety charges
8 against Police Scotland and included an assessment
9 whether there was evidence to support a charge of
10 corporate homicide.

11 A. Yes.

12 Q. So that's a summary of your involvement in this case.
13 If we can scroll back to the first paragraph, we see
14 that you say that Alasdair McLeod worked chiefly on the
15 narrative and you on the analysis. So you worked
16 collaboratively, you worked together, but he led on the
17 narrative and you led on the analysis?

18 A. Yes.

19 Q. And you say, if we can perhaps jump to paragraph 26,
20 please --

21 I beg your pardon. I think it's paragraph 26 of the
22 other statement, but I'll read it to you. I don't think
23 we need to bring it up on the screen. It can be quite
24 confusing when you've got a number of statements, I am
25 sorry, but in your first statement at paragraph 26 you

Transcript of the Sheku Bayoh Inquiry

1 say:

2 "It was not part of my remit from Les Brown to

3 consider whether there were grounds for an FAI. My role

4 are restricted to the analysis of the evidence in

5 respect of any potential criminality by the police."

6 A. Yes.

7 Q. So your remit was a limited one. It was an analysis of

8 whether there was evidence of criminality by the police?

9 A. Correct.

10 Q. And you also considered health and safety and corporate

11 homicide --

12 A. Potential.

13 Q. -- issues too. So if not you then who, if anyone, was

14 tasked with considering whether there should be an FAI?

15 A. I don't know.

16 Q. Do you know whether that consideration, that analysis

17 was in fact carried out?

18 A. I was aware that criminality was the first

19 consideration. I was aware, and I couldn't tell you at

20 what point I became aware, but I was aware that there

21 was a view that there would either be a fatal accident

22 inquiry or a public inquiry, but I don't know at what

23 point I became aware of that. It was discussed at

24 points, but I really couldn't tell you about the timing

25 of it.

Transcript of the Sheku Bayoh Inquiry

1 Q. Now, I understand that Les Brown in his -- one of his
2 statements to the Inquiry talks about taking an
3 incremental approach and the first report that was
4 submitted to Crown Counsel focused on criminality?

5 A. Mm-hm.

6 Q. And he explains that the question of an FAI would wait
7 until a decision had been taken --

8 A. Yes.

9 Q. -- in relation to criminality?

10 A. Yes.

11 Q. Was that your understanding of the process that was
12 being followed here?

13 A. That would always be the process. There wouldn't be a
14 fatal accident inquiry or consideration of that until
15 questions of criminality had been considered.

16 Q. These matters would always be considered --

17 A. First.

18 Q. -- separately with criminality being --

19 A. Always first.

20 Q. -- always first. And then there may be I assume a
21 supplementary report --

22 A. Yes.

23 Q. -- to Crown Counsel addressing the question of a fatal
24 accident inquiry?

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. In circumstances perhaps where Crown Counsel had
2 instructed there shouldn't be a prosecution or at the
3 conclusion of that prosecution?
- 4 A. That's right and certainly my experience in SFIU
5 following my involvement in this is exactly that, so
6 questions of criminality are always addressed first and
7 then sort of SFI use it at the bottom of the pile, if
8 you like, in terms of what report comes and then it
9 would always be that an FAI would be the last
10 consideration following any other proceedings.
- 11 Q. There's nothing unusual then in the fact that the
12 possibility of an FAI wasn't addressed in the narrative
13 analysis that were submitted to Crown Counsel?
- 14 A. No, nothing unusual in that at all.
- 15 Q. And would you agree that certain aspects of your
16 analysis, for example your analysis of use of force and
17 cause of death, would be relevant equally to
18 consideration of criminal proceedings and the
19 appropriateness or otherwise of an FAI?
- 20 A. Yes.
- 21 Q. If we can look at paragraph 3 of this statement, please,
22 you explain that:
- 23 "The purpose of the crown narrative was to provide a
24 factual account of the events, together with relevant
25 background information and the provision of other

Transcript of the Sheku Bayoh Inquiry

1 material connected to the investigation that was deemed
2 relevant. The purpose of the analysis that accompanied
3 the narrative was to provide a legal analysis of the
4 available evidence, addressing the question of whether
5 the evidence disclosed any criminality on the part of
6 the officers involved in the incident in which Mr Bayoh
7 died and the purpose of the supplementary report was to
8 provide a legal analysis of potential criminality under
9 the Health and Safety at Work Act or in relation to the
10 Corporate Manslaughter and Corporate Homicide Act."

11 A. Yes.

12 Q. And you earlier in your evidence explained in general
13 terms the purpose of a narrative and analysis and a
14 recommendation.

15 Now, the final page of the analysis that includes a
16 recommendation has been signed by you, and by
17 Alisdair McLeod, and also by Les Brown, who was your
18 line manager and I think also head of CAAPD at the
19 relevant time?

20 A. That's right.

21 Q. What was the purpose of you signing the precognition
22 report before it was submitted to Crown Counsel?

23 A. It's certainly the practice. I think it simply confirms
24 that you're responsible for it, you take responsibility
25 for your work.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. And what's the purpose then of your line manager also
2 signing the precognition?
- 3 A. That he also confirms that he's read and agrees with the
4 report.
- 5 Q. Now, when you became involved in December 2017 what
6 guidance, if any, were you given as to the issues that
7 were to be addressed in your analysis?
- 8 A. Not sure I was given any guidance about the issues.
9 I was simply told that I was to become involved.
10 I don't have a written record of it and I don't think
11 there is a written record of any guidance by Mr Brown.
12 I understood it was in relation to a death in police
13 custody, and I had to carry out a legal analysis of the
14 evidence. I think during the course of my work, I
15 received various emails from Mr Brown about the issues
16 that he wanted to ensure were addressed, and I think I
17 did -- I think I did that.
- 18 Q. And what guidance, if any, were you given as to how to
19 ensure your work was Article 2 compliant?
- 20 A. I was asked to look at the cases and I think Sean Rigg
21 was one that I particularly looked at. I recall being
22 asked to read the report by Dame Elish Angiolini and to
23 ensure that the investigation was thorough, which I
24 think it was in relation to my work.
- 25 Q. And what guidance, if any, were you given on how to

Transcript of the Sheku Bayoh Inquiry

1 approach Article 14 in your work?

2 A. I don't recall any particular guidance on that.

3 Q. I wonder if we can look at the Precognoser's Handbook
4 again, chapter one, is CFPOS05666.

5 "Pre-allocation prior to the allocation of the case
6 for preparation must be read by solemn legal manager or
7 in accordance with arrangements authorised by the area
8 fiscal and appropriate experienced member of legal
9 staff."

10 So again we can see straight away that some of the
11 job roles have been re-branded and to that extent this
12 must be out of date?

13 A. Yes.

14 Q. And if we can scroll down to page 3, please. There's a
15 section headed "The Allocation Notes".

16 "The solemn legal manager must give appropriate
17 guidance to the precognoscer. The guidance should
18 include advice or instruction on which witnesses should
19 be seen and the extent of the interview required in
20 accordance with the principles of purpose-driven
21 precognition and any legal principles that may apply."

22 Now, we looked earlier at the annex to the
23 Precognoser's Handbook and it was a proforma which you
24 explained to me was used in solemn legal business not in
25 CAAPD, but CAAPD had some sort of equivalent form. Is

Transcript of the Sheku Bayoh Inquiry

1 the form that we looked at, albeit that was the one for
2 solemn proceedings and not for CAAPD, is that a sort of
3 guidance note or allocation note, was that the sort of
4 thing --

5 A. An allocation note traditionally in CAAPD would involve
6 some analysis or some direction as to the issues that
7 should be looked at. I think that would be fair.

8 Q. And did you receive any allocation or guidance note
9 here? You said you didn't have --

10 A. I didn't have anything in writing from Mr Brown. It was
11 a meeting with him and, as I say, over the course of my
12 work there were emails that he sent me in terms of what
13 issues he wanted me to ensure that I covered.

14 Q. Now, as discussed, the Precognoser's Handbook may be out
15 of date nowadays and even in 2017 you would go to the
16 knowledge bank, is there anything that we've looked at
17 in this particular chapter that jars with you as being
18 out of step with the way that things are done in
19 Crown Office?

20 A. I don't know what happens in High Court units and
21 sheriff and jury units these days. It is a long time
22 since I have worked there so I really am not able to
23 comment. I can tell you what happens in CAAPD, but
24 that's about it.

25 Q. That's very helpful, because it's CAAPD that we're

Transcript of the Sheku Bayoh Inquiry

1 interested in. I had understood, perhaps wrongly, that
2 the Precognoser's Handbook would apply to all
3 precognition work irrespective of which unit was
4 undertaking that work or that the principles would carry
5 across?

6 A. I think the principles carry across. In terms of what
7 forms are used and how as a process the work is managed,
8 I think it's a bit different than CAAPD.

9 Q. Thank you. Now, I have had access to a minute prepared
10 by Mr Brown long before your involvement in the case and
11 I would like to pull that up. I'm interested to know
12 whether you ever saw it and if you didn't, there may be
13 good reason for that, but, for completeness, I would
14 like to show it to you.

15 COPFS03853A and it's a minute dated
16 15 September 2016 so that would have been not long after
17 the PIRC report was received in Crown Office. You can
18 see that it's come from Mr Brown and has been sent to a
19 number of individuals within the Crown Office, including
20 Alisdair MacLeod, who of course was the precognoscer,
21 and you mentioned in your statement he had been involved
22 from the outset and Ashley Edwards, who was the
23 allocated advocate depute:

24 "Meeting at Crown Office re Sheku Bayoh. Purpose to
25 identify key issues to be explored at precognition of

Transcript of the Sheku Bayoh Inquiry

1 relevant eye witnesses to actions of police officers
2 engaged in the restraint of Sheku Bayoh."

3 And a little bit of background and if we scroll down
4 to the discussion, this is where Mr Brown mentions the
5 incremental approach:

6 "The incremental approach to the investigation and
7 decision-making process has been proposed. Essentially
8 the first part of the investigative process will be
9 focused upon reaching a decision as to whether there is
10 any basis for taking criminal proceedings against any
11 individual police officer involved in the restraint of
12 Mr Bayoh."

13 So that chimes with your understanding of the way
14 that things are typically done?

15 A. Yes.

16 Q. And if we scroll down a little, please, keep going,
17 please, to this list of bulletpoints:

18 "Without wishing to be prescriptive, I would suggest
19 that the following critical issues require to be explored
20 during the precognition process ... "

21 And if we read these bulletpoints short, they relate
22 to Mr Bayoh's actions before the police arrived,
23 discharge of incapacitant sprays, use of batons,
24 Mr Bayoh's actions towards the police, the restraint
25 process itself, evidence from Ms Wyse about a baton and

Transcript of the Sheku Bayoh Inquiry

1 the question of identification is also noted in the
2 final bullet point.

3 So the focus of this note, which is more than a year
4 before your involvement and on any view was drafted at a
5 very early stage of the crown precognition process,
6 appears to be in the precognition of eye witnesses and
7 there's mention of an incremental approach, with the
8 initial focus being on whether or not there was a basis
9 for bringing criminal proceedings.

10 All that said, in the bulletpoint list that we've
11 looked at, that non-exhaustive list of matters to be
12 addressed, was there any mention of race or how to
13 approach the question of race during the precognition
14 process?

15 A. I don't see it in that list.

16 Q. Okay. And was there any mention of ensuring or how to
17 ensure that the process was Article 2 and 14 compliant?

18 A. I don't see any reference to that there in what you've
19 shown me.

20 Q. And now that you've seen this minute, does this ring a
21 bell with you? Were you shown this at any point, to the
22 best of your recollection, or are you perhaps seeing it
23 for the first time today?

24 A. I don't think I'm seeing it for the first time, but
25 I wasn't directed to it at the start and I can't tell

Transcript of the Sheku Bayoh Inquiry

1 you when I would have seen it. It could well be after
2 my report had been submitted to Crown Counsel, I have no
3 idea, but I did have a review -- I did have a review of
4 the materials. I just can't tell you when I might have
5 seen that.

6 Q. We'll hear from Mr Brown later this week and there may
7 be a very good reason why it was not shared with you at
8 the outset. It was written more than a year before you
9 became involved. I show it to you only because we've
10 looked at what is said in the Precognoscer's Handbook
11 about the preparation of a guidance note and it's the
12 only document that I have come across in my own
13 investigations that might be described as a "guidance
14 note" for the precognoscer so I was keen to know whether
15 that had been shared with you?

16 A. I'm not sure that was the purpose of it. I wonder if
17 I could see the top of it, because I think it's a minute
18 to --

19 Q. There's talk about a meeting and it is in the form of a
20 minute.

21 A. I'm not sure that was the purpose of it. So it's a
22 minute to deputy crown agents and copied to advocate
23 depute, who was allocated the case, Alisdair and Erin
24 were the precognoscers at the time.

25 Q. It's in the form of a minute and it references a

Transcript of the Sheku Bayoh Inquiry

- 1 meeting?
- 2 A. Yes.
- 3 Q. And the purpose is stated as being to identify key
4 issues to be explored at precognition of the relevant
5 eye witnesses.
- 6 A. Yes.
- 7 Q. It may be that it was intended to serve an entirely
8 different purpose and no doubt Mr Brown can tell us more
9 about that?
- 10 A. Yes.
- 11 Q. You are giving evidence before he is and I wanted to
12 share it with you as there are certain aspects of this
13 that perhaps read as though it's intended to be some
14 form of guidance to want precognoscer, but perhaps that
15 wasn't his purpose, but we can ask him about it?
- 16 A. Just reading the first sentence or the first paragraph,
17 it seems to be identifying issues to be explored at the
18 precognition of witness, so it's the topics that would
19 be covered in speaking to the witnesses.
- 20 Q. When speaking to the witnesses?
- 21 A. As I understand it.
- 22 Q. Rather than the process more broadly?
- 23 A. Yes.
- 24 Q. Can we return to the Precognoser's Handbook, please,
25 chapter 1, page 7, and the section headed "Continuing

Transcript of the Sheku Bayoh Inquiry

1 role of the solemn legal manager":

2 "It is important that solemn legal managers remain
3 involved throughout the case preparation process in all
4 cases, especially in serious and difficult cases. This
5 will be particularly facilitated by the establishment of
6 specialised solemn units where precognition officers
7 will be in daily contact with legal staff. The solemn
8 legal manager, who will have ultimate responsibility for
9 the quality of the precognition report and will certify
10 its contents accordingly before its submission to Crown
11 Counsel, should assist in identifying the issues which
12 require to be dealt with during the course of the
13 preparation of the precognition report and be available
14 to give guidance to precognoscers whenever necessary."

15 Now, again the language gives away that this wasn't
16 written specifically for CAAPD, but is there anything
17 here about the role of the solemn legal manager that
18 doesn't sit well with the procedures that were in place
19 in CAAPD in 2017?

20 A. No, although I would say this was perhaps an exceptional
21 case. This was not a run of the mill CAAPD
22 precognition. It would be unusual for Mr Brown to be
23 the solemn legal manager of any report, it would
24 normally be one of the principle deputies who would take
25 that role, so it's a case that was dealt with

Transcript of the Sheku Bayoh Inquiry

1 exceptionally I would say.

2 Q. So Mr Brown was the head of the unit?

3 A. Yes.

4 Q. And it would ordinarily have been one of his principal
5 deputes, that's the grade that you're at now --

6 A. Yes.

7 Q. -- who would take on the role of solemn legal manager?

8 A. Exactly.

9 Q. And why was it that he took on the role of solemn legal
10 manager in this case, why was this case dealt with on an
11 exceptional footing?

12 A. I think you would have to ask more senior members of
13 COPFS the reason for that, but I know it was his role in
14 this particular case.

15 Q. All right. Certainly he says in his statement, and we
16 don't need to bring it up on the screen, it is not at
17 all controversial, he says a full precognition,
18 including detailed analysis of available evidence, was
19 to be prepared under his supervision.

20 So to what extent then did you receive guidance and
21 supervision from Mr Brown during period of time that you
22 worked on the analysis?

23 A. I think it was incremental. I mean certainly my memory
24 of the first meeting in December of 2017 was
25 specifically I want to involve you now in this matter.

Transcript of the Sheku Bayoh Inquiry

1 This is your role. It is about assisting Alisdair in
2 preparing the analysis of evidence and in particular in
3 the instruction of the OST expert who had still to be
4 identified at that point in time.

5 Q. And you mentioned that you had a meeting with Mr Brown
6 and that you received emails from him over the course of
7 the period of time that you were involved that
8 identified issues that you were to consider?

9 A. Yes, but we also met regularly.

10 Q. Okay. Were those meetings on a formal footing or on a
11 need to basis?

12 A. Quite informal, regular chats about how things were
13 going.

14 Q. Now, Mr Bayoh died in police custody or at the very
15 least after contact with the police and as such both
16 Articles 2 and 14 were engaged and you I think
17 acknowledged that in your statement.

18 I wonder if we can bring up your first statement,
19 please. And can we scroll down to paragraph 67. So we
20 can skip across the first few lines and get to the part
21 that begins "my understanding". It's about -- thank you
22 very much -- with the curser is:

23 "My understanding is that Article 2 provides for the
24 right to life and the right not to be deprived of life.
25 By dint of Article 2 COPFS had an obligation to carry

Transcript of the Sheku Bayoh Inquiry

1 out an effective investigation into the death of
2 Mr Bayoh since his death was in the course of restraint
3 at the hands of agents of the state, namely the police.
4 Such an investigation should be independent, effective
5 and include a thorough impartial analysis of all
6 relevant evidence, be expeditious and open to public
7 scrutiny. Although the views of the family of the
8 deceased should be taken into account, the investigation
9 should not be restricted to their concerns and there
10 should be consideration of all relevant lines of
11 inquiry. It affected the approach to my work in that it
12 underpinned everything I did. Much of the investigation
13 had taken place before my involvement, but to the extent
14 that further investigation was required, this was
15 instructed promptly, ensuring that all relevant lines of
16 inquiry were followed.

17 "For my part, I was concerned to obtain the
18 necessary evidence of training materials and submit
19 these along with the relevant statements and productions
20 in an instruction to an expert in restraint who was
21 independent of Police Scotland. Thereafter, I conducted
22 a thorough analysis of the evidence about potential
23 criminality, addressing potential individual and
24 corporate criminality as expeditiously as possible.
25 I had no direct dealings with the family, but was aware

Transcript of the Sheku Bayoh Inquiry

1 through the correspondence with Mr Anwar of their
2 concerns and did my best to address those in my report
3 to Crown Counsel where they related to potential
4 criminality."

5 Then there's some discussion about disclosure and
6 then if we can look at the last four or five lines of
7 that answer, please:

8 "Article 14 provides that the rights and freedoms
9 set forth in this Convention shall be secured without
10 discrimination on any ground, including race and colour.
11 I was aware of this right as it underpins the impartial
12 approach to my work and is a standard that is expected
13 of everyone in COPFS."

14 So you make clear in this answer to a question that
15 you were asked in your first Rule 8 that you were aware
16 of the requirements of Articles 2 and 14 and that those
17 requirements underpinned everything that you did?

18 A. Yes.

19 Q. And that would include your approach to the analysis of
20 the evidenced in this case?

21 A. Yes.

22 Q. And you agreed with me earlier that for an investigation
23 into a death for the Crown Office to be Article 2
24 compliant it requires to be effective? You're nodding.

25 A. Sorry, yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. I should have said that the proceedings are being
2 simultaneous transcribed. So to be effective, it must
3 be adequate?

4 A. Yes.

5 Q. And you accepted too that the precognition process,
6 including the analysis of the evidence, required
7 therefore to be adequate in order to comply with
8 Article 2?

9 A. Yes.

10 Q. And you agreed with me earlier that when there has been
11 a death in state custody, an adequate investigation must
12 be capable of leading to a determination of whether
13 force used was or was not justified?

14 A. Yes.

15 Q. And the analysis of whether the use of force was
16 justified involves asking whether the force used was no
17 more than absolutely necessary?

18 A. Yes.

19 Q. And these are issues that the crown required to
20 consider --

21 A. Yes.

22 Q. -- as part of its investigation? You also agreed with
23 me earlier that when there is a death at the hands of
24 state agents, taking Article 14 in conjunction with
25 Article 2, the state authorities have an additional duty

Transcript of the Sheku Bayoh Inquiry

1 to take all reasonable steps to unmask any recess motive
2 and to establish whether or not ethnic hatred or
3 prejudice may have played a role in the events?

4 A. Yes.

5 Q. And you accept, I think, that it was the responsibility
6 then of COPFS to take all reasonable steps to unmask any
7 racist motive that may have played a part in the death
8 of Sheku Bayoh?

9 A. Yes.

10 Q. And to pursue that line of investigation with vigour?

11 A. Yes.

12 Q. So these were positive on the crown in terms of
13 Article 2 and Article 14?

14 A. Mm-hm.

15 Q. And they required to be discharged through the
16 precognition process?

17 A. Yes.

18 Q. I want to move on shortly to ask you questions about the
19 process that you followed when you analysed the evidence
20 and you drafted the analysis for Crown Counsel and I
21 would like to ask you about three areas, your approach
22 to the analysis of the use of force, your approach to
23 your analysis of cause of death and causation and then
24 finally your approach to race.

25 Now, Mrs Carnan, can you bear with me just a moment,

Transcript of the Sheku Bayoh Inquiry

1 entitled to access to a solicitor too; is that your
2 understanding?

3 A. Yes.

4 Q. A witness, on the other hand, won't be cautioned and
5 they won't be afforded access to a solicitor?

6 A. Sorry. Did you say won't be cautioned?

7 Q. Won't be cautioned?

8 A. Yes, that's right.

9 Q. Nor will they be afforded access to a solicitor?

10 A. That's right.

11 Q. And where a suspect isn't cautioned or isn't given
12 access to a solicitor, then an issue might arise as to
13 the admissibility of their statement as evidence against
14 them in any subsequent proceedings?

15 A. Yes.

16 Q. I wonder if we can look at the analysis, please. That's
17 COPFS 06361 at page 7 of the PDF, please. If we can --
18 sorry -- scroll a little bit. Where that black line is,
19 I'll be looking at the text immediately beyond that
20 black line, thank you.

21 Now, there's very little in the analysis about the
22 admissibility of the officers' statements, but I want to
23 draw your attention to what is there. So if we can look
24 beyond the redacted passage near the top of the screen:

25 "It is also important to note that PIRC

Transcript of the Sheku Bayoh Inquiry

1 investigators who interviewed the police officers on
2 4 June asked them in detail about their own actions
3 (which evidence is not admissible against them) but were
4 less focused in their questioning about what others
5 around them were doing."

6 So there's a statement there that an officer's
7 evidence -- sorry -- an officer's statement is not
8 admissible in evidence against them. And if we can look
9 at the paragraph that follows too, please, if we can
10 look at it in its entirety:

11 "The police officers only provided their statements
12 to PIRC investigators following assurances given by PIRC
13 they were considered to be witnesses and not suspected
14 of having committed any crime. This was at a time when
15 PIRC investigators had already obtained statements from
16 witness such as Wyse, Ali, Nelson, Robinson and Mullin.
17 By that time PIRC investigators had obtained some
18 accounts of police officers bringing the deceased to the
19 ground and pinning him down by lying on top of him. In
20 light of their assurances that the officers were being
21 treated as witness it is considered that their own
22 statements could be inadmissible in evidence against
23 themselves on the ground of fairness. However, the
24 accounts given include descriptions of their colleagues'
25 actions and to this extent their statements can be

Transcript of the Sheku Bayoh Inquiry

1 considered as evidence for or against their colleagues."

2 So in the paragraph we looked at a moment ago the
3 language used was which evidence is "not" admissible
4 against them and in this paragraph here we see it is
5 considered that their own statements "could be"
6 inadmissible in evidence against them on grounds of
7 fairness.

8 Now, leaving aside the inconsistency between "could"
9 and "not", this is really the extent of the discussion
10 about admissibility in the analysis?

11 A. Yes.

12 Q. That they could be inadmissible or they're not
13 admissible and there's no explanation in the analysis at
14 all, beyond the paragraph that I have read out, as to
15 why you formed the view that the officers' statements
16 were or could be inadmissible, is that fair? That's the
17 extent of the discussion --

18 A. I think that's right.

19 Q. -- on that topic.

20 Now, are you aware, Mrs Carnan, that there is
21 extensive case law on the admissibility of statements as
22 evidence against their -- the maker?

23 A. Yes, but it's not explored in this analysis.

24 Q. Yes. And I wondered whether you had considered the case
25 law on admissibility?

Transcript of the Sheku Bayoh Inquiry

1 A. To some extent. I can't remember reading up on it
2 particularly, but I was taking a cautious approach and I
3 think my position is reflected in the second paragraph
4 that you read out and I thought that there was a
5 possibility that the statements of the officers could be
6 held inadmissible in evidence against them. I think the
7 first statement is probably extending it too far.
8 I think that's probably the position.

9 Q. You identified this as being a possibility?

10 A. Potential.

11 Q. A potential, there was the potential for the statements
12 to be ruled by a court of law --

13 A. Challenged.

14 Q. Yes, challenged and found to be inadmissible?

15 A. Yes.

16 Q. And for a reason you left them out of account when
17 analysing the evidence of criminality against each
18 individual officer?

19 A. That's right.

20 Q. Now, when one looks at the case law, one consideration
21 that is relevant is whether suspicious has crystallised
22 on the person who gave the statement at the time that
23 they made the statement; would you agree with that?

24 A. Yes.

25 Q. And we can also see from a review of the case law that

Transcript of the Sheku Bayoh Inquiry

1 where a person is under suspicion or ought to have been
2 under suspicion and treated as a suspect, the
3 admissibility of their statement will depend on whether
4 in all the circumstances it was obtained fairly?

5 A. Yes.

6 Q. Would that be fair?

7 A. Yes.

8 Q. So it's not perhaps as simple as saying a person was or
9 should have been a suspect, they weren't cautioned, they
10 weren't given access to a solicitor and therefore their
11 statement will be inadmissible. The case law perhaps
12 encourages a more nuanced analysis of all of the
13 circumstances, looking at when suspicious crystallises
14 and the fairness in all the circumstances?

15 A. I accept that.

16 Q. There's no discussion in the analysis as to whether
17 suspicion had crystallised on any of the nine officers
18 at the time that they gave their statements, beyond that
19 paragraph that we see on the screen in front of us?

20 A. That's right.

21 Q. Nor is there any discussion in that analysis as to any
22 circumstances that might point towards fairness or
23 unfairness?

24 A. I agree.

25 Q. And there's no reference to any case law. You've

Transcript of the Sheku Bayoh Inquiry

- 1 acknowledged that I think already. And there's no
2 analysis of the likelihood of a challenge or the
3 likelihood of a court ruling the statements to be
4 admissible or inadmissible?
- 5 A. Correct.
- 6 Q. Now, each officer played a different and separate role
7 in the restraint and there's no assessment in relation
8 to each individual officer of these questions of
9 suspicion and fairness?
- 10 A. Correct.
- 11 Q. They have been considered, if you like, as a group,
12 rather than on an individual basis?
- 13 A. That's right.
- 14 Q. So you appear to have proceeded, as you say, on a
15 cautious basis?
- 16 A. Yes.
- 17 Q. On the assumption that the statements of all of the
18 officers were inadmissible or could be -- sorry -- could
19 be inadmissible and so you've left each officer's
20 statement out of account when analysing the evidence
21 against him or her?
- 22 A. Yes.
- 23 Q. And you've adopted that cautious approach rather than,
24 for example, drawing attention to the issue, analysing
25 the case law, and including each officer's statement of

Transcript of the Sheku Bayoh Inquiry

1 his or her own involvement with the caveat for
2 Crown Counsel that there was a question mark over
3 admissibility?

4 A. That's correct.

5 Q. Okay. You do however in your analysis consider whether
6 each officer was justified in using the force that they
7 used and as part of that analysis you take into account
8 any explanation or justification that they gave in their
9 statement?

10 A. Yes.

11 Q. And we see that if we can scroll down just a little bit,
12 please, to the paragraph that's -- yes, thank you,
13 that's perfect. So you say:

14 "In addition, where an officer has provided in their
15 own statement an explanation or justification for their
16 own or others' actions, this may be relevant in
17 considering whether such justification has merit and
18 should be considered in relation to the question of mens
19 rea."

20 And I'm wondering whether there's an inconsistency
21 in your approach here. If a statement is left out of
22 account for the purposes of establishing criminality,
23 can it then be taken into account as evidence of
24 justification for the use of force; do you see the
25 tension there?

Transcript of the Sheku Bayoh Inquiry

- 1 A. I do.
- 2 Q. And I'm wondering whether a statement could be
3 inadmissible for one purpose and admissible for another?
- 4 A. Possibly. I think the -- that paragraph related to the
5 position of an accused person providing a justification
6 if they were prosecuted.
- 7 Q. And if that accused person was prosecuted, they wouldn't
8 be obliged to give evidence?
- 9 A. No, but their statement would be available nonetheless.
- 10 Q. Their statement would be available, unless there was a
11 challenge to its admissibility. So if a person was
12 prosecuted having given a statement in circumstances
13 where perhaps they ought to have been treated as a
14 suspect, cautioned, access to a solicitor and so on and
15 so forth and none of that happened, and their legal team
16 were to challenge the admissibility of that statement
17 and that challenge were to be successful, then any
18 evidence of justification that were contained within
19 that statement would also fall, it would also be
20 inadmissible, because the statement in its entirety
21 would be put to one side; is that right?
- 22 A. I have to say I haven't -- hadn't considered that.
- 23 Q. But I think you agree with me that throughout the
24 analysis the approach that you have taken is that the
25 statement of each officer is left out of account when

Transcript of the Sheku Bayoh Inquiry

1 you look at the evidence of use of force at the hands of
2 that officer?

3 A. Yes.

4 Q. But is taken into account in assessing whether the use
5 of force by that officer was justified?

6 A. Yes.

7 Q. And looking back now do you think that was a sound
8 approach to take?

9 A. I don't think it was the approach that Crown Counsel
10 agreed with, because I recall reading Crown Counsel's
11 instructions and the case of Gillroy being brought to
12 attention, which Crown Counsel effectively disagreed
13 with my assertion.

14 Q. Right. I won't ask you anything about Crown Counsel's
15 instructions. There has been a decision by the Chair
16 that doesn't permit me to probe that. But you are of
17 the view that Crown Counsel didn't agree with the
18 approach that you took?

19 A. That's right.

20 Q. And I wonder whether if you found yourself drafting an
21 analysis in a similar set of circumstances tomorrow
22 whether you might take a different approach?

23 A. Very likely.

24 Q. And what would be different?

25 A. Well, I think the case of Gillroy would be one that I

Transcript of the Sheku Bayoh Inquiry

1 would refer to in terms of fairness and what constituted
2 fairness and what constituted -- and the situation in
3 which a witness' evidence could be used who then became
4 a suspect.

5 Q. So to put it another way then would you analyse in
6 relation to each officer one by one whether the
7 circumstances in which they had given their statement
8 were fair?

9 A. Yes.

10 Q. Okay. You say that Crown Counsel took a different view,
11 were you asked to revise or reconsider this part of the
12 analysis?

13 A. No.

14 Q. No. Before you drafted the analysis and adopted this
15 particular approach in relation to the admissibility of
16 the officers' statements, were you given any guidance on
17 how to treat their statements?

18 A. I'm not sure what you mean by "guidance".

19 Q. Well, clearly you had a concern around admissibility?

20 A. Mm-hm.

21 Q. Did Mr Brown say to you, either off his own bat or
22 perhaps after you knocked on his office door, that you
23 should approach the statements in the way that you have
24 done in your analysis?

25 A. I don't recall any discussion about it.

Transcript of the Sheku Bayoh Inquiry

1 Q. Okay do you recall seeking guidance as to the approach
2 to take in relation to the officers' statements?

3 A. No.

4 Q. And you say you don't recall any discussion around the
5 subject with Mr Brown?

6 A. No, I don't.

7 Q. Looking back would it possibly have been helpful if this
8 particular subject had been identified whether by you or
9 by Mr Brown as a subject that might have been talked
10 through before you embarked on drafting the narrative
11 and analysis?

12 A. In hindsight, yes.

13 Q. Let's move away from that. Now, when an officer uses
14 force to achieve a lawful objective, for example if they
15 were detaining or arresting a subject, the force that
16 they use must be reasonable -- again, sorry, we're
17 picking up an audio, if you wouldn't mention just
18 confirming. I can see you nodding your head?

19 A. Sorry, yes.

20 Q. Thank you so much. Force used must be reasonable. It
21 must also be proportionate?

22 A. Yes.

23 Q. It must be necessary?

24 A. Yes.

25 Q. And no more than the absolute minimum required to

Transcript of the Sheku Bayoh Inquiry

- 1 achieve the lawful objective in question?
- 2 A. Yes.
- 3 Q. Okay. Other options involving a lesser degree of force
- 4 must either have been tried or failed or at least
- 5 considered and found not to be appropriate in all the
- 6 circumstances?
- 7 A. Correct.
- 8 Q. And that was a little bit of a mouthful, but that test
- 9 is sometimes referred to as preclusion?
- 10 A. Yes.
- 11 Q. An officer has to be able to justify his or her use of
- 12 force?
- 13 A. Yes.
- 14 Q. And they have to be able to justify every use of force.
- 15 So for example if an officer strikes someone with a
- 16 baton two or three times, they would have to be able to
- 17 justify each individual strike?
- 18 A. Yes.
- 19 Q. If an officer cannot justify the use of force as
- 20 reasonable, proportionate, necessary, minimum required,
- 21 then that use of force will be unlawful?
- 22 A. Yes.
- 23 Q. And if an officer has failed to preclude options that
- 24 required a lesser degree of force then again their use
- 25 of force would be unlawful?

Transcript of the Sheku Bayoh Inquiry

1 A. Yes.

2 Q. Okay. And so it would have been an important part of
3 your process of analysis to consider the role played by
4 each officer in the restraint?

5 A. Yes.

6 Q. And also whether each use of force by each officer was
7 justified and lawful?

8 A. Yes.

9 Q. And that would involve looking at the evidence of what
10 happened, but also looking at each officers' knowledge,
11 that could be information provided to them over the
12 airwaves, their observations at the scene and also the
13 training that they had received?

14 A. Yes.

15 Q. And whether they were acting in accordance with their
16 training?

17 A. Yes.

18 Q. Okay. Now, I would like to ask you about just two or
19 three small chapters within the analysis and the first
20 relates to what in the Inquiry we've called "the initial
21 contact". That was when officers Walker and Paton
22 arrived at Hayfield Road and if we can look, please, at
23 the analysis and at page 13 of the analysis. That's
24 perfect that middle paragraph there. If we can go five
25 lines down, please, "It is clear", thank you. Do you

Transcript of the Sheku Bayoh Inquiry

1 see where I am, Mrs Carnan:

2 "It is clear from the statements of Walker and
3 Paton"?

4 A. Yes.

5 Q. "It is clear from the statements of Walker and Paton
6 that on the basis of the information to hand they had
7 decided to take a robust confrontational approach, even
8 before they got out of the van. Walker even admits to
9 having considered driving the police van at him."

10 And the Inquiry has heard evidence and it's the same
11 evidence that was available to you that the officers got
12 out of the van with their sprays drawn, that they issued
13 strong verbal commands and when they did not bring about
14 the desired result, they resorted to the discharge of
15 their incapacitant sprays?

16 A. Yes.

17 Q. And you have described this as being a robust and
18 confrontational approach?

19 A. Yes.

20 Q. And the Inquiry has also heard evidence, and again it
21 was the same evidence that was available back in 2017,
22 that when constables Walker and Paton get out of the van
23 Mr Bayoh was walking normally along the road and he had
24 his hands by his side and didn't appear to be carrying a
25 knife?

Transcript of the Sheku Bayoh Inquiry

1 A. Yes.

2 Q. Now, you mention in the analysis, and this is at page
3 11, near the top of that page, please, you had by the
4 time of writing this report a report from Martin Graves,
5 an expert in officer safety training, the Inquiry has
6 heard evidence from him also, and I understand that by
7 the time that he prepared this report, Mr Brown and
8 Ms Edwards had consulted with Mr Graves but you were not
9 part of that consultation process?

10 A. That's right, but Alisdair MacLeod and I precognosed
11 him.

12 Q. You precognosed him?

13 A. Yes.

14 Q. And that was before you prepared the analysis?

15 A. Yes, or in the course of the preparation.

16 Q. In the course of the preparation before it was
17 finalised?

18 A. Yes.

19 Q. I see. So you had the opportunity of a precognition
20 with Mr Graves and I understand that you were also
21 involved in a consultation but that was at a later
22 stage. It was during the VRR process that we won't be
23 discussing today.

24 Returning to what Mr Graves had to say, if we look
25 at the text that follows forgotten the redacted passage:

Transcript of the Sheku Bayoh Inquiry

1 "In his report Martin Graves, OST expert, states
2 that PC Paton could have used a more communicative style
3 to initially make contact but he did not think that his
4 approach was the cause or catalyst for Mr Bayoh's
5 response or behaviour."

6 So we see here that Mr Graves has raised the
7 possibility of an alternative communication style, an
8 alternative to the strong verbal commands or what was
9 referred to in evidence before the Inquiry as
10 "verbal-dominance type approach". So Mr Graves has
11 identified an alternative, albeit he has offered a view
12 as to whether or not the officer's approach, the
13 approach that they did take, triggered the events that
14 followed.

15 So I would like to ask as part of the process that
16 you undertook, and that would include the precognition
17 of Mr Graves as well as your analysis, your thoughts and
18 the drafting of the analysis, did you give consideration
19 to what other tactical options were open to Constables
20 Walker and Paton when they arrived at Hayfield Road?

21 A. I think Mr Graves did and referred to the options in his
22 report so, yes, a communicative, a less dominant, if you
23 like, communicative approach was an option, but he
24 didn't criticise the officers for choosing the more
25 dominant -- I think the words he used were "hard stop"

Transcript of the Sheku Bayoh Inquiry

1 was the way he described it.

2 Q. That's the way he described it in evidence before the
3 Inquiry too. So he wasn't critical of the hard stop,
4 but he identified that there wasn't at least one other
5 option?

6 A. Yes.

7 Q. Now, I have looked through his report, and I will be
8 correct me if I'm wrong, but I didn't immediately
9 identify in his report any other options, that he had
10 laid out any other tactical options. We did in the
11 course of his evidence hear about other options and you
12 had the opportunity to precognosce him so let me tell
13 you what they were. I'm simply interested to know
14 whether they were discussed with Martin Graves or
15 considered by you during the course of your analysis.

16 The other options that we heard about were a
17 rendezvous point. That's where the officers go
18 somewhere away from the immediate locus, for example,
19 the car park at Gallagher's, and convene and arrive at a
20 tactical plan and potentially wait for specialist
21 resources. That was one option. Another option was
22 observe, wait feedback. That involved observations at
23 slightly closer quarters, perhaps from the car parked
24 across the road or something of that sort, waiting for
25 specialist resources to arrive if required and feeding

Transcript of the Sheku Bayoh Inquiry

1 back to the control room. Then of course there's what
2 Martin Graves has referred to as the communicative
3 approach, which I think is referred to as tactical
4 communications in the police training manual and during
5 the course of the Inquiry has often been referred to as
6 "deescalation". So on a continuum, if you like, there
7 would be at one end of the scale the communicative
8 approach, at the other end of the scale the robust
9 confrontational hard stop and in between there were two
10 other potential approaches that were discussed with
11 Mr Graves.

12 Now, I don't think they're in his report. It may be
13 that you're hearing about this for the first time today,
14 but I'm interested to know, we have the benefit of a
15 precognition with him and you have applied your mind to
16 this during the writing of the analysis, I'm interested
17 to know what consideration you gave to the other
18 tactical options that were potentially open to
19 Constable Walker and Constable Paton?

20 A. Well, I think the important thing to get from Mr Graves
21 was his assessment of risk and his assessment was that
22 this was a high risk situation based on the information
23 before the officers attended and therefore he was of the
24 view that the hard stop was the course of action that he
25 would have expected most police officers to adopt. He

Transcript of the Sheku Bayoh Inquiry

1 wasn't critical of it. He didn't discuss the options of
2 a rendezvous point or a standing back. My understanding
3 was that the other resources, I think the dog unit and
4 the armed response vehicle, were not coming anytime
5 soon. That was my understanding. Now, I might be wrong
6 about that, but I think that was from the police
7 officers themselves that they did not anticipate this
8 assistance to come immediately so I understood that they
9 took the view that they were obliged to deal with
10 Mr Bayoh.

11 Q. So you say that Martin Graves wasn't critical of the
12 hard stop and he said to you that it's what most
13 officers -- the tactic that most officers would adopt --

14 A. Yes.

15 Q. -- in those circumstances?

16 A. Yes.

17 Q. Now, that may be his opinion but the test, of course,
18 that the law requires to be met is that the approach
19 adopted should involve the most minimum degree of force,
20 other options have to be precluded, it has to be
21 necessary, reasonable, proportionate, so on and so
22 forth, which is perhaps a different thing from it being
23 the approach that other officers would have adopted; do
24 you see the distinction there?

25 A. I do.

Transcript of the Sheku Bayoh Inquiry

1 Q. I appreciate that you have an expert who appears to be
2 certainly not critical of this particular course, but
3 I'm wondering whether or not withstanding the fact he
4 didn't criticise the approach he did raise the
5 possibility of at least one other tactical option, the
6 communicative one, and I am wondering whether you in
7 your analysis or as part of your analysis considered
8 whether this hard stop was necessary and proportionate
9 and whether other options had been precluded by
10 Constables Walker and Paton?

11 A. I think in considering the position of the first two
12 officers, as I say, the first point was about the
13 information they had and their assessment of risk not
14 only to themselves but to members of the public, given
15 they had information about a large knife. That was
16 foremost in their minds, as I understood it. In terms
17 of then their approach, the question of preclusion of
18 other options I think was provided by Mr Graves in the
19 sense of assessing himself that it was a high risk
20 situation for them and that the use of tactical
21 communications may not have been appropriate.

22 Q. But in saying that the use of tactical communications
23 may not have been appropriate, is that sufficient to get
24 over the bar for preclusion? Preclusion would require
25 either that tactical communications had been tried and

Transcript of the Sheku Bayoh Inquiry

1 had failed or that in all the circumstances it was not
2 an appropriate option?

3 A. That's what I understood the officers to take the view
4 and I understood Mr Graves to support that.

5 Q. All right. And do we see anywhere in your analysis in
6 relation to the actions of Constable Walker and Paton in
7 carrying out the hard stop, the initial actions
8 following their arrival at the scene, do we see anywhere
9 in your analysis a discussion as to whether their
10 approach was necessary, proportionate, the minimum
11 required, and whether they had precluded other options?

12 A. Certainly cited on page 12 the explanations provided by
13 the officers their justification for deploying PAVA.
14 That's probably going further than --

15 Q. I think so. I'm concerned really with --

16 A. The initial contact.

17 Q. -- the initial contact, yes.

18 A. Just bear with me. I'll have a look back.

19 Q. Of course.

20 A. Thank you. Well, I think what I do at pages eight or
21 nine is refer to the information that PCs Walker and
22 Paton have had over the airwave messages of the
23 disturbance and of the description of Mr Bayoh and the
24 risk assessment that although they couldn't see a knife,
25 they assessed that he could still have had the knife in

Transcript of the Sheku Bayoh Inquiry

1 his possession and that was an important point I think.

2 Q. Yes. Yes. So you've looked at information they had
3 from the airwaves?

4 A. Yes.

5 Q. Observations on arrival at the scene, including the fact
6 that although a knife wasn't visible, it could have been
7 concealed, risk assessment and so on, yes, I see all of
8 that is in there, but I'm just wondering whether in
9 terms you have set out in the analysis a view on this
10 initial engagement which it might be said set the tone
11 for the events that followed, whether or where that
12 initial engagement sat in terms of being reasonable,
13 necessary, proportionate, minimum force required, indeed
14 whether any sort of force or combative robust approach
15 was necessary at all? I don't see that set out in the
16 analysis beyond the passages that you've drawn our
17 attention to?

18 A. If it's not there, then I accept that it's not there,
19 but I think I have laid out the information that was
20 available to them, the reference to the training manual
21 where they're advised to assume that there's no such
22 thing as a low threat, so there is a high threat to them
23 at this stage, and I have acknowledged I think -- sorry,
24 I'm just going to try and find it. I have lost it.

25 Q. Take your time.

Transcript of the Sheku Bayoh Inquiry

1 A. I'm sorry I'm not able to find it, but I think there was
2 reference to the officers -- to the fact that Mr Bayoh
3 was on one view walking along the road acting normally.

4 Q. Yes.

5 A. So I think I have acknowledged that position, you know,
6 that we have the police coming at it from this is a high
7 risk situation and, on the other hand, we've got an
8 alternative view of actually on the face of it Mr Bayoh
9 walking quite normally. I can't find where that is.

10 Q. Yes, I recall seeing that in the analysis. If it would
11 assist you, you can consider the analysis over lunch and
12 we can revisit this, but it's before the Inquiry, it's
13 before the Chair --

14 A. Yes.

15 Q. -- subject to the redactions that we can see here and
16 there on the serene. But perhaps what I should take
17 from your evidence is that although you haven't set out
18 the legal test in terms and how that applied to the
19 initial engagement, you consider that all of the
20 relevant information has been laid out in the analysis,
21 the airwaves, observations --

22 A. Yes.

23 Q. -- on arrival, risk assessment?

24 A. Yes.

25 Q. The fact that Mr Bayoh didn't appear to be carrying a

Transcript of the Sheku Bayoh Inquiry

1 knife, but that wasn't to say he didn't have one?

2 A. Exactly.

3 Q. And so on and so forth?

4 A. Yes.

5 Q. The information is there in the analysis?

6 A. I think so.

7 Q. All right. Let's move on then to another chapter in the
8 restraint, the baton strikes by Constable Tomlinson, and
9 I wondered if we can begin with the narrative. If we
10 can perhaps have the narrative up on the screen, please,
11 and if we can turn to page 25.

12 Now, I appreciate that you didn't draft the
13 narrative, but this is just to get a grounding before we
14 look at the analysis.

15 No, sorry, it's the narrative that we're looking
16 for, please. The narrative is COPFS0360. If we don't
17 have it, I can work around it. We don't have that?

18 A. I have a copy of it in front of me.

19 Q. You have a copy. In that case, perhaps we'll look at
20 the hard copy. I was going to look very briefly just in
21 passing at page 25, Mrs Carnan.

22 A. Yes.

23 Q. Second paragraph from the top reads:

24 "PC Tomlinson states that after PC Short was
25 assaulted he ran at the deceased and struck him with his

Transcript of the Sheku Bayoh Inquiry

1 baton once to the head and two or three times on his
2 arms."

3 A. Yes.

4 Q. Okay, I just wanted to see that and if you can hold that
5 thought, because I don't think what's recorded there is
6 factually correct and what I would like to do now is
7 bring up Constable Tomlinson's statement, please. It is
8 PIRC 00263 and if we could turn to the third page of
9 that document, please, and scroll down to there.

10 Perfect. Sorry, a little bit further, sorry, wee bit
11 the more. Perfect.

12 So that bottom paragraph on screen, Mrs Carnan --

13 A. Yes.

14 Q. -- describes the point in time where Constable Tomlinson
15 struck Sheku Bayoh:

16 "I struck him with my baton once to the head. It
17 was to the left-hand side of his head diagonally from
18 the back of the head to the jaw. He stopped stomping on
19 Nicole at that point. I think I hit him again, which
20 was about two or three times in total to the head area.
21 He turned around and took up a boxing sort of stance
22 with both fists clenched in at his chest. I thought he
23 was going to attack me again so I struck him two or
24 three times with my baton to his arms."

25 So we have here him explaining in his own statement

Transcript of the Sheku Bayoh Inquiry

1 that he struck Mr Bayoh once to the head with a baton,
2 at which point of course Constable Tomlinson's position
3 is that Sheku Bayoh was stamping on Nicole Short's back.
4 After that first baton strike he stopped stomping on
5 Nicole and Constable Tomlinson then hit him again, which
6 was about two or three times in total. So there were
7 two or three baton strikes to the head, one which
8 apparently caused Mr Bayoh to stop stomping on
9 Nicole Short's back and then a further strike or
10 possibly two strikes to the head after that. Is that
11 how you would read that statement?

12 A. Yes.

13 Q. He then goes on to explain striking him to the arms two
14 or three times. So if we can just go back to the
15 precognition, which reads in narrative:

16 "PC Tomlinson states that after PC Short was
17 assaulted he ran at the deceased and struck him with his
18 baton once on the head and two or three times on his
19 arms."

20 So it seems that there are two pieces of information
21 that are missing from the narrative there. Firstly,
22 there's the fact that there were two or three baton
23 strikes to the head, not one?

24 A. Yes.

25 Q. And secondly, there's the fact that

Transcript of the Sheku Bayoh Inquiry

1 Constable Tomlinson's account is that after the first
2 baton strike to the head, Mr Bayoh stopped stamping on
3 Nicole Short's back. So do you see that that
4 information has been omitted from the narrative?

5 A. Yes.

6 Q. Okay. Now, I know that you were not responsible for
7 drafting it. This is just to get our bearings before we
8 look at Constable Tomlinson's involvement, because
9 I know that you left his account out of account in the
10 approach that you took to analysing the evidence against
11 him, so I wanted to begin by looking at that first.

12 So if we can perhaps return to your analysis now and
13 you look at the baton strikes on page 20 of the
14 analysis. Now, you provide a very careful analysis of
15 the first baton strike and we don't need I think to
16 concern ourselves with that, but if we could bring up,
17 please, the analysis again on the screen, and if we
18 could go to page 20, please and if we could look at the
19 second paragraph here.

20 At page 20 of his report Mr Graves in more general
21 terms highlights that strikes with a baton must be
22 justified by the officer concerned and that each
23 individual strike must be justified and consideration
24 given to its effectiveness against another possible
25 tactical option. PC Tomlinson was not asked to and has

Transcript of the Sheku Bayoh Inquiry

1 not provided in his statement justification for each
2 blow. He clarified at precognition that he thought that
3 PC Tomlinson, a relatively inexperienced police officer,
4 was likely to be stressed in this encounter and when he
5 got no response to the first baton blow to the head,
6 repeated that same action as if "locked in to that
7 action."

8 Now, when you go on to analyse the use of baton
9 strikes by Constable Tomlinson, as we have identified,
10 there's no reference in the narrative to him striking
11 Mr Bayoh in the head two possibly three times, nor is
12 there any reference in that to the fact that after the
13 first baton strike, according to Constable Tomlinson,
14 Mr Bayoh stopped stamping on Nicole Short. And further,
15 Constable Tomlinson's own account is left out of account
16 by you in the analysis section.

17 However, Mr Graves has drawn to your attention, and
18 I don't think this is in any doubt, that each individual
19 strike with a baton requires to be justified. So we're
20 dealing here with two, possibly three baton strikes to
21 the head. As I say, I'm not concerned with the first
22 baton strike, but I am concerned to explore your
23 analysis of the second and third baton strikes.

24 And so far as I can see in this paragraph and
25 elsewhere in the analysis, beyond noting Martin Graves'

Transcript of the Sheku Bayoh Inquiry

1 sympathy I suppose for Constable Tomlinson's lack of
2 experience, I'm not clear that you went on to analyse
3 whether the subsequent blows to the head were necessary,
4 proportionate, reasonable, the minimum required, whether
5 other use of force options had been precluded. Were
6 those issues analysed by you?

7 A. I'm just looking at my analysis of the evidence about
8 criminality of PC Tomlinson. I think I start on page
9 18:

10 "To establish criminality it would have to be shown
11 that PC Tomlinson went far beyond the limit of the force
12 which a police officer is entitled to apply in
13 apprehending the suspect. Police training on the use of
14 force in general in module one discusses the need for
15 the officer to take account of the profiled offender
16 behaviour and the impact factors that my apply.
17 PC Tomlinson provides justification for his actions
18 because of the assault on PC Short and his own
19 perception that he was about to be assaulted."

20 And I say at the top of page 19:

21 "He provides this as justification for striking the
22 now deceased [and I have got actually in my analysis] on
23 the left side of his head two or three times and two or
24 three times to his arms and around the Achilles heel
25 area."

Transcript of the Sheku Bayoh Inquiry

1 But I don't identify and don't discuss each strike
2 individually.

3 Q. Okay. And although you include his justification for
4 the multiple strikes --

5 A. Yes.

6 Q. -- do you anywhere in the analysis set out whether each
7 individual blow was necessary, proportionate, minimum
8 required, whether lesser use of force options had been
9 precluded and so on and so forth?

10 A. No, I don't think so. It would appear that my analysis
11 is of a cumulative analysis of the baton strikes. I
12 haven't gone through each one.

13 Q. And in particular, in your analysis was any
14 consideration given or any import attached to the fact
15 that Constable Tomlinson's account was that after the
16 first baton strike to the head Mr Bayoh stopped stamping
17 on Nicole Short?

18 A. No. I'm just looking -- I'm looking back at my own sort
19 of workings and I don't see that reference in that
20 document either.

21 Q. Because any justification once that assault came to an
22 end could not be based on the ongoing assault?

23 A. Sorry. Repeat that, please.

24 Q. Sorry. If it was unclear, that's a failing on my part
25 entirely. So Constable Tomlinson, you have noted at the

Transcript of the Sheku Bayoh Inquiry

1 top of page 19 --

2 A. Yes.

3 Q. You record the stomp with a great deal of force?

4 A. Yes.

5 Q. PC Tomlinson thought that PC Short was dead and that the
6 male was going to kill him?

7 A. Yes.

8 Q. He provides this as justification for striking the
9 deceased on the left side of the head two or three times
10 and two or three times on his arms and around the
11 Achilles heel.

12 Mr Bayoh stopped stamping on Nicole Short after the
13 first baton strike to the head. So to the extent that
14 an ongoing assault may have formed part of the
15 justification for striking him --

16 A. On PC Short.

17 Q. -- yes, that justification was no longer available after
18 the assault reached its conclusion?

19 A. I think that's right.

20 Q. I'm just wondering whether you had analysed the blows
21 that came after the assault on PC Short stopped
22 separately and taken account of the fact that the
23 assault was no longer ongoing?

24 A. I took account of the justification which he provided
25 was that he thought PC Short was dead, but also that the

Transcript of the Sheku Bayoh Inquiry

1 male was going to kill him. It was a perception of the
2 risk to both of them.

3 Q. All right. Now, you drew my attention to a passage on
4 page 18 a moment ago. If we could perhaps have page 18
5 on the screen, that would be helpful. Towards the
6 bottom of the page, please, there we are, thank you:

7 "To establish criminality it would have to be shown
8 that Tom went far beyond the limit of the force which a
9 police officer is entitled to apply in apprehending the
10 suspect."

11 Is that the correct test?

12 A. That's my understanding based on the case law, which I
13 think I set out at the start of my analysis of evidence.

14 Q. We're not in a position to look at the case law at the
15 beginning of your analysis today, I'm afraid, because of
16 a decision that's been taken around the boundaries of
17 the Inquiry's terms of reference but you agreed with me
18 earlier that a use of force which is not reasonable, is
19 not proportionate, is more than is absolutely necessary
20 and more than the minimum required in all the
21 circumstances will be unlawful.

22 A. Yes.

23 Q. And I'm wondering therefore why you set out this
24 particular test to establish criminality it would have
25 to be shown that Tomlinson went far beyond the limit

Transcript of the Sheku Bayoh Inquiry

1 because far beyond the limit is a different test from
2 reasonable, necessary and proportionate and so on.

3 A. I understand -- I understand the difference. My
4 understanding, however, and perhaps if I'm contradicting
5 myself now in giving evidence, but my understanding in
6 terms of case law is that that paragraph is correct.

7 Q. Right. But I think you agreed with me earlier that
8 certainly from the perspective of Article 2 to be
9 lawful, force must be reasonable, proportionate, no more
10 than absolutely necessary, and lesser use of force
11 options must have been precluded.

12 A. Yes.

13 Q. Okay.

14 A. But there is, I think, a tension between Article 2 then
15 and the existing case law.

16 Q. And you make clear in your statement that Article 2
17 underpinned everything that you did --

18 A. Yes.

19 Q. -- in your work on this precognition, including the
20 analysis.

21 A. Yes.

22 Q. So insofar as there may be a tension, and as I say I
23 regret we cannot get into the case law around
24 criminality, but if there is a tension between what the
25 criminal law requires and what Article 2 decrees to be

Transcript of the Sheku Bayoh Inquiry

1 unlawful, do we see that tension set out and analysed in
2 your analysis?

3 A. Not specifically, no.

4 Q. So we should understand here that you considered that
5 this was the application of the correct test from the
6 point of view of considering the criminal law.

7 A. Yes.

8 Q. But your focus here was on the criminal law of Scotland
9 or domestic law, if you like --

10 A. Yes.

11 Q. -- and perhaps not in Article 2.

12 A. It was the understanding of the applicable criminal
13 law --

14 Q. Okay.

15 A. -- in Scotland.

16 Q. And I don't see anywhere in the analysis, but you will
17 correct me if I'm wrong, consideration as to whether
18 Tomlinson's actions were Article 2 compliant?

19 A. No.

20 Q. Let's move away from Tomlinson and I would like to ask
21 you briefly about Constable Walker. Now, it might be
22 helpful if we look in short compass at some of the
23 evidence in relation to Constable Walker, if we could
24 look at perhaps page 37 of the analysis. Here we are,
25 against Constable Walker, and you look here at what each

Transcript of the Sheku Bayoh Inquiry

1 and every other officer has to say about
2 Constable Walker's actions and I'm concerned here with
3 the point in the restraint when Mr Bayoh has been taken
4 to the ground and with the evidence it tends to suggest
5 that Constable Walker was lying on or over Mr Bayoh's
6 body.

7 A. Mm-hm.

8 Q. So if I can just pick a few examples you quote
9 Constable Paton:

10 "Craig Walker was lying across the chest of the guy
11 and he saw him being lifted by him."

12 And if we go to the next page, and scroll down to
13 Good, Constable Good provided a fairly detailed
14 description, she saw Walker using the top half of his
15 body lying across the top of the upper half of the
16 deceased's back in an effort to push him down.

17 A. Yes.

18 Q. And then further down, DS Davidson:

19 "On arrival there's PC Walker lying over part of the
20 deceased's upper body as he lay face down while leg
21 restraints were being applied or at least discussed."

22 So I have cherry picked rather than go through what
23 each and every officer had to say but that gives a
24 flavour of the evidence that was available to you
25 regarding the role that Constable Walker played in this

Transcript of the Sheku Bayoh Inquiry

1 part of the restraint.

2 A. Yes.

3 Q. And you summarise the evidence at page 43 of the
4 analysis where you say at page 43, please, down a little
5 bit, please, perfect, you say:

6 "In summary then there are several witnesses who
7 speak to PC Walker lying on top of or at least asserting
8 the top half of his body over the now deceased for some
9 period of the restraint."

10 A. Yes.

11 Q. Which is a summary of some of the evidence that we've
12 looked at and there was more evidence that you took into
13 account too. Now, would it be fair to say that the
14 focus of your analysis from this point onwards is
15 whether Constable Walker remained on top of Sheku Bayoh
16 after the point at which the leg straps had been applied
17 and the police effectively had control of Mr Bayoh.

18 A. Yes, to some extent.

19 Q. Sorry?

20 A. To some extent.

21 Q. To some extent. Well, let's look at the bottom
22 paragraph here:

23 "In light of the lack of corroborated evidence
24 showing that PC Walker remained on top of Mr Bayoh
25 constantly and continuing to a point where he was fully

Transcript of the Sheku Bayoh Inquiry

1 under control, there is insufficient evidence from which
2 it can be inferred that Constable Walker acted in a way
3 that showed gross or wicked recklessness."

4 So the focus seems to be on looking at whether there
5 was evidence that he remained on top of Mr Bayoh
6 constantly and beyond the point that control had been
7 achieved by the police; is that fair?

8 A. Yes.

9 Q. And again I'm wondering as part of your process of
10 analysing the lawfulness of Walker's use of force, I can
11 well understand why you've addressed your mind to the
12 question of whether he continued to apply his body
13 weight or pressure to Mr Bayoh's body after the point
14 that his colleagues had control.

15 A. Yes.

16 Q. But beyond asking that question, I'm wondering whether
17 you asked yourself other questions and did you consider
18 as part of the process of the analysis
19 Constable Walker's body weight relative to Sheku Bayoh's
20 body weight?

21 A. I don't think I have specifically addressed it but
22 I think I have addressed somewhere in the report that he
23 had a considerable weight.

24 Q. Yes -- sorry, carry on.

25 A. I'm not sure that I would have had any expertise in

Transcript of the Sheku Bayoh Inquiry

- 1 commenting on that, however.
- 2 Q. Were you aware of what Constable Walker's body weight
3 was relative to Sheku Bayoh?
- 4 A. I think he was heavy but beyond that I can't remember
5 now.
- 6 Q. All right. I gather that he was seen by a Dr Norrie who
7 was a force medical examiner on the 3 May 2015 and that
8 that report would have accompanied the PIRC report and
9 that he was 25 stones in weight.
- 10 A. It's possibly in the narrative somewhere.
- 11 Q. It might be, which is approximately twice Mr Bayoh's
12 body weight. And you say you may not have had the
13 expertise to draw any conclusion from the relative
14 weights of the two men, is that an issue that was
15 perhaps explored with the expert witnesses? I
16 appreciate you weren't involved in the consultation with
17 the medical witnesses but would Constable Walker's body
18 weight been drawn to their attention and raised with
19 them?
- 20 A. I don't recall doing that. My recollection, however,
21 was of the evidence tending to support the position that
22 the -- that Mr Bayoh was moving from one position to
23 another during the course of the restraint which had an
24 impact on the restraint itself. Does that make sense?
- 25 Q. Okay, I think part of that evidence, and we looked at it

Transcript of the Sheku Bayoh Inquiry

- 1 when we looked at just some of the summaries from the
2 other eye witnesses, the other officers, was that
3 Mr Bayoh seemed to be able to lift Constable Walker's
4 body weight.
- 5 A. Yes.
- 6 Q. And was the impact of that, lifting twice one's own body
7 weight, in the context of a restraint something that was
8 explored?
- 9 A. I think it was something that the experts on ABD
10 commented on as a typical sign, showing exceptional
11 strength was a typical sign of ABD.
- 12 Q. We'll perhaps return to that when we look at cause of
13 death but returning now to your process of the analysis
14 of the lawfulness or otherwise of Constable Walker's use
15 of force during the restraint, again did you consider
16 whether it was absolutely necessary for him to lie on
17 top of Mr Bayoh?
- 18 A. I recall Mr Graves providing opinion that a restraint
19 process would always involve the assertion of some body
20 weight, it wasn't possible to do it without asserting
21 some body weight.
- 22 Q. Okay. And did you consider again in returning to the
23 Article 2 criteria whether his actions were the minimum
24 necessary in the circumstances?
- 25 A. I don't think that's addressed specifically in this

Transcript of the Sheku Bayoh Inquiry

1 report.

2 Q. Okay. Did you consider whether his actions were
3 proportionate?

4 A. I'm in -- I think the question of whether necessary
5 proportionate is all bound up and again relying on
6 Mr Graves or referring to Mr Graves, he talked about the
7 need to gain control of the subject and that the use of
8 physical body weight was part of a restraint, it
9 couldn't be excluded, the police officers would have to
10 use some physical body weight in order to obtain the
11 control of the subject.

12 Q. And --

13 A. Sorry, page 43 I think I comment on Mr Graves' comments.

14 Q. Um-hum.

15 A. About the range of movement of the deceased throughout
16 the period. Lying on his front during for which some of
17 that Mr PC Walker was across the body putting a degree
18 of pressure on him but didn't think this could have been
19 prolonged or given accounts from the witnesses such as
20 Tomlinson and I think PC Good as well of bench pressing.

21 Q. Okay, so Martin Graves has offered a view here that:
22 "This part of the restraint involving Constable
23 Walker lying on or over Mr Bayoh couldn't have been
24 prolonged or sustained given the accounts of a
25 bench-pressing movement by him."

Transcript of the Sheku Bayoh Inquiry

1 Did Mr Graves have the expertise so far as you're
2 aware to comment on what appears to be a medical matter?

3 A. I'm not quite sure in what terms it's a medical matter.
4 Well, he certainly -- he gave comment and I understood
5 his position to be that he was commenting about the way
6 police restraint is performed and the need for some
7 physical assertion of body weight in order to achieve in
8 some cases, that's what he was commenting on.

9 Q. It may be that nothing turns on this but on one reading
10 he appears to be saying that because Mr Bayoh was able
11 to carry out this bench-pressing movement, then it
12 couldn't have gone on for terribly long and I'm just
13 wondering whether that's perhaps something the matter in
14 his expertise.

15 A. I'm not sure that's what he said. I think what he was
16 saying was it didn't look like he was in one position
17 for very long. He was moving from one position to
18 another, he wasn't in one position.

19 Q. Oh, I see, I may have misread what's been recorded
20 there. But in any event, returning to your analysis of
21 Constable Walker's actions during the course of the
22 restraint, would it be fair to say that again you have
23 focused very much on the criminal analysis here and we
24 don't see set out anywhere in the analysis section a
25 discussion around whether or not this particular action

Transcript of the Sheku Bayoh Inquiry

1 or indeed the restraint itself was compliant with the
2 requirements of Article 2?

3 A. I think that's correct.

4 Q. Okay. I would like to move away from use of force and
5 ask you some questions now about cause of death and it
6 may be that we can make a start on this in the next five
7 minutes or so before the lunch recess. Can we go to
8 your first statement, please, and to paragraph 68.
9 Sorry, bear with me just a second. Yes. Here we are,
10 sorry.

11 "Articles 2 and 14 applied to both Police Scotland
12 and to PIRC. In the course of the investigation the
13 question of whether the use of force by the police
14 officers who engaged with him had caused the death of
15 Mr Bayoh was explored in great depth and the report to
16 Crown Counsel fully addressed the available evidence on
17 this."

18 So you say that the question of whether the use of
19 force caused his death was explored in great depth in
20 the report and the available evidence on this was
21 addressed in the precognition report. I wonder if we
22 can now cut back to the analysis and to page 24:

23 "The restraint on the ground led to the death of the
24 now deceased, although, as has been set out in great
25 detail in the narrative, the extent to which the role of

Transcript of the Sheku Bayoh Inquiry

1 restraint contributed to the death of Sheku Bayoh is not
2 known but cannot be excluded completely."

3 So at the very outset you say that the extent to
4 which the role of the restraint contributed is not known
5 but cannot be excluded completely. And is that
6 effectively a summary of your understanding of the
7 position?

8 A. Yes and no. I think the first part of the sentence is
9 probably misleading. I think the death followed the
10 restraint on the ground, rather than the restraint led
11 to the death.

12 Q. Right.

13 A. I'm not sure that the evidence actually makes a causal
14 link.

15 Q. That's the nub of the issue really is whether the
16 evidence does make a causal link and in that regard it
17 seems that what you have concluded from your review of
18 the evidence for the purposes of the analysis was that
19 the extent to which the role of restraint contributed is
20 not known but cannot be excluded completely.

21 A. I think that's what the medical experts concluded.

22 Q. Okay.

23 LORD BRACADALE: Ms Thompson, I think before you start on
24 this substantial issue, we should stop for lunch and
25 take it up at 2 o'clock.

Transcript of the Sheku Bayoh Inquiry

1 (12.59 pm)

2 (Luncheon adjournment)

3 (2.07 pm)

4 LORD BRACADALE: Ms Thompson.

5 MS THOMSON: Thank you. Mrs Carnan, over the lunch recess
6 several of my colleagues brought to my attention the
7 part in the analysis that we were both looking for
8 earlier on without success.

9 A. Right.

10 Q. So just for completeness, we don't need it on the
11 screen, but you have a hard copy there I think, it's on
12 page 13.

13 A. Yes.

14 Q. And it's the second paragraph down:

15 "On one view the now deceased was walking along the
16 road in a normal manner without a knife and seeming not
17 to present a danger to the public."

18 A. Yes.

19 Q. And so on. Grand. That was just to tie off that loose
20 end.

21 Just before lunch, we turned away from use of force
22 and we turned our attention to the question of causation
23 and I took you to your first statement where you said
24 that the question of whether use of force by the police
25 officers had caused the death of Sheku Bayoh was

Transcript of the Sheku Bayoh Inquiry

1 explored in great depth and the report to Crown Counsel
2 fully addressed the available evidence. Then we looked
3 at analysis, page 24, where you said that:

4 "The extent to which the role of restraint
5 contributed to the death is not known and cannot be
6 excluded completely."

7 That is where we were at at lunchtime. Would it
8 help to have that second comment up on screen again or
9 do you have it in front of you?

10 A. I have it now.

11 Q. It's page 24 in first paragraph.

12 Now, so far as I can see, although you make the
13 statement and the analysis that the extent to which the
14 role of restraint contributed to the death is not known,
15 but cannot be excluded completely, so far as I can see
16 nowhere in the analysis do you set out the legal test
17 for establishing causation?

18 A. I think the medical evidence was considered in the
19 narrative and it wasn't addressed in the analysis to any
20 extent. It was set out simply in the narrative.

21 Q. Well, we're going to look at the narrative shortly and
22 we're going to look at the summaries contained within
23 the narrative of the conclusions reached by the various
24 experts who were instructed, but -- I'll be corrected if
25 I'm wrong -- I don't think anywhere in the analysis is

Transcript of the Sheku Bayoh Inquiry

1 the legal test for causation set out or do we see that
2 anywhere in the narrative.

3 A. Okay.

4 Q. If you see that test set out as we work our way through
5 the narrative or the analysis, please do tell me, but to
6 the best of your recollection you were carrying out the
7 legal analysis of the evidence did you set out the test
8 for establishing causation?

9 A. I think my approach to analysis was to -- I think as set
10 out in that first paragraph -- was to assume that there
11 was or there may have been some causal link. I think --
12 when you look at the expert opinion, I think some of the
13 experts have said actually police restraint or the
14 involvement with the police may not have had an impact
15 at all.

16 Q. So your understanding was that there was or may have
17 been a causal link?

18 A. Yes.

19 Q. You say that when we look at what the experts said, some
20 of them thought there may not have been impact at all?

21 A. That's right.

22 Q. Is that perhaps not all the more reason to set out in
23 the analysis the legal test for causation and then apply
24 that test to the opinions of the experts?

25 A. Again, in hindsight possibly.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. Where could you have look for guidance on causation?
- 2 A. Presumably the knowledge bank.
- 3 Q. Did you do that?
- 4 A. No.
- 5 Q. Did you have a discussion with Mr Brown about causation?
- 6 A. I don't recall that, although we had a discussion about
- 7 what the medical experts said because he was providing
- 8 updates when consultations had taken place.
- 9 Q. And what did you understand was required for there to be
- 10 a causal link between any potentially unlawful actions
- 11 on the part of the police and the cause of death?
- 12 A. That there was some link.
- 13 Q. That there was some link. There's no mention of the
- 14 postmortem report itself in analysis?
- 15 A. Yes.
- 16 Q. But it is discussed in the narrative and I wonder if it
- 17 might be helpful to remind ourselves what conclusions
- 18 the pathologists who carried out the autopsy reached. I
- 19 wonder if we can bring up the narrative, please. And
- 20 can we go to page 78, please.
- 21 Now, again, I appreciate that you didn't draft the
- 22 narrative, Mrs Carnan, but it's a convenient way for us
- 23 to review the opinions of the experts?
- 24 A. Yes.
- 25 Q. Which have all helpfully been summarised by your

Transcript of the Sheku Bayoh Inquiry

1 colleague so we will use the narrative for that purpose.

2 So this is the section that repeats verbatim what
3 was said in the concluding paragraphs of the postmortem
4 report:

5 "Taking everything into consideration, the
6 pathologists noted his death was sudden in nature. In
7 summary, there was no evidence of gross or histological
8 natural disease that would account for death.
9 Toxicology revealed MDMA and alpha-PVP and these drugs
10 could potentially have caused sudden death at any time
11 due to a fatal cardiac arrhythmia. That said, it is
12 recognised that restraint in itself can be a cause or
13 contributing factor in some deaths and, given the
14 circumstances, in that this man was restrained at the
15 time of his respiratory arrest and postmortem
16 examination showed petechial hemorrhages which may
17 represent a degree of asphyxia, it could not be
18 completely excluded that restraint also played a role in
19 the deceased's death."

20 And if we scroll down a little, please:

21 "Overall, it was not possible to be sure what was
22 the most significant factor in the death and as such the
23 cause of death was best regarded as 1A, sudden death in
24 a man intoxicated by MDMA (Ecstasy), and alpha-PVP,
25 while being strained."

Transcript of the Sheku Bayoh Inquiry

1 So we see here that the pathologists who prepared
2 this report, if I can scroll to the paragraph above
3 again, please, recognised that restraint in itself can
4 be a cause or contributing factor in some deaths
5 Mr Bayoh was restrained at the time of his respiratory
6 arrest, petechial hemorrhages may represent a degree of
7 asphyxia and therefore restraint cannot be completely
8 excluded as having had a role to play in death?

9 A. Yes.

10 Q. That's what they had to say and they certified the cause
11 of death as being sudden death in a man intoxicated by
12 MDMA and alpha-PVP whilst being restrained.

13 Mrs Carnan, are you familiar with the phrase de
14 minimus?

15 A. Yes.

16 Q. Do you understand it to refer to something that's
17 trifling or insignificant?

18 A. Yes.

19 Q. And are you phrase material contribution?

20 A. Yes.

21 Q. And do you understand a material contribution to be one
22 that is more than de minimis?

23 A. Yes.

24 Q. Where the postmortem report says that restraint can be a
25 cause or contributing factor in a death and it cannot be

Transcript of the Sheku Bayoh Inquiry

1 completely excluded that restraint had a role to play in
2 death here, did you understand that the pathologists
3 were saying that the role of restraint was de minimis or
4 did you understand that they were saying that restraint
5 made a material contribution to death?

6 A. I understood that they weren't in a position to say one
7 way or the other.

8 Q. Was that question asked of them a lot precognition?

9 A. I didn't precognosce them.

10 Q. Now, we've heard evidence that the cause of death was
11 multifactorial?

12 A. Yes.

13 Q. Is that your understanding?

14 A. Yes.

15 Q. And the cause of death, which would have been repeated
16 on the death certificate, lists ecstasy, alpha-PVP, and
17 restraint, so restraint is mentioned not only in the
18 narrative of the death report, but in the actual cause
19 of death and on the death certificate itself --

20 A. Yes.

21 Q. -- as part of a narrative cause of death and it's listed
22 under part 1A which Dr Shearer explained in her evidence
23 is the primary cause of death. With your experience of
24 working in deaths unit, would you understand that 1A is
25 a primary cause of death?

Transcript of the Sheku Bayoh Inquiry

1 A. Yes.

2 Q. And under 1A here the pathologists who performed the
3 autopsy considered that restraint was worthy of mention?

4 A. Yes, although the wording is "whilst being restrained"
5 rather than "caused by restraint".

6 Q. Did that not create at the very least a question mark in
7 your mind as to whether there was a need to go back to
8 Dr Shearer and clarify that particular point?

9 A. I understood that Crown Counsel had consulted with
10 Dr Shearer --

11 Q. Um-hum.

12 A. -- following further expert reports.

13 Q. Um-hum.

14 A. I would need to see what Dr Shearer said in
15 consultation, but my understanding was that she agreed
16 that death could have taken place without police
17 involvement.

18 Q. And was this consultation note made available to you?

19 A. I think it was, yes.

20 Q. Okay. I don't have that to hand, but we can perhaps
21 revisit that after the afternoon break.

22 Let's go back to the narrative and look at the
23 summaries of the other reports, because I understand
24 that a variety of experts were instructed in this case.
25 We don't need to look at all of the summaries, really

Transcript of the Sheku Bayoh Inquiry

1 only those that offered a view on cause of death. So,
2 for example, Dr Lipsedge, who was an eminent consultant
3 psychiatrist, we don't need to look at the summary of
4 his report because he wasn't a pathologist, but let's
5 look at those that do bear on cause of death.

6 So we've looked at postmortem report as a starting
7 place so if we could perhaps now move to page 84. Now
8 here we are looking at a report prepared by a Dr
9 John Parkes. We can stay on page 84, but page 83
10 explains that he's a senior lecturer at the Faculty of
11 Health and Life Sciences and Coventry University. Was
12 he medically qualified?

13 A. I would need to have a look at the report.

14 Q. In any event, because his report is summarised in the
15 narrative let's look at it. If we can look at the
16 bottom part of page 84, please, final paragraph on that
17 page, and we can read it short:

18 "In conclusion the precise contribution of restraint
19 to the death could not be determined with certainty."

20 And at the very bottom of that page and, again, this
21 is a lift from his report I think:

22 "On balance of probabilities, the most likely impact
23 of restraint is that the restraint contributed to the
24 death of a man who was also at risk of sudden death due
25 to the consumption of illicit drugs."

Transcript of the Sheku Bayoh Inquiry

1 So that was his opinion. Leaving to one side the
2 question of his experience and expertise and
3 qualifications, his opinion is that:

4 "On balance of probabilities, the restraint
5 contributed to the death of a man who was also at risk
6 of sudden death due to the consumption of illicit
7 drugs."

8 If you have an expert telling you that the role of
9 restraint contributed to death, is that more than de
10 minimis?

11 A. He doesn't go into the extent to which the role of
12 restraint contributed to the death so I'm not able to
13 comment beyond what the words say.

14 Q. Well, if he says it contributed, we know that anything
15 that is trifling or insignificant and might be
16 considered to be de minimis can effectively be left out
17 of account. So here we have, do we not, an expert
18 saying that restraint contributed to the death? It
19 would be reasonable to infer, might it not, that his
20 opinion was that the role played by restraint was more
21 than de minimis?

22 A. I don't know and I'm not able to comment other than what
23 he said. I think it would need to be explored with him.

24 Q. All right. And was it explored with him?

25 A. I don't know.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. If there was a question mark over whether he was saying
2 that the role played by restraint was more than de
3 minimis, is that not a matter that should have been
4 clarified with him?
- 5 A. I didn't do that.
- 6 Q. You didn't do that. When you were preparing your
7 analysis you would have look at the report prepared by
8 Dr Shearer or at least a summary of her report?
- 9 A. I looked at all of the reports.
- 10 Q. So far we have only look at the two, Dr Shearer's report
11 and Dr Parkes' report?
- 12 A. Mm-hm.
- 13 Q. In relation to both reports you express yourself
14 uncertain as to what the experts were saying with regard
15 to the role played by the restraint. Now, if you were
16 preparing your analysis effectively as a desktop
17 exercise and these matters hadn't been clarified to your
18 satisfaction was that not something that you might have
19 brought to the attention of Mr Brown?
- 20 A. I think there were a number of experts instructed and I
21 looked at all of them and carried out my exercise based
22 on all of the evidence.
- 23 Q. Okay. Well, considering them one at a time, if you were
24 in doubt as to the role that Dr Shearer considered was
25 played by restraint or if you were in doubt as to what

Transcript of the Sheku Bayoh Inquiry

1 Dr Parkes meant when he said the restraint contributed
2 to the death of a man who was also at risk of sudden
3 death due to the consumption of illicit drugs, would it
4 have been open to you to say to Mr Brown there's an
5 ambiguity here or I'm not quite sure what these experts
6 mean, these points require to be clarified, can that be
7 done please whether it be through consultation or
8 precognition?

9 A. I wasn't involved in the medical side of things, if you
10 like. That was not part of my analysis. I was looking
11 at the police restraint and my analysis of evidence
12 brought together all the information I had to hand but
13 I was not involved in a discussion about the medical
14 expert evidence.

15 Q. You may not have been involved in that discussion, but
16 you were responsible for preparing the analysis?

17 A. Yes.

18 Q. And the analysis applies the law to the facts?

19 A. It does.

20 Q. So that would, one might think, involve looking at the
21 test for causation and looking at how that test sat in
22 relation to the opinions expressed by the various
23 experts?

24 A. I accept that.

25 Q. And I wonder if you accept that if there was a question

Transcript of the Sheku Bayoh Inquiry

1 mark in your mind as to what Dr Shearer meant or what
2 Dr Parkes meant it would have been open to you to go
3 back to Mr Brown and say this needs to be clarified, I
4 can't answer this critical part of the analysis without
5 clarification?

6 A. I don't think I was in difficulty with Dr Shearer,
7 because I had seen the PM report but also her
8 consultation notes. I can't recall whether Dr Parkes --
9 there was a consultation with Dr Parkes or not.

10 Q. In either case, if Dr Shearer had clarified what she
11 considered the role of restraint to have been and if
12 Dr Parkes had clarified in recognition or consultation
13 what he meant when he said the restraint contributed to
14 the death, might we have expected to see that set out
15 here in the narrative?

16 A. Sorry. The follow-on consultation notes? I am not sure
17 that that would have happened, no.

18 Q. So if an expert prepares a report --

19 A. Yes.

20 Q. -- and there's something in the report that is ambiguous
21 that requires clarification and the fiscal clarifies
22 that matter through consultation or precognition as the
23 case may be, would we not expect to see that additional
24 level of clarification and detail set out in the body of
25 the precognition?

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes, if the fiscal had done that, but if Crown Counsel
2 had done it, no.
- 3 Q. But you certainly didn't consult with Dr Shearer?
- 4 A. No.
- 5 Q. And so far as Dr Parkes is concerned, you didn't consult
6 with him either?
- 7 A. No.
- 8 Q. Do you recall having seen notes of a precognition or a
9 consultation?
- 10 A. I don't recall.
- 11 Q. At the time that you prepared the analysis and at the
12 time that you read his report was there a question mark
13 in your mind as to what he meant when he said the
14 restraint contributed to the death?
- 15 A. I don't think there was a question mark. I think what
16 he was saying was on the balance of probabilities
17 restraint in some way contributed to the death, but
18 there was also the risk of sudden death due to the
19 consumption of illicit drugs so the extent to which the
20 restraint played a role couldn't really be determined.
21 That's what I understood him to say.
- 22 Q. All right. Although he does say clearly in terms that
23 the restraint contributed to this man's death, even
24 though he was already at risk of death?
- 25 A. He says it's unlikely that the restraint made no

Transcript of the Sheku Bayoh Inquiry

1 contribution, but he doesn't elaborate as to the extent
2 the contribution made.

3 Q. And is that not a matter that it might have assisted you
4 to have had clarified whether he was saying that the
5 restraint was de minimis or whether it made a material
6 contribution to death?

7 A. It may have done, but I understood that the
8 clarification came from other witnesses in relation to
9 that question.

10 Q. Let's look at the other witnesses then and what they had
11 to say. I wonder if we can move on to page 88. This is
12 a discussion of the report prepared by a
13 Dr Anthony Bleetman, who is a consultant in emergency
14 medicine, and I wonder if we can look at the bottom
15 paragraph on page 88, please:

16 "The use of force and eventual restraint will result
17 in a degree of immobilisation. Before any restraint, an
18 individual will have already accrued a significant
19 oxygen debt and any immobilisation will carry the risk
20 of restricting chest diaphragmatic movement. This, even
21 if modest, may compromise an individual's ability to
22 restore adequate oxygenation and address the oxygen
23 debt. A prolonged struggle on the ground will compound
24 an individual's physiological derangements and increase
25 the risk of death."

Transcript of the Sheku Bayoh Inquiry

1 He states that:

2 "A restraint which compromises breathing efforts may
3 exacerbate an already grave situation."

4 And over the page, please, second paragraph down. I
5 am going to read this slightly short but I will be
6 corrected if miss anything that is critical.

7 Dr Bleetman also states that:

8 "In an individual already in severe oxygen debt due
9 to excited delirium, further compromise of breathing
10 efforts through either prone restraint possibly or
11 restriction of chest wall movements by putting weight
12 across the torso certainly will put the restrained
13 individual at more risk of asphyxia and will hinder
14 recovery from hypoxia and acidosis. This may reach a
15 critical point at which cardiac arrest occurs."

16 He states that:

17 "Given the poor physiological state of these
18 individuals at the onset of cardiac arrest recovery is
19 rare in spite of adequate resuscitation attempts."

20 Dr Bleetman noted:

21 "The period of restraint was relatively short and
22 concluded that on first contact with the police the
23 deceased was already at very high risk of cardiovascular
24 collapse due to fatigue and the effects of excited
25 delirium and powerful potentiating drugs even if there

Transcript of the Sheku Bayoh Inquiry

1 had been no restraint. It is reasonable to assume that
2 the actions of police officers are likely to have had a
3 contributory role in the evolution of the deceased's
4 collapse and subsequent cardiac arrest by adding one
5 more factor to the already lethal brew."

6 In effect he states:

7 "The restraint precipitated the cardiovascular
8 collapse that was already likely to have had occurred."

9 So what did you understand Dr Bleetman was saying
10 here that the restraint or the role of restraint in the
11 death Sheku Bayoh was de minimis or that it made a
12 material contribution to death?

13 A. I understood that he said the role of restraint was de
14 minimis because the impact of the cardio -- the impact
15 of excited delirium and the drugs, even if there had
16 been no restraint, was such that he was likely to have
17 collapsed.

18 Q. He was likely to have collapsed in any event, was that
19 your understanding of what he had to say?

20 A. That was my understanding, yes.

21 Q. Did anybody consult with Dr Bleetman, to your knowledge?

22 A. I believe so, but I can't remember. Were there
23 consultation notes?

24 Q. And did you precognosce him?

25 A. No.

Transcript of the Sheku Bayoh Inquiry

1 Q. Okay. Let's carry on moving through the reports. Page
2 93, please. This is Professor Jack Crane, acting state
3 pathologist for Northern Ireland. And at the bottom of
4 the page he says:

5 "If respiration was not impeded during restraint
6 cases it is not the restraint per se which may
7 predispose to cardiac arrest, but its association with
8 the effects of stimulant drugs along with aggressive and
9 violent behaviour, excitability and physical and
10 emotional stress. It is a combination of factors which
11 may be considered, albeit the effect of the drugs must
12 be regarded as the principal contributory factor in the
13 fatal course."

14 So here he draws attention to a combination of
15 factors?

16 A. Yes.

17 Q. He regards drugs as being the principal contributory
18 factor, but that's not to say that the role played by
19 other contributing factors is minimal.

20 Over the page, about halfway down, "the role of
21 restraint", wee bit the further down, please:

22 "The role of restraint is problematic and cannot be
23 determined solely from autopsy findings. If the
24 deceased was being restrained at the time he suffered
25 cardiac arrest and if that restraint was such as to have

Transcript of the Sheku Bayoh Inquiry

1 impeded respiration then it would be reasonable to
2 conclude that restraint played a part in the fatal
3 outcome."

4 So what did you understand that Professor Crane was
5 saying with regard to causation?

6 A. In relation to restraint?

7 Q. Yes, did you read his report as saying that restraint
8 was de minimis, trifling, significant, or that it made a
9 material contribution to the death?

10 A. I understood that he really wasn't able to determine the
11 extent to which restraint played a part.

12 Q. Okay. So if he couldn't determine the extent to which
13 restraint played a part or if that wasn't clear to you
14 from your reading of his report, again, is that not a
15 matter that should have been clarified with him?

16 A. My understanding from this and the other experts who
17 offered that opinion was that that was simply the
18 position that you couldn't say from the findings of the
19 postmortem, you couldn't say.

20 Q. And which expert offered that opinion, that you couldn't
21 say?

22 A. I think that's what this witness is saying, that it's
23 frequently not possible to determine from the findings
24 of the postmortem findings alone if positional or
25 postural asphyxia caused or contributed to the fatal

Transcript of the Sheku Bayoh Inquiry

1 outcome.

2 Q. And he then goes on to say that:

3 "The role of restraint is problematic and cannot be
4 determined solely from the autopsy findings. If the
5 deceased was being restrained at the time he suffered
6 cardiac arrest and if that restraint was such as to have
7 impeded respiration, it would be reasonable to conclude
8 that restraint played a part in the fatal outcome."

9 A. Yes.

10 Q. And the page we looked at, page before that, please, 93
11 at the very bottom, he says:

12 "It's a combination of factors which may be
13 considered, albeit the drugs must be regarded as the
14 principal contributory factor."

15 A. Yes.

16 Q. Recognising that there may have been a causal role
17 played by factors other than drugs.

18 A. Yes.

19 Q. Let's move on to page 95. Dr Steven Karch, what did you
20 understand his qualifications and experience to be?

21 A. Other than what's written, I would have to go back to
22 his report to make any further comment. I can't recall.

23 Q. Well, certainly I think this was one of the reports that
24 was instructed by the PIRC?

25 A. That's right.

Transcript of the Sheku Bayoh Inquiry

1 Q. And Kate Frame, who was the Commissioner at the relevant
2 time, was asked about this in her evidence and she said
3 that he was instructed on the basis that he was a
4 cardiac pathologist and a toxicologist. Would that
5 chime with your understanding of the basis on which he
6 was instructed?

7 A. I'm really not sure.

8 Q. You're not sure?

9 A. I'm not able to comment, sorry.

10 Q. All right. The Inquiry has before it a statement
11 prepared by Dr Karch in which he confirms that he has no
12 formal toxicology qualifications or training as a
13 clinical toxicologist and, further, that he's not a
14 forensic pathologist and has in fact never carried out
15 an autopsy. Were you aware of those limitations to his
16 experience?

17 A. No.

18 Q. I think you are aware because this is covered in one of
19 your statements that he at one stage spoke with the
20 press --

21 A. Yes.

22 Q. -- about findings that he reached having viewed
23 histology samples and there was an article in The
24 Sun newspaper.

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. There doesn't seem to be anything about this -- again, I
2 will be corrected if I'm wrong -- but nowhere in the
3 narrative or the analysis is Crown Counsel's attention
4 drawn or the reader of this report's attention drawn to
5 the fact that that happened?

6 A. No.

7 Q. Does that surprise you?

8 A. I don't know except that I knew that it had been brought
9 to the attention of the crown. Now, whether Crown
10 counsel were aware of it before the report was
11 submitted, I don't know.

12 Q. Is it the sort of thing that you might have expected to
13 see in the narrative, because on the face of it Dr Karch
14 is being presented as an expert who hasn't blotted his
15 copybook?

16 A. Yes, I'm not -- I don't think the opinion of Dr Karch
17 was particularly relied upon in coming to a view by
18 Crown Counsel.

19 Q. But was it particularly relied upon by you in coming to
20 the views that you reached in your analysis?

21 A. No, he seemed to be an outlier in relation to all of the
22 opinions they expressed.

23 Q. And do you make that clear that you haven't relied on
24 his --

25 A. No, I haven't done that. No, clearly I haven't.

Transcript of the Sheku Bayoh Inquiry

1 Q. Now, Mr Brown was asked about Dr Karch and the incident
2 with him speaking to a journalist and the article in
3 The Sun newspaper and he says in his statement that the
4 Lord Advocate got to hear about it and expressed the
5 view that Dr Karch compromised his duties as an expert
6 and, as a result, the opinion of Dr Karch would not be
7 relied upon by the crown?

8 A. I think I saw something in correspondence about that.

9 Q. So I'm just curious to know why Dr Karch, against that
10 background, features in the narrative at all and I
11 appreciate you didn't draft the narrative --

12 A. I can't recall. I can't comment for a reason.

13 Q. And I'm wondering whether it might have been helpful for
14 there to have been an explanation of that background in
15 the narrative so that anyone reading the narrative who
16 had perhaps forgotten about at the incident with The Sun
17 newspaper might have reminded themselves that there was
18 an issue with this particular expert?

19 A. I can't comment.

20 Q. In any event, let's look at what he had to say at the
21 bottom of page 95:

22 "The effect of physical restraint would have been de
23 minimis."

24 So there we have his opinion in terms that the
25 effect of restraint would have been de minimis. He then

Transcript of the Sheku Bayoh Inquiry

1 goes on to say that positional of asphyxia is nothing
2 more than junk science and he also provides some detail
3 as to his findings on review of the histology samples
4 and, as is noted on page 96, that:

5 "Dr Karch was the only pathologist who examined the
6 microscope sections of the heart and considered them to
7 show significant morphological abnormalities. All of
8 the others, Dr Shearer, Dr Buhaidar, Professor Shepherd,
9 Dr Soilleux, Professor Crane and Dr Carey either
10 attribute minor changes seen to cardiac arrest and
11 resuscitation or interpret the appearance as being
12 within normal limits. Dr Karch was the only one to
13 argue the deceased must have had significant
14 pre-existing heart disease which could have predisposed
15 him to sudden and relatively unexpected cardiac arrest."

16 Is that what you meant when you said he was
17 something of an outlier?

18 A. Yes.

19 Q. As well as being an outlier, he has offered a view on
20 causation and said the effect of physical restraint
21 would have been de minimis, so that was his opinion, but
22 you told us already you effectively left his opinion out
23 of --

24 A. Yes.

25 Q. Can we move on to page 96, please:

Transcript of the Sheku Bayoh Inquiry

1 "In his opinion the present case had all the
2 ingredients of a case where restraint and struggling had
3 the potential to have caused or contributed to the
4 deceased's death. He noted there was a prolonged period
5 of restraint, the deceased was significantly outnumbered
6 and on most accounts restraint was in the prone
7 position."

8 And then further down that page, if we can skip a
9 paragraph, perfect:

10 "Dr Carey states it was not possible to separate the
11 role of any restraint from struggling. As is common in
12 these cases of acute behavioural disturbances, the
13 deceased displayed remarkable strength and stamina.
14 Ongoing restraint and struggling in these circumstances
15 is very likely to lead to significant metabolic
16 disturbances with early breakdown of muscle releasing
17 potassium which can precipitate cardiac dysrhythmia and
18 the development of metabolic methadosis(?).

19 "Dr Carey states that given the presence of potent
20 stimulant drugs, the present case cannot be viewed
21 simply as an example of a case of sudden death during
22 restraint. He entirely supports the pathologist's cause
23 of death, sudden death in a man intoxicated by MDMA and
24 alpha-PVP whilst being restrained, but suggests
25 substituting the phrase 'whilst being restrained' with

Transcript of the Sheku Bayoh Inquiry

1 'in association with struggling and restraint'."

2 So he has made it clear that given the presence of
3 potent drugs the present case cannot be viewed simply as
4 an example of a case of sudden death during restraint.
5 He advocates the cause of death put forward by
6 Dr Shearer being tweaked to include a reference to
7 struggling and restraint and we saw at the foot of page
8 96 that he considered that the case had all the
9 ingredients of a case where restraint and struggling had
10 the potential to have caused or contributed to death.

11 So what did you understand Dr Carey had to say about
12 causation? Did you read these passages as him saying
13 that the role played by restraint was de minimis or that
14 the role played by restraint in the cause of death was
15 sufficient to make a material contribution?

16 A. I understood him to highlight that it wasn't simply the
17 restraint but the struggling by Mr Bayoh against that
18 restraint, so it was a combination of the two rather
19 than simply the restraint that was the issue.

20 Q. And at the risk of stating the obvious, the struggle
21 wouldn't have happened if he hadn't been restrained, so
22 the two or part and parcel of the same thing?

23 A. Yes.

24 Q. So you understood that he was drawing attention to the
25 significance of the struggle --

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes.
- 2 Q. -- that was a response to the restraint?
- 3 A. The effort. Yes, the effort required.
- 4 Q. Yes, the physical effort to fight against that restraint
5 was important and he drew attention to it. So did you
6 understand him to be saying then that the restraint and
7 the struggle against that restraint were de minimis or
8 that they made a material contribution to the cause of
9 death?
- 10 A. I don't think he makes that clear.
- 11 Q. You don't think he makes that clear?
- 12 A. I don't think that is clear from the report.
- 13 Q. Okay.
- 14 A. And I don't think I applied my mind to that question.
- 15 Q. Okay. Well, that's very candid of you, but did you as
16 the analyst go back to Mr Brown or any of your senior
17 colleagues and say it's not clear to me what he's saying
18 here? This is at the test for causation, and when I
19 read the test for causation alongside his report, I'm
20 not clear what he's saying, can this be clarified?
- 21 A. No, I didn't, although I was aware that Mr Brown and
22 Ms Edwards had taken the view of Dr Lawlor as the crown
23 pathologist having an overview of all the reports and
24 put all of those questions to him.
- 25 Q. We'll come to him shortly, but staying for the moment

Transcript of the Sheku Bayoh Inquiry

1 with Dr Carey, he's not the first of the experts who's
2 reports that we've looked at where you've perhaps
3 expressed a degree of uncertainty as to exactly what
4 they were saying about causation. Would it have been
5 open to you to have taken your concerns to the door of
6 Mr Brown and to have said I'm just not quite sure what
7 this witness is saying, it needs to be clarified before
8 I as the analyst can properly perform my task?

9 A. I think I did understand what the experts were saying
10 and they were all saying what they provided in the
11 report. The question of my analysis, and you've already
12 referred to the fact that my analysis is absent those
13 critical questions. I haven't addressed that.

14 Q. And I wonder whether looking back, with the benefit of
15 hindsight, these are questions that might usefully have
16 been addressed in your analysis?

17 A. Yes.

18 Q. Okay. Now, you mentioned Dr Lawlor and I paraphrase,
19 but I think you said that Mr Brown and Ms Edwards were
20 taking their lead essentially from Dr Lawlor who had
21 been brought in to carry out a review of all of the
22 reports?

23 A. He undertook a review with a view to commenting on the
24 approach taken by the experts and whether he had a view
25 about their conclusions.

Transcript of the Sheku Bayoh Inquiry

1 Q. Okay. Well, let's have a look at what Dr Lawler had to
2 say. At the bottom of page 97, the way that the
3 narrative has been drafted, we have Dr Lawler's comment
4 on each of the other experts' reports individually and
5 then he has a conclusion at the end.

6 So let's have a look about Dr Carey's report.

7 Paragraph at the bottom of the page:

8 "He also strongly supports Dr Carey's suggested
9 modification of the death certificate, believing the
10 struggling must have been a very important factor in
11 causing the deceased to die when he did."

12 So Dr Lawler appears to recognise that it's not just
13 the restraint, it's the struggle against the
14 restraint --

15 A. Yes.

16 Q. -- that is important. And he says that the struggling
17 must have been a "very important factor in causing the
18 deceased to die when he did."

19 How do you read that from -- through the lens of
20 causation? What did you understand that Dr Lawler had
21 to say there? Was he suggesting that the struggle and
22 against the restraint in combination with the struggle
23 were de minimis or that they were causative in the sense
24 that they made a material contribution to death?

25 A. I think going back to the issue of restraint and

Transcript of the Sheku Bayoh Inquiry

1 struggling, you asked me a moment ago about whether the
2 two in fact were part of the same. The restraint was
3 down to the police officers. The struggling was down to
4 Mr Bayoh. So I suppose it's the extent to which the
5 restraint by the officers was a -- had causal
6 implications.

7 Q. So when analysing whether the restraint was causative of
8 the death are you suggesting that you should leave out
9 of account the role played by this struggle against the
10 restraint, because that was down to Mr Bayoh?

11 A. Well, it was -- you have to -- I suppose I was looking
12 at what the role of police officers was and the police
13 officers' role was in restraint. The police officers
14 didn't have a role in the struggling.

15 Q. Okay. And if -- work with me on this hypothesis. If
16 that restraint or any aspect of it were considered to be
17 unlawful because it was more than the minimum, it wasn't
18 necessary, it wasn't proportionate, it wasn't justified,
19 it wasn't reasonable, other use of force options hadn't
20 been precluded, if that restraint or any aspect of it
21 had been unlawful and Mr Bayoh had struggled against
22 that restraint, is that on him?

23 A. I think it's a difficult one to separate out, but in the
24 event those were not my conclusions in terms of the
25 police restraint and therefore I did not apply that

Transcript of the Sheku Bayoh Inquiry

1 consideration.

2 Q. I raise that question only because of what you said in
3 your evidence a moment or so ago that the restraint was
4 on the police?

5 A. Yes.

6 Q. The struggle was on Mr Bayoh?

7 A. Yes.

8 Q. It's not unusual for persons who are being detained or
9 restrained to struggle against the police, is it?

10 A. No.

11 Q. No. And the police, of course, have to keep under
12 review their use of force options at all times?

13 A. Yes.

14 Q. So I suppose if the police had a sense, and again I'm
15 working on a hypothesis example here, but if the police
16 had a sense that someone was struggling to the point of
17 fatigue then they would have to keep that in mind when
18 they were looking at whether it was appropriate to carry
19 on with the particular use of force options that they
20 had chosen?

21 A. I was not aware of anything in the evidence that
22 suggested that was the perception of the police.

23 Q. Let's go back to Dr Lawler. We looked at what he had to
24 say about Dr Carey's conclusions. Can we go to the top
25 of page 99, please. So this as I understand it is

Transcript of the Sheku Bayoh Inquiry

1 either a lift or a precis of his report and his
2 conclusions:

3 "The struggle in its totality was very important per
4 se and must have contributed substantially to the
5 various metabolic disturbances associated with the
6 psychological and physiological stresses. If it is
7 accepted that the struggle per se contributed
8 significantly to the deceased's death, then it must mean
9 that the act of restraint (whether necessary or not, and
10 whether performed appropriately or not) also contributed
11 significantly to his death if only because it was a
12 significant, albeit indirect, contributor to the total
13 stress burden affecting the deceased in general and his
14 heart in particular."

15 So you said that Dr Lawler seemed to be giving
16 something of a steer to Mr Brown and Ms Edwards and,
17 tell me if I'm overstating this, but I took what you
18 were saying to mean that essentially if there was a
19 dispute between the experts, Dr Lawler was being looked
20 to for advice as to how to resolve that?

21 A. Yes.

22 Q. And here he seems to be saying that the struggle was
23 very important and must have contributed substantially
24 to the metabolic disturbances and if that is accepted
25 then it must mean that the act of restraint also

Transcript of the Sheku Bayoh Inquiry

1 contributed significantly, significantly, to death, if
2 only because it was a significant, albeit indirect,
3 contributor to the total stress burden.

4 So what do you understand that Dr Lawler is saying
5 here about causation? Is he suggesting that the act of
6 restraint was de minimis or is he giving the opinion
7 that it made a material, perhaps even significant,
8 contribution to death?

9 A. I think the word "significantly" is there.

10 Q. Yes, okay.

11 A. But I think also on page 99 further down, I think, it is
12 again -- it's a further piece of information. He
13 concluded it was never going to be possible to exclude
14 completely the possibility that this aspect of the
15 restraint may have had a minimal contribution to
16 collapse and death, but he thought it very unlikely, and
17 that's when he was talking about the question of
18 asphyxia in the restraint.

19 Q. Sorry. Let's look at that.

20 A. He's talking about the number of petechiae in the eyes
21 and the absence of hemorrhages elsewhere in the face.

22 Q. Sorry. Let's just get this on the screen. I think
23 we've gone too far. Move it up.

24 A. Page 99.

25 Q. Is this paragraph "Dr Lawler was impressed"? It that

Transcript of the Sheku Bayoh Inquiry

1 the paragraph?

2 A. I think it was the paragraph above and then, yes, I
3 quoted from.

4 Q. Let's look at that. Sorry, I lost my place there:

5 "Given the relatively small number of petechiae on
6 his eyes and the absence of hemorrhages elsewhere on his
7 face, it was not the case that they must reflect some
8 form of asphyxia."

9 A. That's right.

10 Q. So the petechiae were not necessarily conclusive
11 evidence of asphyxia:

12 "Dr Lawler was impressed by the relatively short
13 period of time between the onset of the restraint and
14 the deceased's collapse. He concluded that it was never
15 going to be possible to exclude completely the
16 possibility that this aspect of the restraint may have
17 had a minimal contribution to collapse and death, but he
18 thought it was very unlikely."

19 Okay, well, the first of those two paragraphs
20 focuses very much on asphyxia, whereas the paragraphs in
21 the various reports that were considered, perhaps
22 Dr Bleetman in particular, draw attention to aspects of
23 as part of restraint that might have been causative of
24 death, leaving asphyxia to one side. So Dr Bleetman
25 talked about acidosis and oxygen deficit and the

Transcript of the Sheku Bayoh Inquiry

1 restraint and the struggle against the restraint and
2 exhaustion and that's a separate thing I think from
3 asphyxia.

4 The focus I thought in your analysis insofar as this
5 is addressed at all was very much on asphyxia?

6 A. Yes.

7 Q. Were you looking essentially for evidence that asphyxia
8 was causative of death, rather than looking at the
9 restraint in the round?

10 A. I think I was -- I think certainly I took the view that
11 asphyxia was a -- would have been a significant matter,
12 yes.

13 Q. Yes.

14 A. Yes.

15 Q. And we know that the petechiae in and of themselves are
16 not necessarily conclusive evidence of asphyxia?

17 A. Yes.

18 Q. Did you go on to look at the evidence about the
19 restraints more generally to consider whether leaving
20 aside the possibility of asphyxia the restraint might
21 still have been causative of death? For all of the
22 reasons that Dr Bleetman essentially narrates, this was
23 an individually who was potentially suffering from what
24 was then known as excited delirium, who had taken
25 alpha-PVP, who had taken ecstasy, who was struggling

Transcript of the Sheku Bayoh Inquiry

- 1 against restraint, who was becoming exhausted?
- 2 A. I think so, but I think my focus was on the question of
- 3 the knowledge of the officers about what was going on.
- 4 Q. Is this not a separate issue? This is whether the
- 5 actions of the officers were causative of death?
- 6 A. I don't think that was really fully addressed.
- 7 Q. Okay. So the analysis that you carried out was
- 8 essentially a desktop exercise?
- 9 A. Yes, it was.
- 10 Q. And insofar as there were consultations with the medical
- 11 experts or insofar as they were precognosed, you might
- 12 have seen the notes from those consultations or
- 13 precognitions, but you yourself didn't have the benefit
- 14 of being present at those consultations?
- 15 A. That's correct. The only precognition I was in
- 16 attendance was Martin Graves.
- 17 Q. But so far as the medical experts are concerned, you
- 18 were doing this on the papers, as it were?
- 19 A. Yes.
- 20 Q. And without yourself having the benefit of exploring the
- 21 issues that we've explored today with the writers -- the
- 22 authors of the reports?
- 23 A. No, and I understood that was being carried out by
- 24 Mr Brown and Ms Edwards.
- 25 Q. Looking back, do you think it would have been helpful

Transcript of the Sheku Bayoh Inquiry

1 for you to have been involved in that process as the
2 analyst as the person who was looking at the evidence
3 and looking at how the law applied to that evidence?

4 A. Possibly, but as I say, I was aware of and provided with
5 the consultation notes.

6 Q. I wonder if we can return briefly to page 24 of the
7 analysis. We've looked at this already:

8 "The extent to which the role of restraint
9 contributed to the death of Sheku Bayoh is not known but
10 cannot be excluded completely."

11 With the benefit of hindsight and -- sorry, please
12 can we stay at the top of the page -- and reflecting
13 perhaps on the issues that we have discussed this
14 afternoon, do you maintain that that is a correct
15 summary of the medical evidence in this case?

16 A. I think it's a very brief summary and I think it's more
17 nuanced than that, but -- and as I say I'm not happy
18 with the first line of that in the sense of the
19 restraint leading to the death, because I think the
20 death followed restraint and I think that's a more
21 appropriate way to put it.

22 Q. Well, let's imagine that we've made that correction, so
23 that it reads:

24 "The restraint on the ground or the death followed
25 the restraint on the ground, although as has been set

Transcript of the Sheku Bayoh Inquiry

1 out in great detail in the narrative the extent to which
2 the role of restraint contributed to the death of Sheku
3 Bayoh is not known but cannot be excluded completely."

4 I would agree with you that that's a brief summary,
5 is it an accurate summary?

6 A. I think I would say, yes, with reference to the
7 narrative in relation to all of the medical evidence.

8 Q. So you would stand by the statement that the role of
9 restraint is not known but cannot be excluded
10 completely?

11 A. Yes.

12 Q. Okay. And having reflected on the reports that we have
13 looked at today, do you consider that the medical
14 evidence was consistent with the view that the role of
15 restraint was de minimis or that it made a material
16 contribution to death?

17 A. I don't think it was -- I don't think you can see with
18 certainty it was de minimis nor really can you say with
19 certainty it had played a significant part in the death.

20 Q. Bear with me just a moment, please.

21 LORD BRACADALE: It's 3 o'clock. Shall we take a 15-minute
22 break at this point?

23 MS GRAHAME: Yes, thank you, sir.

24 (3.01 pm)

25 (A short break)

Transcript of the Sheku Bayoh Inquiry

1 (3.21 pm)

2 LORD BRACADALE: Ms Thompson.

3 MS THOMSON: Thank you. Mrs Carnan, I'm going to move on to
4 the final chapter of questions that I have for you and
5 these concern race. Now, you have told us of your
6 awareness of the requirements of Article 2 and
7 Article 14 and that they underpinned everything that you
8 did and you have already acknowledged that there's no
9 consideration of race in the analysis at all and you
10 gave a very brief explanation for that earlier in your
11 evidence that you were looking for criminality and race
12 didn't really feature and I want to look at that in some
13 detail with you and I think a good place to start would
14 be to bring up the explanation you give in your first
15 Inquiry statement at paragraph 45.

16 So you were asked to what extent was race a factor
17 in your analysis of the actions of the police officers
18 and your view was that sufficient to inform Crown
19 Counsel of the impact, if any, that Mr Bayoh's race had
20 on the actions of the police officers who engaged him
21 and you said:

22 "I was concerned with considering whether the
23 actions of any of the officers, either individually or
24 collectively, amounted to criminality. My focus was on
25 thea actions of the officers during the period of their

Transcript of the Sheku Bayoh Inquiry

1 engagement with the deceased and the evidence of how
2 they conducted themselves thereafter. I did not
3 identify criminality on the part of any of the officers
4 involved. Had I identified criminality, it would then
5 have been part of my analysis in respect of criminality
6 to consider whether the conduct was racially aggravated
7 under section 50A(1) (b) of the Criminal Law
8 (Consolidation) Scotland Act 1995 or whether race was a
9 motivating factor that would amount to an aggravation of
10 the conduct of the accused officers in terms of section
11 96(2) of that Act."

12 So you say here that your focus was on establishing
13 whether there was evidence of criminality?

14 A. Yes.

15 Q. You didn't identify criminality. If you had identified
16 criminality, then you would have gone on to consider
17 whether there was a basis for a racial aggravation under
18 section 50A or an aggravation under section 96 of the
19 1995 Act?

20 A. Yes.

21 Q. Now, to understand your approach, and really for the
22 benefit of any members of the public who might be
23 following your evidence, I think it might be helpful to
24 look at the legislation and it's set out quite
25 conveniently in one of the chapters in the

Transcript of the Sheku Bayoh Inquiry

1 Precognoser's Handbook. So I wonder if we could look at
2 chapter 44, which is COPFS 06411 and it's headed up
3 "Racially Aggravated Offences."

4 Now, just to get our bearings, we can note in
5 passing in the introductory section that there's a
6 reference to Recommendation 12 of the Stephen Lawrence
7 Inquiry report by Sir William Macpherson which states
8 that:

9 "A racist incident is any incident which is
10 perceived to be racist by the victim or any other
11 person."

12 And that definition was formally adopted by the
13 Scottish Executive.

14 Would it be fair to say then that if the death of
15 Mr Bayoh was perceived by his family to be racist then
16 his death would fall within the definition of a racist
17 incident?

18 A. Yes, I accept that.

19 Q. We could perhaps also note in passing in the second
20 paragraph on this page that there's a reference to the
21 prosecution code, which is underlined:

22 "It is stated in the prosecution code public
23 interest is likely to require prosecution wherever
24 sufficient criminal behaviour was motivated by any form
25 of discrimination against the victim's ethnic or

Transcript of the Sheku Bayoh Inquiry

1 national origin or religious beliefs."

2 So there is essentially a presumption that the
3 public interest will be in favour of the prosecution
4 where there's evidence of a crime and evidence of a
5 racial motivation or aggravation?

6 A. Yes.

7 Q. Now, if we could go to the top of the second page,
8 please, beginning section 50A(1) so this is a new
9 section that was inserted by legislation in 1998 into
10 the Criminal Law (Consolidation) Scotland Act 1995 and
11 the section creates the statutory offences of racially
12 aggravated harassment and racially aggravated behaviour.
13 Section 50A(1) provides that:

14 "A person is guilty of an offence if he pursues a
15 racially aggravated course of conduct which amounts to
16 harassment and is intended to amount to harassment or
17 occurs in circumstances where it would appear to a
18 reasonable person that it would amount to harassment or
19 acts in a manner which is racially aggravated and which
20 causes or is intended to cause a person alarm or
21 distress."

22 And I think it was that second limb that you drew
23 attention to in your statement, 50A(1)(b), which makes
24 it an offence to act in a manner which is racially
25 aggravated and causes or is intended to cause a person

Transcript of the Sheku Bayoh Inquiry

1 alarm or distress.

2 As to what constitutes racial aggravation, we see a
3 definition if we scroll down the page a bit, please. A
4 little further, please:

5 "Definition of racial aggravation. A course of
6 conduct or an action is racially aggravated if
7 immediately before, during or immediately after the
8 course of conduct or the action the offender evinces
9 towards the person affected malice and ill will based on
10 the membership or presumed membership of a racial group
11 of a course of conduct or action is motivated wholly or
12 partly by malice and ill will towards members of a
13 racial group based on their membership of that group."

14 If we continue to the next page, please, to look at
15 the second of the two matters that you highlighted in
16 your statement, where we see the heading "Definition of
17 racial aggravation". If we could bring that to the top
18 of the page, please.

19 Section 96.2 defines racial aggravation for the
20 purposes of section 96 in the following terms:

21 "An offence is racially aggravated if at the time of
22 the committing the offence or immediately before or
23 after doing so the offender evinces towards the victim
24 any malice and ill will based on the victim's membership
25 or presumed memberships of a racial group or the offence

Transcript of the Sheku Bayoh Inquiry

1 is motivated wholly or partly by malice and ill will
2 towards members of a racial group based on their
3 membership of that group."

4 And if we scroll down onto the next page, please, we
5 see that the racial aggravation must be liable on the
6 indictment or specified in the complaint for the section
7 to apply and we also see that evidence from one source
8 is sufficient to establish the aggravation for the
9 purposes of that section, so corroboration is not
10 required.

11 A. No, criminality is required and then one source, that's
12 correct.

13 Q. Thank you. So section 50A -- we can take this off the
14 screen now thank you -- creates an offence of racially
15 aggravated behaviour and section 96 provides that when
16 an offence, and it could be any offence, has been
17 committed, if racially aggravated, then you can liable
18 that aggravation as part of the offence?

19 A. Yes.

20 Q. So that's at the distinction between the two sections?

21 A. Yes.

22 Q. But in both cases there's a requirement to consider
23 whether there was evidence that immediately before,
24 during or immediately after the incident, whether it's a
25 behaviour or an offence, the offender evinced malice and

Transcript of the Sheku Bayoh Inquiry

1 ill will based on the victim's membership or presumed
2 membership of a racial group or whether the behavior or
3 offence was motivated in whole or in part by malice or
4 ill will towards members of a racial group.

5 Would that be a fair summary of what those sections
6 bring to the statute?

7 A. Yes.

8 Q. We've looked at your explanation already in paragraph
9 45. Am I right to understand that essentially this was
10 a two-stage process? You would look for evidence of
11 criminality first?

12 A. Yes.

13 Q. And if you found criminality, evidence of criminality,
14 if and only if you found evidence of criminality, then
15 you would go looking for evidence of a racial
16 aggravation or motivation for that criminality?

17 A. That's right.

18 Q. Does that fairly set out the approach that you took?

19 A. Yes.

20 Q. And if we can look in passing at paragraph 38 of your
21 statement. This is your first statement. Thank you.
22 Paragraph 38 and you essentially confirm your approach
23 here:

24 "I was not involved in gathering evidence about
25 race. If my analysis of evidence had established that

Transcript of the Sheku Bayoh Inquiry

1 there was sufficient evidence to support criminal
2 charges against any of the officers, the question of any
3 racial motivation or intention would have been addressed
4 at that stage. Since the analysis of evidence did not
5 identify criminality by any officer, the question of
6 racial aggravation did not arise since no offence had
7 been identified."

8 A. Yes.

9 Q. So essentially there was no offence on which you could
10 tag an aggravation or motivation?

11 A. That's right.

12 Q. So you've been very clear as to the approach that you
13 took both in your oral evidence and in your written
14 evidence. What I would like to examine is how that
15 approach sits with your statement that the requirements
16 in Article 2 and Article 14 underpinned everything that
17 you did, including your work on the analysis and that is
18 because Article 14, read with Article 2, requires an
19 authority to take all reasonable steps to unmask any
20 racist motive and establish whether or not ethnic hatred
21 or prejudice may have played a role in events and to
22 pursue that investigation with vigour and we spoke about
23 those requirements this morning?

24 A. Yes.

25 Q. Let's begin by looking at the way you approached the

Transcript of the Sheku Bayoh Inquiry

1 officer's assessment of risk. Can we move to your
2 second statement, please.

3 The question of officer's attitude -- sorry:

4 "My focus was on potential criminality. The
5 question of officers' attitude towards Mr Bayoh's race
6 would only be relevant if there was evidence of
7 criminality on the part of any officer. I found no
8 evidence of criminality. In considering the question of
9 criminality, an assessment was made about their
10 perception of the threat posed by Mr Bayoh, both to the
11 general public and to themselves. It appeared that the
12 perception of threat was based on a number of factors,
13 including the information provided to them in advance of
14 their attendance at the scene by way of airwave messages
15 about the male, their own observations and what could
16 and should have been obvious to them at each stage as
17 the incident unfolded. It did not appear that their
18 perception of risks was based on Mr Bayoh's race."

19 You then go on to narrate the circumstances as
20 shared with the officers over the airwaves, and you go
21 on to say perhaps six lines from the bottom of the
22 paragraph that:

23 "The man's race whilst an undeniable fact was of
24 little significance to the officers in assessing
25 potential risk in light of the description of his

Transcript of the Sheku Bayoh Inquiry

1 physique, the fact that he was chasing someone and the
2 fact that he was carrying a large knife."

3 And for completeness, I wonder if we can look in
4 passing at the very bottom of your answer at question 7,
5 where you say:

6 "I did not find evidence that the officers'
7 perception of threat was influenced by Mr Bayoh's race
8 and therefore did not consider it in my analysis."

9 So we'll return to this in just a moment, but before
10 we do that I would like to look in passing at paragraph
11 16. And perhaps if we can go on to the next page, can
12 stop there. Sorry. If we could scroll up a little bit
13 so we get the bottom of the page above. Thank you.
14 Perfect. So the bottom line of the top page:

15 "For the officers that assessment of risk was
16 heightened by the possibility that they may be en route
17 to a terrorist incident in the accounts provided by PCs
18 Walker and Paton. That does not entitle them to act
19 differently but indicates their heightened state of
20 awareness to the risk to their own safety and that of
21 the public and would inform their choice of approach and
22 tools to deal with Mr Bayoh."

23 So here you say that for the first officers, that is
24 Walker and Paton, their assessment of risk was
25 heightened by the possibility they might be en route to

Transcript of the Sheku Bayoh Inquiry

1 a terrorist incident and I just wonder how that fits
2 with the statements that you make earlier that you
3 didn't find any evidence that the officer's perception
4 of threat or risk was influenced by Mr Bayoh's race?

5 A. I simply didn't make that link. They had been provided
6 with intelligence in the month leading up to this
7 incident. The intelligence was of a severe risk of a
8 terrorist attack on the police. So they had a factual
9 basis for asserting in their statements that they were
10 heightened -- their awareness was heightened by that.

11 Q. You were aware that the officers or some of the officers
12 had made references to the terrorist threat?

13 A. Yes.

14 Q. And you fact-checked that?

15 A. Yes.

16 Q. And satisfied yourself, we see from the reading of the
17 narrative analysis, that there had been an increase to
18 the threat level to severe?

19 A. Yes.

20 Q. And there had been I think two memoranda that had been
21 circulated amongst the officers that are referenced in
22 the precognition. So there is evidence that some of the
23 officers were concerned they were attending a terrorist
24 incident. First on the scene, as we know, were
25 Constables Walker and Paton and their statements were

Transcript of the Sheku Bayoh Inquiry

1 available to you. I won't bring them up on the screen,
2 but I will be corrected if anything I say is wrong, but
3 Walker in his statement said:

4 "It did cross my mind that he was doing this to get
5 the police there, bearing in mind we were on a severe
6 threat level for an attack on the police."

7 And the severe threat level that he was referring to
8 related to the threat of a terrorist attack on the
9 police; is that right?

10 A. Yes.

11 Q. And Constable Paton in his statement said:

12 "It also ran through my mind that this male could be
13 part of a terrorist plot."

14 And he describes that thought running through his
15 mind before he got out of the van and at a later stage
16 as events unfolded, at the point where he had been
17 incapacitated by his own spray, he said:

18 "I kept thinking about the Lee Rigby boy, the
19 soldier who was killed."

20 Lee Rigby of course was a soldier in the
21 British Army who was murdered by Islamic terrorists in
22 2013; is that right, my understanding?

23 A. Yes.

24 Q. Now, as part of the process that you went through in
25 your analysis, and in ensuring Article 2 and 14

Transcript of the Sheku Bayoh Inquiry

- 1 compliance, did you consider why the possibility of
2 terrorism crossed their minds?
- 3 A. I asked the question, although I think it had already
4 been answered, why they had considered terrorism,
5 because they had a briefing, they had two briefings, in
6 the early months of 2015.
- 7 Q. Okay. And did you consider whether they would have
8 thought about terrorism if Mr Bayoh had been white?
- 9 A. No.
- 10 Q. Did you consider whether they thought about terrorism
11 every time they went to a knife call?
- 12 A. No.
- 13 Q. And did you consider why Constable Paton thought about
14 Lee Rigby in particular?
- 15 A. I simply noted his position.
- 16 Q. You didn't give thought as to why he thought about
17 Lee Rigby?
- 18 A. I didn't interpret it as being influenced by his race,
19 no.
- 20 Q. You didn't interpret it that way?
- 21 A. No.
- 22 Q. No, did you consider whether Constable Paton would have
23 been thinking about Lee Rigby if Sheku Bayoh had been
24 white?
- 25 A. I didn't ask that question. It wasn't -- it wasn't the

Transcript of the Sheku Bayoh Inquiry

1 practice to precognosce officers who are the subject of
2 potential criminality so I had to take his statement on
3 face value.

4 Q. Mm-hm. I wasn't suggesting that you ought to have
5 precognosed the officers. I can see the difficulty
6 there, but sometimes as an analyst one can look at the
7 facts and circumstances and perhaps draw inferences from
8 them.

9 A. It's not an inference I drew.

10 Q. Not an inference you drew. All right, and did you
11 consider whether there was evidence from which the
12 inference could be drawn that the colour of Mr Bayoh's
13 skin was relevant to their concern that the incident was
14 related to terrorism?

15 A. I did not make that assessment.

16 Q. Now, Constable Good also thought about Lee Rigby and she
17 said:

18 "I was also thinking at that point of the Lee Rigby
19 incident in London, mainly due to the fact of the
20 coloured male and the potential terrorist connotations."

21 And again, her statement would have been available
22 to you. So Constable Good made a link between the
23 colour of Mr Bayoh's skin and the potential terrorist
24 connotation so you didn't need to draw an inference so
25 far as she was concerned that she was thinking about

Transcript of the Sheku Bayoh Inquiry

1 terrorism because Mr Bayoh was black, because she said
2 as much in her statement?

3 A. Yes.

4 Q. And did her statement not perhaps cause you to wonder
5 whether others who also thought about terrorism and
6 Lee Rigby had done so because of the colour of
7 Mr Bayoh's skin?

8 A. I have to say, no, it didn't.

9 Q. And for completeness, Sergeant Maxwell who arrived later
10 on once the incident was underway said:

11 "A part of me considered this to be terrorism
12 related based on recent intelligence and the threat
13 level to serving police officers in the United Kingdom."

14 So we have four of the attending officers have
15 referenced terrorism and/or Lee Rigby in their
16 statements. Let's look at paragraph 8 of your
17 statement, please. You say:

18 "I have made no reference in my analysis of evidence
19 to the use of racial tropes or negative stereotypes
20 being used by any of the response officers in their
21 statements. However, it is unlikely that I would have
22 done so since use of racial tropes is not criminal."

23 And then if we can skip a paragraph and go down:

24 "PC Good and PC Paton both made references to
25 thinking about the attack on Lee Rigby and I can see now

Transcript of the Sheku Bayoh Inquiry

1 how such reference could on one view be interpreted as a
2 racial trope. On another view, their comments reflect
3 the knowledge of intelligence briefings provided in
4 recent months. As police officers who had been so
5 briefed, they were alive to the possibility of this
6 incident being terrorist related. I would not
7 necessarily view their comments as racist tropes.
8 Evidence about negative attitudes of officers to
9 Mr Bayoh's race would not be relevant to the analysis
10 unless criminality was identified."

11 Were you not concerned that Constable Good made a
12 link between the colour of Mr Bayoh's skin and the
13 potential terrorist connotations?

14 A. As I say, I was really focused on criminality, and
15 PC Good had little to do with the events. She was right
16 in the periphery of it. So as far as I was concerned
17 her involvement, her the potential for her to be
18 involved in criminality was -- it simply wasn't there.
19 She had a very minimal part to play. She wasn't really
20 involved in the restraint until assisting with leg
21 restraint at the very end. No.

22 Q. Okay. And she may have had a relatively small part to
23 play --

24 A. Mm-hm.

25 Q. -- and I cannot get into a discussion as to the offences

Transcript of the Sheku Bayoh Inquiry

1 you were looking at or anything of that sort, but you
2 would at some point in your analysis presumably have had
3 to address your mind to art and part.

4 A. Yes.

5 Q. And to that extent at least there was the potential for
6 Constable Good to have been implicated had you found
7 criminality --

8 A. Yes.

9 Q. -- in the course of the restraint?

10 A. Yes.

11 Q. And you say that your focus was very much on
12 criminality, but her mindset and the link that she made
13 between the colour of Mr Bayoh's skin and terrorism
14 could have been relevant to her state of mind?

15 A. Yes, and that would go to the question of mens rea.

16 Q. Yes, and potentially could have been relevant to
17 concept?

18 A. Had criminality been identified, yes.

19 Q. Had criminality been identified, but whether criminality
20 was identified or not, you had a responsibility through
21 the precognition process to ensure that your analysis
22 was Article 2 and Article 14 compliant?

23 A. I think I had a responsibility or the responsibility was
24 on the investigation as such. My responsibility, as I
25 understood it, was to report on criminality.

Transcript of the Sheku Bayoh Inquiry

1 Q. Okay. And you say in your statement that Articles 2 and
2 14 you were aware of what they required?

3 A. Yes.

4 Q. And they underpinned everything that you did?

5 A. Yes, but also the application of the law.

6 Q. By that do you mean the domestic law?

7 A. Yes.

8 Q. Because we have already examined that there doesn't
9 appear to be any analysis of the requirements of
10 Article 2 in terms of lawful use of force within the
11 analysis section of the precognition, so your focus was
12 on domestic law?

13 A. Yes.

14 Q. Rather than on ECHR?

15 A. Yes.

16 Q. Would you accept that Article 14 is part of our domestic
17 law?

18 A. Yes.

19 Q. Article 2?

20 A. Yes, I suppose it's the extent to which they are -- they
21 relate to each other.

22 Q. And the extent to which they relate to each other you've
23 already accepted is not an issue that you exposed to the
24 light --

25 A. No.

Transcript of the Sheku Bayoh Inquiry

1 Q. -- in your analysis? And insofar as you took the view
2 that there might have been a tension between domestic
3 law, and we can't get into that conversation because
4 I can't ask you about domestic law today, but to the
5 extent that you might have thought that there was a
6 tension between domestic law and the ECHR, that is not
7 set out and exposed in your analysis?

8 A. It's not.

9 Q. Okay. Returning to Constable Good and the link that she
10 made between the colour of Mr Bayoh's skin and the
11 potential terrorist connotations, did you consider
12 whether the link she made was reasonable or whether it
13 might have been indicative of racial stereotyping?

14 A. I considered it was not unreasonable given the
15 briefings. Was it indicative of racial stereotyping?
16 Possibly.

17 Q. You're saying that -- are you saying that now with the
18 benefit of time to reflect or did you think that at the
19 time?

20 A. I don't think I thought it at the time.

21 Q. You didn't think it at the time or you didn't consider
22 it at the time?

23 A. I didn't think it at the time.

24 Q. Even though she said in terms that she had made a link
25 between the colour of his skin and terrorism?

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes.
- 2 Q. At the time you didn't think of that as racial
3 stereotyping. With the benefit of hindsight and
4 reflection, your evidence today is that it could be
5 indicative of racial stereotyping?
- 6 A. Yes.
- 7 Q. And if it had occurred to you at the time or if you had
8 thought that way about it at the time, is it something
9 that you might have included in the analysis?
- 10 A. It's possible, yes.
- 11 Q. Insofar as it perhaps could be said to shine a light on
12 her state of mind and that would be potentially relevant
13 to mens rea, if you were in a situation where you had
14 found criminality and you were looking at (inaudible)?
- 15 A. Yes, in terms of criminality, yes.
- 16 Q. And that's leaving to one side whether there might have
17 been a desirability to explore these issues from the
18 point of view of ensuring that your work was Article 2
19 and 14 compliant?
- 20 A. Yes.
- 21 Q. Let's look at paragraph 15, "question of
22 reasonableness":
- 23 "The question of reasonableness of the police
24 decision-making and action was considered at each stage
25 against their state of knowledge, their perception of

Transcript of the Sheku Bayoh Inquiry

1 risk and their training. Had I not considered that
2 their perception that the call to the locus could have
3 been terrorist related was unreasonable, I think I would
4 have said so in the analysis of evidence. I considered
5 that, given the recent memos, their speculation en route
6 to the scene of the knife-carrying male being a
7 terrorist was not outwith the realms of possibility and
8 therefore not unreasonable."

9 So you were not concerned, you have told us already,
10 that some of the officers believed this could be a
11 terrorist incident and you didn't consider that that
12 concern was unreasonable?

13 A. That's correct.

14 Q. Okay. Simply because something isn't outwith the realms
15 of possibility it doesn't follow that it is reasonable,
16 would you agree?

17 A. They may not be the same thing.

18 Q. They may not be the same thing and if the only reason --
19 if the only reason that they thought that this was a
20 terrorist incident was because of the colour of
21 Mr Bayoh's skin, would that be reasonable?

22 A. I didn't read that into their statements.

23 Q. That's why I used the word "if". Hypothetical, and we
24 can read that into Constable Good's statement, but as
25 far Walker, Paton and Maxwell are concerned we perhaps

Transcript of the Sheku Bayoh Inquiry

- 1 can't, but if an officer thought this was a terrorist
2 incident because and only because of the colour of
3 Mr Bayoh's skin, would that be reasonable?
- 4 A. Possibly.
- 5 Q. Can you expand on that?
- 6 A. Because of their experience about what terrorist
7 incidents are taking place previously, such as
8 Lee Rigby.
- 9 Q. Do you mean because terrorist incidents that had been
10 reported in the news had involved men who were --
- 11 A. In the recent past. I mean if you go back 25 years, you
12 could be talking about people with an Irish accent do
13 you know, so I think it would depend.
- 14 Q. Okay. But insofar as you might consider that to be
15 reasonable, should we understand that what you are
16 saying is that that would be because there had been
17 recently reported terrorist incidents where the
18 terrorists who had carried out certain atrocities were
19 black or perhaps from an ethnic minority background?
- 20 A. It could be a factor --
- 21 Q. It could be a factor.
- 22 A. -- in their perception.
- 23 Q. And you say that could be a reasonable perception?
- 24 A. It could be.
- 25 Q. Let's look at paragraph 17, please. If we can look at

Transcript of the Sheku Bayoh Inquiry

1 the second half of that big paragraph, it's about ten
2 lines from the bottom:

3 "I did not have a concern."

4 I'll let you find the place there, Mrs Carnan.

5 Thank you. I see that the cursor was being held over
6 it. Are you with me?

7 A. Yes.

8 Q. "I did not have a concern that some officers were
9 speculating that they could be dealing with a potential
10 terrorist attack following the report of a black male
11 with a knife. They had received intelligence briefings
12 in the previous months and were on high alert for a
13 potential terrorist attack. Such an attack was not
14 outwith the realms of possibility. The fact that they
15 made an association between the report of a black male
16 with a knife and recent memos warning of the threat of a
17 terrorist attack was not of itself of concern in the
18 context of assessing criminality which was the focus of
19 the report."

20 Now, evidence of a racist motive for behaviour will
21 not always be overt, would you agree with that?

22 A. Yes.

23 Q. Okay. And it may be a question of drawing an inference
24 from facts and circumstances?

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. Now, I wonder whether when you embarked on the process
2 of your analysis you turned to any sources of guidance
3 or information to guide you on how you might approach
4 the question of race, is that something you did?

5 A. No, because I didn't get to that point.

6 Q. I see. So we have heard some evidence in the Inquiry
7 that the IPCC issued a set of guidelines on
8 investigating allegations of discrimination, including
9 race discrimination. That was in 2015. Were they on
10 your radar back in 2017?

11 A. No.

12 Q. Are they on your radar now?

13 A. No.

14 Q. All right. As part of your process, and I appreciate
15 that your focus was on criminality, but you have told us
16 that Article 2 and Article 14 underpinned all that you
17 did, did you consider whether the language used by the
18 officers in their statements might indicate a racist
19 frame of mind?

20 A. It did not -- that did not seem to me to be the case.
21 But as I said I wasn't looking for racial motivation at
22 that stage because I had not crossed the threshold of
23 criminality.

24 Q. Okay. I understand.

25 A. So it wasn't a test, it wasn't an exercise that I

Transcript of the Sheku Bayoh Inquiry

- 1 undertook.
- 2 Q. I appreciate that you didn't undertake that exercise but
- 3 there are a number of specific points that I would be
- 4 interested to know whether they were within your
- 5 thinking and your mindset as you approached your
- 6 analysis. We have spoken already about terrorism and
- 7 Lee Rigby. I'm sure that you will be aware of racist
- 8 stereotypes in society, that black men are more violent,
- 9 unpredictable, aggressive, you will have come across
- 10 these stereotypes, I would imagine?
- 11 A. I have.
- 12 Q. Um-hum. And did you examine the officer's statements
- 13 for language of that sort?
- 14 A. No.
- 15 Q. And did you consider patterns of behaviour whether for
- 16 example they had used their sprays or drawn their batons
- 17 at previous knife incidents?
- 18 A. No, I was simply concerned with this incident.
- 19 Q. Did you consider whether they treated all knife calls as
- 20 potentially terrorist related?
- 21 A. No, that wasn't a question that was asked.
- 22 Q. Did you consider looking for comparator evidence, for
- 23 example, looking at Walker, Paton and Tomlinson's
- 24 history of use of spray or Tomlinson's history of use of
- 25 force involving a baton with a view to establishing

Transcript of the Sheku Bayoh Inquiry

- 1 whether those officers had ever used sprays or batons
2 before?
- 3 A. No.
- 4 Q. Or whether they had used sprays or batons when detaining
5 a white suspect?
- 6 A. No.
- 7 Q. Did you consider whether the speed with which the
8 officers elected to use force against Mr Bayoh was
9 because he was black?
- 10 A. That wasn't my understanding. I think I have explained
11 in one of the answers, my understanding of their
12 perception was based on a whole lot more than the colour
13 of his skin.
- 14 Q. Okay. Did you consider whether Constable Walker and
15 Constable Paton's decision to opt for a hard stop may
16 have been influenced by Mr Bayoh's race?
- 17 A. Again we didn't cross the threshold into criminality so
18 that wasn't a consideration per se.
- 19 Q. So you've explained that you took a two-stage process,
20 you looked for evidence of criminality, you didn't find
21 it so you didn't get past first base essentially.
- 22 A. Yes.
- 23 Q. And it would only have been if you had found evidence of
24 criminality that you would have scrutinised the evidence
25 for evidence that might allow you to draw an inference

Transcript of the Sheku Bayoh Inquiry

- 1 of racial aggravation --
- 2 A. Yes.
- 3 Q. -- or motivation. With the benefit of hindsight, and in
4 light of your statement that everything that you do is
5 underpinned by Article 2 and Article 14, do you think
6 that the approach that you took to analysis of the
7 evidence as far as race was concerned was adequate?
- 8 A. I think it was adequate in terms of assessing
9 criminality.
- 10 Q. With hindsight, do you consider that your approach
11 pursued with vigour all reasonable steps to unmask any
12 racist motive and establish whether or not prejudice may
13 have played a role in events?
- 14 A. In the context of assessing criminality, yes, because
15 that's as far as I got so therefore -- I understand your
16 question but I revert to my focus was on criminality.
- 17 Q. So if your focus wasn't on pursuing with vigour all
18 reasonable steps to unmask any racist motive, then who
19 was focused on that task?
- 20 A. I don't know if that was a focus for this stage of the
21 report to Crown Counsel.
- 22 Q. You've explained that your focus was on criminality.
- 23 A. Yes.
- 24 Q. You accept that the crown investigation required to be
25 Article 2 and Article 14 compliant?

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes.
- 2 Q. So if you weren't investigating this particular aspect
3 as required by Articles 2 and 14, I wonder who if anyone
4 was and your answer to that, I think, is that that was
5 for another day.
- 6 A. Well, if there wasn't criminality, then everything else
7 needed to be looked at.
- 8 Q. Um-hum. So was it anticipated then that if Crown
9 Counsel instructed there should not be criminal
10 proceedings, as in fact happened, that there would be a
11 further precognition process or some sort of addendum to
12 the precognition that would explore all of these issues?
- 13 A. I could tell you that in normal practice there would be
14 a precognition report to Crown Counsel considering a
15 fatal accident inquiry and the issues that would be
16 addressed in that.
- 17 Q. Okay, and did that happen in this case?
- 18 A. No, it didn't, because, as I understand it, a decision
19 was made that a public inquiry should take place and
20 that preceded any further report to Crown Counsel.
- 21 Q. So at the point that a public inquiry was announced, did
22 the Crown effectively down tools on its own
23 investigation?
- 24 A. I can only speak for my involvement.
- 25 Q. Um-hum. Is it possible then that the crown

Transcript of the Sheku Bayoh Inquiry

- 1 investigation is essentially an incomplete one?
- 2 A. As I say, I can only speak to my involvement in the
3 crown investigation; I can't speak to what else is going
4 on.
- 5 Q. But certainly as the analyst no one came back to you and
6 Crown Counsel instructed there shouldn't be proceedings
7 here so now we need to look at an FAI.
- 8 A. No, that wasn't --
- 9 Q. That didn't happen?
- 10 A. That didn't happen, no. And as I say, my role was very
11 much on looking at criminality.
- 12 Q. Okay. With the benefit of hindsight, is there any
13 aspect of your analysis that you might approach
14 differently now other than those aspects that we've
15 discussed already and you have said you might approach
16 differently?
- 17 A. I don't think so.
- 18 Q. Right. Can you bear with me a second. Just one final
19 thing, Mrs Carnan, and I appreciate that your role, your
20 remit, was limited.
- 21 A. Yes.
- 22 Q. And you might not be able to assist us with this but
23 I think what you are saying is that the Crown perhaps to
24 date haven't fully explored Article 2 and Article 14
25 because they only got as far as preparing the

Transcript of the Sheku Bayoh Inquiry

1 precognition in connection with possible criminal
2 proceedings and then a decision was taken that there
3 should be an FAI --

4 A. No, a public inquiry.

5 Q. -- a public inquiry, sorry.

6 A. Yes.

7 Q. So if that is the case, and we'll hear from others
8 within Crown Office whose involvement went beyond yours
9 as to what might have been going on --

10 A. Yes.

11 Q. -- beyond the point that your precognition report was
12 submitted to Crown Counsel --

13 A. Yes.

14 Q. -- but if that's what has happened here, and there
15 certainly isn't before the Inquiry a supplementary
16 precognition addressing an FAI or anything of that sort.

17 A. No.

18 Q. But if that work is essentially unfinished and if the
19 Crown have in fact never fully explored Articles 2 and
20 14 of the ECHR, you will be aware that Article 2
21 requires an investigation to be reasonably prompt and
22 for delays to be avoided, would that mean that any
23 responsibility that fell to the Crown to carry out an
24 investigation and a prompt one at that has not yet been
25 satisfied?

Transcript of the Sheku Bayoh Inquiry

1 A. I don't think I can answer that.

2 Q. All right. That's maybe for another day.

3 I have no further questions, thank you.

4 LORD BRACADALE: Are there any rule 9 applications? Right,
5 Mrs Carnan, would you mind withdrawing to the witness
6 room, please, for a moment?

7 MRS CARNAN: Yes.

8 LORD BRACADALE: Yes, Mr Henry?

9 MR HENRY: Yes, thank you, sir. There is one matter which I
10 would wish to address with this witness. It relates to
11 an entry in a notebook used by her, which is COPFS
12 05222. This document isn't paginated but it is at page
13 28 of the PDF. Thank you. So you'll see the first line
14 of this page which says, "Points: race card". It is
15 this reference to the term "race card" that I wish to
16 explore with Mrs Carnan, which I would like to ask her
17 about her understanding of the term "race card",
18 including whether she's aware of any pejorative or
19 negative connotations in relation to the phrase, what
20 she understands it to mean if someone is accused of
21 "pulling the race card" and her reasons for using the
22 phrase in her notebook. That's everything, sir.

23 LORD BRACADALE: Very well, I shall allow you to ask that.
24 If we can have the witness back, please. There might be
25 a little rearrangement of seating.

Transcript of the Sheku Bayoh Inquiry

1 (Witness returned)

2 Mrs Carnan, Mr Henry, who is junior counsel for the
3 Coalition for Racial Equality & Rights, has some
4 questions for you.

5 Cross-examination by MR HENRY

6 MR HENRY: Thank you, Mrs Carnan, I have a question about an
7 entry in a notebook which I understand was made by you,
8 it's COPFS 05222 and it's at page 28. Firstly,
9 Mrs Carnan, do you recognise that writing?

10 A. Yes.

11 Q. Is that your writing?

12 A. Yes.

13 Q. Mrs Carnan, I'm interested in the first line of that
14 page where it says, "Points: race card".

15 A. Yes.

16 Q. And it's the phrase "race card" that I'm interested in.
17 What do you understand by the term "race card"?

18 A. A suggestion that race played a part in an incident.

19 Q. Are you aware of any pejorative or negative connotations
20 to the phrase "race card"?

21 A. No.

22 Q. What do you understand it to mean if someone is accused
23 of "playing the race card"?

24 A. That they are raising the question of race.

25 Q. No other meanings behind that phrase?

Transcript of the Sheku Bayoh Inquiry

1 A. No.

2 Q. Thank you, Mrs Carnan, I have no further questions for
3 you.

4 LORD BRACADALE: Mrs Carnan, thank you very much for coming
5 to give evidence to the Inquiry, I'm grateful for your
6 time. The Inquiry is about to rise for the day and
7 you'll be free to go.

8 A. Thank you.

9 LORD BRACADALE: Adjourned until tomorrow.

10 (The hearing was adjourned to 10 am on Wednesday, 17 April,
11 2024)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Transcript of the Sheku Bayoh Inquiry

1 INDEX

2 17:18:42 2 2FIONA CARNAN (sworn)

3 2Examination-in-chief by MS THOMSON

4 3174Cross-examination by MR HENRY

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Transcript of the Sheku Bayoh Inquiry

1

2