

Transcript of the Sheku Bayoh Inquiry

Tuesday, 4 June, 2024.

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(10.03 am)

LORD BRACADALE: Good morning, Ms Edwards.

A. Good morning.

LORD BRACADALE: Before your evidence begins, may I advise you that the terms of reference of the Inquiry exclude the prosecutorial decision and review. At the beginning of the Crown Office hearing, I set out my interpretation of how the Inquiry should approach that exclusion.

The Inquiry will not examine the ultimate prosecutorial decision of the Lord Advocate and his reasoning. Your prosecutorial decision and reasoning and the recommendations and advice given by the Procurator Fiscal in reporting the case to you. In addition, the Inquiry will not examine in detail which particular potential crimes you considered could be relevant.

Subject to these exclusions, the Inquiry will examine the post-incident management process, and the investigation conducted by the crown. As the vehicle for the crown's investigation was a criminal precognition, that examination will include the work associated with the precognition.

Would you now take the oath.

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1 ASHLEY EDWARDS KC (sworn)

2 Examination-in chief by MS A GRAHAME KC

3 MS GRAHAME: Good morning.

4 A. Good morning.

5 Q. You're Ashley Edwards?

6 A. I am.

7 Q. And you're a King's Counsel?

8 A. I am.

9 Q. What age are you?

10 A. 58.

11 Q. And you, as I understand it, went into Crown Office in
12 2008; is that correct?

13 A. I did.

14 Q. And you have remained there until you were laterally
15 appointed as Assistant Principal Advocate Depute and now
16 Principal Advocate Depute?

17 A. Deputy Principal in between that.

18 Q. Sorry. So Deputy Principal Advocate Depute?

19 A. Deputy Principal Crown Counsel.

20 Q. Crown Counsel, thank you.

21 And you have provided an Inquiry statement. You
22 have provided a statement at the request of the Inquiry.
23 They sent you a Rule 8 request and in response to that
24 request, you prepared written answers to the questions
25 that were asked by the Inquiry team?

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- 1 A. I did.
- 2 Q. And let's just very quickly look at that. It's -- the
3 request was SBPI 00439. I won't put that on the screen,
4 that's just for the benefit of those behind me, but your
5 response was SBPI 00445. You'll see that statement
6 given on Wednesday, 17 January 2024, it's your name,
7 Principal Crown Counsel, and if we look, it's 14 pages
8 of a pdf. If we look at the final page now, this has
9 been redacted. Your signature is not visible to those
10 looking on the screen, but as I understand it you did
11 sign it in the hard copy?
- 12 A. I did.
- 13 Q. And it was signed by you on 18 January 2024, and the
14 final paragraph, number 69, says:
- 15 "I believe the facts stated in this witness
16 statement are true. I understand that this statement
17 may form part of the evidence before the Inquiry and be
18 published on the Inquiry's website."
- 19 And that was your understanding when you signed?
- 20 A. It was.
- 21 Q. Thank you. Now, you were doing your best, as I
22 understand it, when you completed this statement to be
23 honest and truthful and accurate in your recollection,
24 but am I correct in saying you didn't have a full set of
25 papers made available to you?

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1 A. I didn't have any papers. So I did ask for papers but
2 I was told that I could only have what the Inquiry gave
3 me so the bundle -- when I prepared my statement, all
4 I had was the bundle that was sent through to me with
5 the Rule 8 request, which was simply I think documents
6 supporting the questions that had been asked so I didn't
7 have a recollection or an overview from the papers in
8 front of me at the time.

9 Q. But since this statement was prepared, am I correct in
10 saying that papers have been provided to you?

11 A. Some papers have been provided to me, much more
12 extensive than I had for the preparation of the
13 statement.

14 Q. And am I also correct in saying that's allowed you to
15 refresh your memory on certain areas?

16 A. It has.

17 Q. Thank you. If -- well, let me first of all say I also
18 am aware you have watched some evidence to the Inquiry?

19 A. I have.

20 Q. Do you have specific witnesses that you have watched or?

21 A. I didn't watch anything of the earlier sections of
22 evidence, and I made a conscious decision not to do that
23 because I didn't know what I would be doing and what you
24 needed me to look at if I was required to prepare a
25 statement.

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1 Once I knew I was coming to give evidence, I thought
2 it would be most helpful to the Inquiry if I actually
3 knew the types of questions that you were asking, what
4 you were looking for and so I have managed over the last
5 week to look at some of the witnesses. I have looked at
6 some of Les Brown, I have looked at Lindsey Miller, I
7 looked at James Wolffe. I didn't look at
8 Lord Mulholland. because he -- for the time that was
9 available to me he was in the investigation before I
10 came in so I didn't look at him. I looked a bit of
11 Stephen McGowan as well.

12 Q. You will have seen if you watched some evidence that
13 there is a folder in front of you that's for your use.

14 A. Yes.

15 Q. There should be a hard copy of your statement in there.

16 A. It is.

17 Q. You can make reference or make use of that in any way
18 and it's entirely for your use during giving evidence?

19 A. And what I do have in front of me is my own printed out
20 copy of my statement.

21 Q. Right. And if during the course of giving evidence you
22 think another document might be helpful, if we don't
23 have it available to show on the screen, if you just let
24 me know, we will try and get a copy in the next break.

25 A. Okay, I will do that. Thank you.

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1 Q. So if there's anything at all that would assist you,
2 please just let us know?

3 A. Okay.

4 Q. The -- if we go back to the top of your statement,
5 I think you have helpfully set out at the beginning of
6 your statement a detailed summary of your involvement
7 with Crown Office, your appointments during that time,
8 essentially your experience and your background before
9 becoming involved in the investigation into the death of
10 Mr Bayoh.

11 A. That's correct.

12 Q. And that's at paragraph 1 and you have also set out your
13 experiences of SFIU cases as an Advocate Depute and your
14 experience of meeting the family of Mr Bayoh and that's
15 at paragraphs 4 and 5 and I don't want to go into those
16 in any detail at this stage.

17 Could we look, please, at paragraphs 57 to 59 and
18 this relates to training that you have been given as
19 part of your work as an Advocate Depute, and you say:

20 "By 2016 I had been an Advocate Depute for eight
21 years. I was experienced in dealing with large and
22 complex cases, including death investigations both prior
23 to reporting to Crown Counsel and following instructions
24 to proceed. I was experienced in preparing and
25 presenting large and complex cases to juries. I had

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1 completed all the annual training courses, together with
2 eight two-day residential cases."

3 Is that "cases"?

4 A. I think that's meant to say "courses".

5 Q. Courses, thank you. And 59:

6 "By 2016 I think I had completed at least two
7 separate training modules covering equality and
8 diversity issues."

9 I'm interested in learning a little more about the
10 training courses that you had undergone. Could you
11 explain what the content of those courses was?

12 A. So if we're talking about the annual Advocate Depute
13 course that was at the time I think a two-night and
14 two-day course. I think we went on the Friday and
15 worked on the Saturday, Sunday. It's now just we work
16 on the Saturday, Sunday, but we only stay over on the
17 Saturday, but in those -- initially those training
18 courses were two nights and two days and a full range of
19 presentations would be made. Sometimes we bring in
20 external speakers and other times Advocate Deputes do
21 internal training.

22 Q. And at one time was that known as Bollathie?

23 A. It was and even though it's now in Crieff, it's still
24 known as Bollathie.

25 Q. Is it? Thank you. And you have mentioned here at least

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1 two separate training modules covering equality and
2 diversity issues; tell us about that?

3 A. So I did a wee bit of refreshing for coming here to give
4 evidence and I found that the initial course on equality
5 and diversity was rolled out in 2004 and that of course
6 is before I joined the Crown Counsel team. The next
7 training course was 2010, and I was able to access the
8 training schedule for that day and I was able to see the
9 individual pieces of training that were given.

10 The next one was in 2015. Again, I had the
11 materials for that, but in 2015 when that course was
12 being run I was on annual leave, but I had access to the
13 actual training materials.

14 Q. Right. And tell me, did either of those courses that
15 you did attend deal with issues regarding Article 2
16 investigations?

17 A. They did.

18 Q. Did they deal with Article 14?

19 A. I don't recall Article 14 ever being specifically
20 mentioned in the training, but it certainly focused on
21 Article 2 obligations.

22 Q. Was there any reference in the course which you had the
23 materials for that referred to Article 14?

24 A. I don't recall. I didn't go back to the materials to
25 check exactly what was in the actual training.

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- 1 Q. Was there specific -- although they talked about
2 Article 2 was there any other specific training given in
3 relation to investigation that dealt with deaths in
4 custody or deaths in custody where race was a factor?
- 5 A. I think there was, but I can't recall the details at
6 this stage.
- 7 Q. Right. Do you remember anything at all, even a general
8 recollection?
- 9 A. I have made some notes if you would like me to look at
10 the notes.
- 11 Q. Were those notes made in preparation for helping answer
12 the questions?
- 13 A. They were.
- 14 Q. Please tell us.
- 15 A. If I can locate them. So the training that I attended
16 was on 2 October 2010. The -- there was a full
17 programme of talks from other Advocate Deputes,
18 including an approach to diversity and an update with
19 regard to the Chhokar and the Jandoo Inquiry and the
20 aftermath of what happened with the Chhokar trial. That
21 is the only details that I have got. I have got them
22 noted. There was an Advocate Depute diversity booklet
23 given out, but I didn't have a copy -- I don't have a
24 copy of that now.
- 25 Q. Did you have a copy then?

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1 A. Yes.

2 Q. And was that something that you read?

3 A. Yes.

4 Q. Do you remember much about the content?

5 A. I don't, no.

6 Q. Right. When you say you were given information about
7 the Chhokar and Jandoo report, to what extent did that
8 form part of that day's course?

9 A. Well, I have noted that the introduction was given by
10 Principal Crown Counsel at the time, that was the
11 welcome, he was the Chair, and then at 9.45 and it looks
12 like that was -- the next talk was "Approach to
13 Diversity", and it looked like that took up a
14 considerable portion of the morning and that was, as I
15 indicated, the Jandoo inquiry, the post Chhokar
16 implementation of the recommendations and the
17 Equalities Act 2010.

18 Q. Right, thank you. You were -- we have heard evidence
19 that Mr Bayoh died on 3 May 2015, and PIRC became
20 involved and carried out an investigation and initially
21 sent a report or perhaps an interim report to
22 Crown Office in August of 2015, but then subsequent to
23 that, on 10 August 2016, a final PIRC report was sent to
24 Crown Office.

25 Now, we've heard evidence that for the two years

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1 after that final PIRC report, so between 2016 and
2 August 2018, that was the period during which the crown
3 investigation essentially took place and there was
4 something known as a crown precognition prepared.

5 Does that all accord with your recollection?

6 A. It does and and that was the period during which I was
7 involved.

8 Q. And the Inquiry has documentation available that
9 indicates that Principal Crown Counsel at the time
10 emailed you on 11 August 2016 and asked you to become
11 what we've heard was known as the allocated AD, the
12 allocated Advocate Depute?

13 A. That accords with my memory.

14 Q. And up until that date, you had had no involvement at
15 all in the investigation into Mr Bayoh's death?

16 A. Nothing.

17 Q. Thank you. Could we look at paragraph 31, please. And
18 you talk here in some detail about the Crown Counsel's
19 role. You say:

20 "Once the reporting agency has made a report to
21 Crown Office ..."

22 And that reporting agency may sometimes be the
23 police or it may be PIRC or it may be one of the other
24 organisations.

25 "... Crown Office initiates an investigation. The

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1 results of that investigation are either included in a
2 full crown precognition or a report to Crown Counsel for
3 instruction depending on the type of case. The role of
4 Crown Counsel in the precognition process is varied and
5 dependent on the nature and complexity of the case. In
6 essence the role of Crown Counsel pre-reporting for CCI
7 [which is Crown Counsel instruction] is to provide
8 direction where necessary to ensure that the
9 investigation report [the precognition] has explored all
10 relevant areas and provides all necessary documentation
11 to allow Crown Counsel to make a fully informed decision
12 on criminality. At this stage, Crown Counsel is not
13 involved in the analysing or interpreting the
14 information to be included in the precognition. In this
15 case this was a pre-petition precognition. I was
16 allocated to the case some months after the PIRC had
17 reported to Crown Office. The investigation
18 precognition process was already underway. As indicated
19 above, I met with the investigation team and various
20 other officials in September 2016. My input into the
21 process was as outlined above: High level advice and
22 direction."

23 Now, I appreciate this was prepared before you had
24 an opportunity to look at the papers. I would like to
25 talk about the normal common or garden case that might

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1 come to Crown Counsel. The crown precognition in the
2 past would have been delivered to the Advocate Deputes,
3 the Crown Counsel, and they would have picked that up,
4 read through it and taken a decision on whether to
5 prosecute or not prosecute?

6 A. That's correct.

7 Q. And that would be the normal sort of procedure for the
8 majority of cases coming to counsel?

9 A. Yes, if it's not an allocated case at the petition
10 stage.

11 Q. And the difference is if there's an allocated
12 Advocate Depute or Crown Counsel, the procedure is
13 changed for that purpose. Now, when is an allocated AD
14 appointed, what types of cases would you say?

15 A. Usually the later stage more complex cases are allocated
16 to Advocate Deputes. I'm thinking back to 2016 because
17 it has changed slightly now. We allocate out a greater
18 percentage of cases to Advocate Deputes, but at that
19 time it was only the larger more sensitive cases that
20 were allocated out.

21 Q. And in that situation, where it's a larger more
22 sensitive investigation, what was the procedure when an
23 allocated AD was brought into a case?

24 A. Usually the allocated AD would be given some reading
25 materials in order to inform them about the nature of

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1 the case and what was required and, again, it just
2 depended on the stage, the preparation of the case, what
3 type of case it was and what was envisaged in the
4 preparation as to that would dictate the early
5 interaction with the Advocate Depute.

6 Q. And in particular in relation to Mr Bayoh you were sent
7 some reading materials?

8 A. I was. I think I was given the two PIRC reports and
9 perhaps at that time some of the expert reports as well.

10 Q. Right. And that was before the crown precognition had
11 been prepared?

12 A. Yes, I didn't receive the crown precognition until --
13 I think into the spring of 2018.

14 Q. And when you said at the bottom there "high-level advice
15 and direction", I wonder if you could help us understand
16 what that means in practice or what that meant in
17 practice?

18 A. So the Crown Counsel team is an independent team of
19 counsel, of lawyers, of Advocate Deputes. We're not
20 part of Crown Office and Procurator Fiscal Service, so
21 we provide independent legal advice and analysis on
22 cases depending on the stage that we're at and what's
23 been requested. The types of request that were coming
24 to me in this particular case was, do we need another
25 expert, who should the expert be, do you have any advice

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1 on what we should be looking at, here's a timeline, do
2 we need to be looking at something else? That kind of
3 thing.

4 Q. This is prior to the crown precognition having been
5 prepared?

6 A. Yes.

7 Q. And requests were coming to you as the allocated AD.
8 What papers were also sent to you when those requests
9 were being made?

10 A. I think it depends on what it was that they were asking.
11 Obviously, in order to make those decisions, I had to
12 have a base-level knowledge of what stage the
13 investigation was at and the factual matrix, as much as
14 we could determine at that stage. So again I have got a
15 note of what I was getting early on if you would like me
16 to refer to it.

17 Q. Yes, please do.

18 A. So what I have noted here is by 18 January, so that's
19 quite far on in the investigation -- I had --

20 Q. Is that January 2017?

21 A. 2018.

22 Q. 2018.

23 A. I had the relevant witness summary from the
24 precognoscer, I had a timeline, I had airwave recordings
25 with a synopsis of the recordings which was in

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1 transcript form, I had CCTV timeline, and that included
2 dash cam, CCTV, which was synced with the airwaves, and
3 also Ashley Wyse's Snapchat clips. So that's what I had
4 by the time it came to January of 2018. Before that
5 I think what I might have had is a timeline at various
6 points in the earlier 18 months and expert reports.

7 Q. What about witness summaries, would you have had them?

8 A. I think I had witness statements. Now, I am aware that
9 there were upwards of 400 statements provided by PIRC to
10 Crown Office. I didn't look at all 400, but from my
11 notes and from my understanding of what the things that
12 I'm asking in my emails, I obviously had an in-depth
13 understanding of the statements of the police officers
14 who attended at Hayfield Road.

15 Q. Thank you. Right. We have heard evidence from
16 Les Brown that he prepared a minute, COPFS 03853A, and
17 we have heard from Les Brown that he was the solemn
18 legal manager, he was the head of CAAPD at that time,
19 and that the minute he prepared was on
20 15 September 2016. You'll see that on the screen. So
21 this is the month after the final PIRC report has been
22 received by Crown Office and you'll see that -- if we
23 move up the screen, you'll see that you are one of the
24 people who's copied into this minute. And it's -- it
25 was prepared, as we understand the evidence of

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1 Les Brown, in advance of a meeting that was to take
2 place in Crown Office regarding the death of Mr Bayoh
3 and the purpose of the meeting was to identify key
4 issues to be explored at precognition of relevant eye
5 witnesses to the actions of police officers engaged in
6 the restraint of Mr Bayoh.

7 Now, by this stage I think you had been appointed as
8 the allocated AD, and I wonder what information --
9 whether you remember a meeting taking place with
10 yourself, with Mr Brown and with any number of the
11 people who are listed here. We have heard the evidence
12 that Alisdair McLeod had been brought in to essentially
13 precognosce for the crown precognition with
14 Erin Campbell at that stage?

15 A. I don't recall the details of that meeting, but I do
16 recall being at a meeting, whether it was a meeting in
17 2016, I can't remember.

18 Q. Right. Let's just go through this minute. You'll see
19 that the background is given and then the discussion:

20 "An incremental approach to the investigation and
21 decision-making process is being proposed. Essentially
22 the first part of the investigative process will be
23 focused upon reaching a decision as to whether there is
24 any basis for taking criminal proceedings against any
25 individual police officer involved in the restraint of

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1 Mr Bayoh."

2 Does that refresh -- ring any bells for you?

3 A. I have seen the document so I know what's in the
4 document. Does it remind me of the actual meeting? Not
5 really. My memory is having a lot of contact with
6 Alisdair McLeod. I don't remember meeting Erin at that
7 time, she is now an Advocate Depute, but I think I only
8 met with Erin once or even maybe perhaps twice with
9 regard to this particular case. So I had lots of
10 meetings with Alisdair, but I only remember one meeting
11 with Erin, but I understand perhaps I also met with her
12 when we went through the CCTV and I think that was done
13 in Crown Office.

14 Q. All right. Let's leave that for a moment then and go
15 back to your Inquiry statement. First of all, at
16 paragraph 4. So if we look at paragraph 4 you'll see
17 halfway down that paragraph towards the end of the line
18 it says:

19 "I do not recall race."

20 Do you see that?

21 A. Paragraph 4? Yes, I have that.

22 Q. Paragraph 4 5th line at the end:

23 "I do not recall race being a particular feature in
24 any of the cases I was involved in, except in the Appeal
25 Court where I was involved in cases which included

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1 debate on the law surrounding the inclusion in charges
2 of racial aggravations."

3 Does that remain your recollection today?

4 A. It doesn't. So this is the benefit of having time to
5 refresh my memory. I was involved in a case under the
6 Terrorism Act round about that same time and I think
7 actually in fact it came to trial either in 2017 or
8 2018, and it involved potential viewpoints of white
9 supremacy, and I had a number of consultations with an
10 expert called Professor Feldman who assisted in
11 informing me of the background to some of the literature
12 that was involved in that case.

13 Q. Right. And so were there elements of that case that
14 involved consideration of race?

15 A. There was. There was elements of far right wing
16 viewpoints.

17 Q. Okay, thank you. And can we look at paragraph 54,
18 please. This is a section of your statement called
19 "Race". 54:

20 "I do not recall race being a factor in any previous
21 death in custody in which I was involved. It may be
22 that race had been a factor in some of the cases in
23 which I issued CCI, but I do not recall any particular
24 case."

25 Does that remain correct today?

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- 1 A. Apart from what I just said, because I do recall that
2 particular case and that was a trial that ran I think
3 over three weeks, so it was quite a detailed trial and
4 there was a focus on race.
- 5 Q. Was that in any way a death in custody?
- 6 A. No.
- 7 Q. So insofar as 54 relates to a previous death in custody,
8 does that remain the position today?
- 9 A. That's correct. The other case that I'm thinking of was
10 under the Explosives Act and the Terrorism Act.
- 11 Q. Thank you. As well as you've explained your experience
12 at that time, did you seek out guidance, information, in
13 relation to an investigation after -- the investigation
14 into the death of Mr Bayoh, but an investigation after a
15 black man has come into contact with police?
- 16 A. In what way? What do you mean by "seek out"?
- 17 Q. I understand at one point you went to
18 Crown Prosecution Service down south?
- 19 A. I did and in the lead up to that, obviously, I would
20 have done my own research, that's my practice, Googled,
21 looked on the knowledge bank to see the information that
22 I could find, looked to see if I could see any other
23 cases that would assist me and, ultimately, I knew that
24 the CPS were more experienced in dealing with this type
25 of case than we were in Scotland, because I wasn't aware

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1 that it had happened before with the particular focus
2 and sensitivities so I wanted to find out as much as
3 possible as I could about other people's experiences,
4 what they did and if that could assist us in our
5 investigation and looking at the things that we needed
6 to look at.

7 Q. You've mentioned the knowledge bank. We've heard some
8 evidence about the knowledge bank. What information did
9 you find that you found helpful?

10 A. I can't specifically remember. I did a lot of research
11 at this time. I did a lot of research into sickle cell
12 anaemia. I did a lot of research into -- not a lot, but
13 a bit of research into Sierra Leone. There is not -- my
14 geography is not that great so I did a bit of research
15 into that. Those are the types of things I would be
16 looking at and doing all the time.

17 Q. And you mention researching or looking for other cases,
18 did you find any?

19 A. Not -- obviously they were the English cases, and I had
20 a few ultimately from the contact in CPS, I had some
21 sort of their marking decisions, but for Scottish cases,
22 no, I didn't find anything that assisted me.

23 Q. And --

24 A. Aside from the ECHR cases, human rights, that kind of
25 thing.

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1 Q. Right. So you looked up ECHR cases specifically in
2 relation to race?

3 A. Yes.

4 Q. And you have said there were no Scottish cases, but you
5 had some decisions from the CPS available to you and
6 English decisions. What assistance did you glean from
7 your research into the English decisions?

8 A. I think at the time that we went down -- Les Brown and I
9 went down to meet the contact in CPS -- I think at that
10 time what I was looking for was assurances that
11 everything that they had done with regard to their
12 experience, their built-up knowledge, we had covered and
13 that's what I was looking for. I was looking for
14 assurances that there wasn't a gap in our investigation,
15 that we shouldn't -- there wasn't another area that we
16 should have investigated, there wasn't an expert that we
17 didn't have. That's the type of thing that I was
18 looking at.

19 Q. Did they provide the assurance that there was no gaps in
20 the investigation?

21 A. I didn't ask them to provide me with the assurance
22 because there was -- the person that we met he had his
23 own caseload. I couldn't possibly ask him to sit down
24 and read our whole precognition or all the information
25 and that wouldn't have been the correct thing to do

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1 anyway. What I was looking at was to get as much
2 information as I could about his experience, how he
3 dealt with -- or how they dealt with these types of
4 investigations. So I wasn't looking for him to make an
5 analysis of the case that was my responsibility, I was
6 just looking to inform myself.

7 Q. Did you ask him how he dealt with deaths in custody or
8 deaths following police contact where race was a factor?

9 A. Absolutely, that was the whole focus of why I went down
10 to speak to him.

11 Q. What guidance did he give you?

12 A. He was very generous with his time. He shared the
13 working of the unit that they had down south. He gave
14 me a number of I think statements, marking statements, I
15 can't remember the right terminology, but the documents
16 that they produced when they marked and decided on
17 criminality in a case, and we talked about a number of
18 high-profile cases that they had at that time. I'm
19 sorry I can't remember the names of the particular
20 cases.

21 Q. Don't worry. When you looked at the marking statements
22 used when they decide criminality, was race mentioned on
23 those marking statements?

24 A. I think I had two or three of the marking statements and
25 of course one of the particular aspects that we were

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1 asking about was race and their deaths in custody after
2 restraint where the person was of an ethnic minority.
3 So I don't remember if any of the actual written
4 statements contained those particular circumstances, but
5 it was certainly something that I was interested in
6 discussing.

7 Q. Were these marking statements templates that they used
8 or were they completed statements that were perhaps
9 anonymised or not?

10 A. I think they were completed statements and I don't think
11 they were anonymised.

12 Q. Right.

13 A. But that's only from my recollection.

14 Q. And of those completed statements, were there sections
15 that dealt specifically with evidence regarding race?

16 A. I can't remember, because I can't remember if the
17 written ones were in the particular circumstances where
18 race was involved, but it was certainly something that
19 we discussed.

20 Q. Right. So although the purpose of the meeting was how
21 they dealt with deaths in custody or following police
22 contact where race was a factor, you don't remember if
23 of any of the particular examples of marking statements
24 actually dealt with race or ethnic minorities?

25 A. Exactly.

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1 Q. Is it possible that the examples you were given with
2 these marking statements did not include race or involve
3 an ethnic minority?

4 A. It's absolutely possible.

5 Q. And was there any discussion between you and the
6 Crown Prosecution Service about where race is a factor
7 how that would alter or impact on the marking statement?

8 A. I don't remember, but I do remember that compared to the
9 types of Crown Counsel's instructions that we were
10 routinely preparing in Scotland that those marking
11 statements were much more detailed than here at that
12 stage. Ours are much more detailed now than they were
13 then.

14 Q. So were the marking statements the English equivalent of
15 a Crown Counsel's instruction at that time as opposed to
16 being the equivalent of anything to do with what in
17 Scotland would be a crown precognition?

18 A. Yes.

19 Q. It wasn't a narrative?

20 A. No.

21 Q. It wasn't an analysis?

22 A. No.

23 Q. Nothing like that?

24 A. No, these were the decisions made by the legal teams
25 once they had all the information.

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- 1 Q. So the examples you gave probably didn't include any
2 death of an ethnic minority?
- 3 A. I can't remember.
- 4 Q. You can't remember, okay. Did you any stage -- you've
5 talked about the research, you've talked about the trip
6 to Crown Prosecution Service. Did you at this stage
7 discuss with a Ms McQuaid, or any other qualified person
8 in Crown Office, we understand she was known as an
9 "equality champion", did you discuss with her whether
10 there were other sources of information or support
11 available to you?
- 12 A. Not at the time. I have had subsequent discussions with
13 Ruth McQuaid, but not at the time.
- 14 Q. Was that something you considered at the time might have
15 been of assistance?
- 16 A. I didn't. I didn't consider it at the time, but it may
17 well have been of assistance. I have subsequently been
18 involved in the equality and diversity and I think last
19 year or the year before I think I stood in for the
20 Lord Advocate at the Champion's awards, so I spent
21 I think one or two days at the award ceremony so I
22 learnt a bit about it then.
- 23 Q. Right. When you became or shortly after you became
24 involved as the allocated Advocate Depute, were you
25 aware of any guidelines being available from the IPCC in

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1 England in relation to investigations regarding where
2 race is a factor or was a factor?

3 A. I think I was, because I think Les Brown and I discussed
4 it and he directed me towards the IPCC and the report of
5 the Angiolini Inquiry.

6 Q. And was that something you considered as part of your
7 role in relation to this particular investigation?

8 A. What do you mean?

9 Q. Did you read the IPCC guidelines?

10 A. I can't remember now reading them, but I remember being
11 directed towards them so I obviously did read them. I
12 also remember reading the report, the Angiolini report,
13 but, again, I don't remember the details now at this
14 stage.

15 Q. And was that the Angiolini report from 2017 about deaths
16 in custody?

17 A. Yes, it was.

18 Q. And do you remember -- even if you don't remember the
19 details of either of those documents, do you remember
20 taking any points forward in terms of your work
21 involving Mr Bayoh's death?

22 A. I do remember discussing with Les Brown the Angiolini
23 report. I don't remember discussing the IPCC
24 guidelines, but certainly the report. Les had read it
25 in much greater detail than I had.

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- 1 Q. Right. Was there anything that you -- thinking back
2 now, was there anything that you read, either from the
3 guidelines or from the deaths in custody report, that
4 made you question whether everything had been done in
5 relation to Mr Bayoh's investigation?
- 6 A. I was constantly questioning that we were trying to --
7 was everything done, are we looked at the right things,
8 are we really going that extra mile to unmask any
9 motives? We were constantly questioning and looking to
10 make sure that our investigation was as full as possible
11 and that was the reason for the trip down to see the --
12 our English counterpart.
- 13 Q. So when you became the allocated AD, unmasking motives
14 was something you considered and wanted to pursue?
- 15 A. Of course. That was the major sensitivity in the case.
16 That was made clear to me from the beginning. It was
17 clear to me from the beginning anyway, because I had
18 seen the press long before being the instructed
19 Advocate Depute.
- 20 Q. When you say "the beginning", was that from
21 August/September 2016 it was something you were
22 concerned to pursue?
- 23 A. No, I was aware of it from May of 2015 obviously from
24 the press reporting.
- 25 Q. Right. And did you take any particular steps yourself

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1 or recommend any lines of investigation particularly
2 with regard to unmasking motives?

3 A. I don't recall, but in one of the emails or perhaps one
4 of the notes that you've got from me attached on one of
5 the reports is a list of things that required to be done
6 and there under the heading "mens rea" there is a
7 section on race.

8 Q. Right. And for the public who may not understand mens
9 rea, could you explain what that meant to you in your
10 notes?

11 A. So that's the mental element of the -- of a potential
12 crime, so what was in the minds of the potential accused
13 or potential suspects, when the circumstances, when the
14 factual matrix is unfolding.

15 Q. Thank you. And in terms of unmasking motives and
16 investigating motive and what was in the mind of the
17 people who may be accused or what their state of mind,
18 was racial motivation part of that? Was racial
19 motivation something you were also keen to pursue?

20 A. Absolutely.

21 Q. Yes. Now, let's go back to the minute we looked at a
22 short while ago, COPFS 04543 -- sorry -- COPFS 03853A.
23 So this is the minute from 15 September 2016. You were
24 copied in to that, and we noted at the beginning the
25 purpose was to identify key issues to be explored at

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1 precognition of relevant eye witnesses to the actions of
2 the police officers. We've heard evidence from
3 Les Brown about this minute in some detail. You have
4 explained you don't have a detailed recollection of
5 that -- that -- the meeting that took place.

6 Could we look at page 3, please, and I'm interested
7 in the second paragraph which is above "Conclusion" and
8 it says:

9 "There should also be precognition of the ambulance
10 personnel who attended, including their actions on
11 attendance and the subsequent transportation of
12 Sheku Bayoh to hospital. In addition, during this
13 initial investigative stage, all recordings of airwave
14 broadcasts should be listened to and checked for
15 accuracy with the transcripts provided by PIRC so that
16 the crown can be satisfied as to the state of knowledge
17 of the officers attending. Similarly, all video footage
18 should be viewed."

19 That reference there to the crown being satisfied as
20 to the end "state of knowledge" of the officers
21 attending, is that a factor that is also part of your
22 consideration when you're thinking about what was in the
23 mind of the officers at the time?

24 A. Absolutely. I wanted to know what the officers knew
25 when they arrived at the scene, because obviously there

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1 was a background of a lot more information with regard
2 to reports in the circumstances of the earlier morning
3 before the contact and I wanted to know exactly what
4 each officer knew and we got that -- we would get that
5 from the airwaves.

6 We also investigated from recollection to see if
7 anyone had used mobile telephones or were -- anyone was
8 in contact in an additional way in addition to the
9 airwaves contact.

10 Q. Is it fair to take from this minute that when the
11 meeting took place after this minute that this would
12 have been part of the discussion, the state of knowledge
13 of that officers and lines of investigation to pursue
14 that?

15 A. Yes.

16 Q. Would you say that that was something that you were
17 discussing personally that was of interest to you or was
18 that coming more from the other members of the team?

19 A. At the stage of this meeting I'm listening a lot,
20 because I'm just becoming involved. There had been a
21 period of over a year where that information --
22 information had been coming into Crown Office so I'm
23 trying to absorb and understand what everyone else knew
24 so that I could bring myself up to speed. So I was
25 participating, bring my experience from other cases with

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1 regard to how to approach the preparation of a case for
2 reporting to Crown Counsel, but I was also listening to
3 the information that they had.

4 Q. And in relation to the crown being satisfied as to the
5 state of knowledge of the officers attending, what were
6 your expectations of Alisdair McLeod and Erin Campbell?
7 We've heard other evidence that the precognitions were
8 taken from eye witnesses between the beginning of
9 October 2016 and completed by towards the end of
10 November 2016 and I'm interested in what your
11 expectations were in relation to the precognition
12 process, taking precognitions?

13 A. With regard to the knowledge of the officers?

14 Q. Yes.

15 A. Well, obviously it wasn't the officers that were being
16 precognosed and I understand that particular sentence to
17 be directed at the -- not so much the precognition of
18 the eye witnesses, but the analysis of the information
19 that we had about the instructions to the police
20 officers, the -- where they should go, what information
21 they were given, who attended, the sequence of who was
22 attending, the information as it went along as the
23 incident unfolded as to the further information that was
24 being provided, whether officers briefed each other when
25 they arrived. So that's the kind of thing that I think

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1 they were thinking of in that particular sentence.

2 Q. Thank you. In terms of precognosing the eye witnesses,
3 did you have any involvement in directing lines to adopt
4 in relation to particular witnesses or strategies to
5 adopt with witnesses or topics to cover?

6 A. I don't think on an individual basis I was involved, if
7 you're talking about things like what questions to be
8 asked of a particular witness, I don't think so,
9 although there might have been a particular piece of
10 evidence that had -- that I wanted clarified that I
11 might say "Can we make sure that you raise that with
12 witness X?"

13 Aside from that I think there was an agreed approach
14 with regard to the witnesses, so that was a more
15 traditional taking of the precognition, asking open
16 questions and allowing the witnesses to tell their
17 story.

18 Q. Thank you. And we have heard evidence from Les Brown.
19 Perhaps we could have his statement SBPI 00419 on the
20 screen, paragraph 105. This is a copies of his Inquiry
21 statement which has been signed by him and he has spoken
22 to in evidence and it might be easier for us if we just
23 have that on the screen.

24 So you see the first paragraph there:

25 "A key element of the incremental strategy approved

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1 by the Lord Advocate was to separate out and resolve the
2 issue of potential criminality and to get to a point
3 where Crown Counsel could take a decision in this regard
4 with the necessary confidence, thus permitting the
5 investigation to move forward to other areas in
6 anticipation on an Inquiry whose forum had yet to be
7 determined. It had been hoped initially that the
8 necessary further inquiries could be completed
9 relatively quickly."

10 So that reference there is to what's known as an
11 "incremental strategy" by Les Brown. We have also heard
12 it described as "sequential" or "linear", but my
13 understanding is that initially they were going to look
14 at criminality first and foremost and then move forward.
15 Then if we look at the next paragraph:

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

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1 incident would have been probed, scrutinised and
2 evaluated."

3 Does that description of this incremental strategy,
4 also we've heard this called the sequential strategy,
5 accord with your recollection of the approach that was
6 agreed to be taken to the investigation into Mr Bayoh's
7 death?

8 A. It does and that's my understanding of the approach that
9 was taken with regard to all death investigations where
10 there was potential criminality.

11 Q. And who was it, as far as you recollect, who devised or
12 proposed this strategy?

13 A. I don't know. I understand that the SFIU came into
14 being maybe in 2012, something like that, and I
15 understood that that was the way it worked with regard
16 to the investigation and ultimately the presentation
17 of -- for fatal accident inquiries.

18 Q. We understand it was CAAPD that dealt with the
19 investigation into Mr Bayoh's death; is that your
20 understanding?

21 A. That's correct.

22 Q. To what extent did you expect race to be considered as
23 part of this precognition process?

24 A. It was obviously a very important part of the
25 investigation process, because it was an important part

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1 from my point of view with regard to potential -- the
2 mental element, the mens rea.

3 Q. So when you talked earlier of the motivation and racial
4 motivation --

5 A. Yes.

6 Q. -- was it your expectation that that would be considered
7 from the beginning?

8 A. Yes.

9 Q. Did you give directions or instructions or guidance to
10 any of the precognoscers at that stage in relation to
11 seeking to identify, seeking to investigate, racial
12 motivation?

13 A. I don't remember specifically any guidance with regard
14 to race, but I do remember discussing the importance of
15 understanding the mental element, the mens rea, what the
16 officers were thinking when they went into the
17 situation.

18 Q. Did you make it clear that as part of considering that
19 mental element that race should be also considered?

20 A. Yes, and I have seen that in my handwriting in some of
21 the documents available to the Inquiry.

22 Q. Right. And do you remember specifically which
23 documents? Is this notebooks that you had or can you
24 help us?

25 A. You have it. It's part of the information that was

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1 given back to me. I could probably find it to let you
2 know.

3 Q. That would be very helpful, thank you.

4 A. I think I have the reference as well. Sorry, I can't
5 see. I have got two or three notes with regard to your
6 numbering of documents. I know that I looked at it just
7 last night so at a later stage I can probably find it
8 for you.

9 Q. Well, over the break or over lunchtime please take your
10 time and if you could come back to us on that, that
11 would be very helpful.

12 A. I will do.

13 Q. Now, we have heard from the precognoscer Fiona Carnan
14 who prepared the analysis, so she came in at the end
15 of -- I was going to say 2016, but actually I think it
16 was later than that, 2017?

17 A. I think she came in at the end of 2017, because at some
18 point, as I indicated to you, I didn't have a massive
19 amount of contact with Erin Campbell and at some point
20 Erin moved on to a new post and was taken away from the
21 investigation and I think Alisdair was doing the bulk of
22 the work. There was a real push at the beginning of
23 2018 and I had some big cases trials coming up. I
24 needed to have a full precognition so that I was fully
25 informed and was able then to fit in some consultations

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1 before I started a long-running trial, one in the April
2 and then one towards the end of the summer.

3 Q. Could you explain to the public what you mean by a
4 "long-running trial"?

5 A. Again, in preparation for giving evidence, I looked at
6 some old rotas just to refresh myself of what I was
7 doing at the various times, so although I was allocated
8 Crown Counsel for this investigation, the Bayoh
9 investigation, I was, as I said in my statement,
10 providing high level advice and direction. I had an
11 opportunity, although I don't think a rota-ed
12 opportunity, I think I just had to fit it in around my
13 other work, to read the materials, to familiarise myself
14 with what was coming in to the Crown Office, and so, as
15 we went along I would be able to give Crown Counsel's
16 instructions, but I wasn't only working on this case.

17 At the time there were I think about 30 Advocate
18 Deputes, we have got more than double that now, and so
19 Advocate Deputes are not just looking at allocated
20 cases. At that time, I was just appointed Assistant
21 Principal Crown Counsel so I was doing less management
22 work and more trials, so I would have a full rota of
23 serious and complex trials and the question you asked
24 more was a long-running trial. I think during the
25 period that I was working on this, I had a 13-week

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1 trial, an eight-week trial, a 15-day trial, so those are
2 probably the longer more complex trials as well as that,
3 because, you know, we were manning all the high courts,
4 I picked up the rota-ed trials as well so that would be
5 a four-day, five-day trial. I was covering some of them
6 at the same time.

7 Q. So with other witnesses we have heard that they were
8 perhaps brought in to focus on the investigation
9 regarding Mr Bayoh. That doesn't sound that was akin to
10 your role as allocated AD?

11 A. No, it wasn't. My role was to be -- as we went along,
12 to be as informed as I could be, time allowing, on the
13 material that was available to me and to provide the
14 high-level advice and direction, should the team need
15 it, but my involvement was not in the day-to-day
16 preparation of the crown precognition and, in fact, it
17 would be quite wrong for an Advocate Depute to be
18 involved in the day-to-day preparation of the crown
19 precognition, because the whole point is that we are
20 independent Crown Counsel, that that information comes
21 to us as a prepared piece and then we look at it from an
22 independent viewpoint.

23 Q. And you mentioned a moment ago that you weren't full
24 time and you were not -- this was not rota-ed time that
25 you had available to look at this?

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- 1 A. Yes.
- 2 Q. And can you explain -- you said you were fitting in,
3 explain to us the level of time that you did have to
4 consider papers and work on this investigation?
- 5 A. Initially, I think I had a few days to read the PIRC
6 reports. That was quite dense reading and was quite
7 difficult to assimilate a lot of information over that
8 period. My -- I didn't go through the rotas in detail,
9 but my first block of actual periods where I can see I
10 have got days together out of the rota is not until the
11 early part of 2018, so that's the time where I would be
12 saying to the team, pushing the team, that I needed a
13 final precognition, because I had that time allocated in
14 the rota and I needed to make sure that I had all the
15 information that I required in order to make a final
16 decision and also to be fully prepared in case I needed
17 to consult with any of the experts.
- 18 Q. So until 2018, when you had that time carved out of your
19 diary, can you help the Chair understand the sort of
20 level of commitment that you gave to this particular
21 investigation?
- 22 A. It was doing the initial reading and then the team would
23 send me something. If it was a timeline or it was
24 something to do with the airwaves or they wanted me to
25 have a look at the CCTV, then I would carve out time in

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1 the rota, I would ask for time in the rota for that. As
2 I went through the various rotas, I didn't see the odd
3 day, but I didn't specifically look for that, but that's
4 the type of time commitment that I would be given, two
5 or three days at a time, until I had a continuous period
6 and I think that might have been just over a week.

7 Q. And was that 2018?

8 A. That was in the early part of 2018, but that might have
9 then followed with three or four days here, three or
10 four days there.

11 Q. Thank you. We've heard evidence from Fiona Carnan, as I
12 said, and she's given a statement to the Inquiry. She
13 said:

14 "It was not part of my remit from Mr Brown to
15 consider whether there were grounds for an FAI. My role
16 was restricted to an analysis of evidence in respect of
17 any potential criminality by the police."

18 So the remit was limited to analysis of whether
19 there was evidence of criminality. And we've also heard
20 from Mr Brown on 19 April, one of the days he gave
21 evidence, where he was talking about this incremental
22 process and he was asked questions by the Chair about
23 the focus on criminality and what things would be left
24 for further investigation in the event that no
25 proceedings were taken and Mr Brown explained that

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1 factors such as race and exploration with the officers
2 of their considerations was going to be left until a
3 later stage.

4 And we've also asked Mr Logue about this, John Logue
5 gave evidence at the previous hearing 23/24 April, and
6 he wasn't aware of this incremental strategy being
7 agreed or the approach that was agreed for this
8 investigation. He took the view, and I quote:

9 "What I would expect to happen is that an
10 investigation would identify a number of issues which
11 needed to be considered. Questions of criminality was
12 an immediate or was an obvious issue which would need to
13 be explored in the investigation and in simple terms was
14 an immediate priority. There may be wider issues which
15 relate to broader learning which could come out of a
16 fatal accident inquiry or an inquiry of this nature, but
17 the priority would be to reach a decision on the
18 criminal aspects as quickly as possible but I would not
19 expect that that would mean that those individual
20 elements would be isolated off from each other and dealt
21 with one at a time. The investigation I would expect
22 would have an understanding of all of them and be trying
23 to make progress on all of them at the same time.
24 I think our approach as much as possible is to progress
25 the whole investigation."

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1 So on the one hand we have heard from Fiona Carnan
2 who felt she was only looking at criminality and her and
3 Les Brown thought race would be dealt with later. I'm
4 summarising of course. John Logue thought that race
5 would be very much part of the whole picture. And I'm
6 interested in what your expectations were at that time.
7 Was it the incremental strategy where race would be left
8 until a later date, maybe when an FAI was considered, or
9 was it, as you have said, weaved into the investigation
10 from the beginning?

11 A. It's the latter. So it is an incremental approach, but
12 race was very much a focus of the criminal
13 investigation, but it was anticipated that race and
14 other aspects could be dealt with in more detail once
15 the issue of criminality had been decided. So it's not
16 that it was syphoned off and put to one side, it was
17 that we would go -- we could only go so far, perhaps
18 with regard to the race, because the obvious next step
19 once the step had been taken with regard to criminality
20 was further statements from police officers and so that
21 could only be done at the stage where there was a
22 decision on criminality.

23 Q. So certain elements of the investigation could be left
24 until later, but race as a whole would not be left until
25 later. That was your understanding.

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1 A. Yes, and of course when we were looking to make a
2 decision with regard to criminality, then we had to make
3 sure that our investigation was focused, so we couldn't
4 go off exploring perhaps something that might be
5 explored in the wider sense at an FAI. We had to stop
6 somewhere, but it definitely was part of that criminal
7 investigation.

8 Q. But in terms of --

9 LORD BRACADALE: Sorry to interrupt. Can I just ask you,
10 Ms Edwards, as this process was going on, did you ever
11 write a document, write a note indicating what you
12 wanted done?

13 A. With regard to --

14 LORD BRACADALE: First of all, as a general proposition and,
15 secondly and particularly, in relation to the matter of
16 how race was to be addressed.

17 A. No, I don't think I ever committed into a formal
18 writing, apart from the notes -- my own notes for myself
19 and the discussions that were had at meetings.

20 LORD BRACADALE: Do you think it would have assisted if you
21 had done something like that?

22 A. It certainly would have assisted me today and giving
23 evidence to the Inquiry. Would it have made a decision
24 with regard to the actual inquiry that was taking place
25 at the time, I'm not sure, because I was satisfied at

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1 the time that they were carrying out all the
2 investigations that they could -- they could with regard
3 to race, because that was the subject of a number of
4 discussions.

5 LORD BRACADALE: Thank you.

6 MS GRAHAME: Thank you. We've heard from Mr Logue as I
7 explained and he agreed with the Chair's questions that:
8 "You couldn't consider the question of criminality
9 without considering the question of race."

10 Is that a comment that you would agree with?

11 A. I would.

12 Q. And Mr Logue would have expected CAAPD to investigate
13 race as part of their exercise of investigating
14 criminality, would you agree with that?

15 A. I would.

16 Q. He also said that he would see an investigation into
17 race as being part of a thorough investigation and he
18 also said that would be of the kind that would inspire
19 confidence in the family; would you agree with that?

20 A. Yes, there's nothing there that I would disagree with.

21 Q. Thank you. And we've heard from Stephen McGowan who
22 said:

23 "I was not of the view that what was being held back
24 was consideration of race. Race insofar as it was
25 relevant to the question of criminality was something

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1 that would be covered."

2 Would you agree with his comments about that?

3 A. I would.

4 Q. Now, we spoke to Les Brown about this in evidence and he
5 had given an Inquiry statement, which we have got on the
6 screen, could we look at page 60, please. Some of his
7 paragraph numbers and answers span a number of pages.
8 It's page 60 that I'm interested in. And it begins "My
9 advice", so I wonder if we can just look down a bit, or
10 look up. Could we look at the top of the page, please?
11 Here we are:

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

21 And is that a comment that you would agree with?

22 A. I would.

23 Q. Now, I asked him about an apparent tension that appeared
24 to exist in relation to the evidence from Fiona Carnan
25 where she said race would be looked at. She was

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1 exclusively focused on criminality. We've heard that
2 had she found criminality, she would then have gone on
3 to consider a racial aggravation, but she did not
4 consider race as part of her assessment of criminality.
5 And I asked Mr Brown about that tension where he is
6 saying here it's a continuous process, racial motivation
7 should be considered, but that is not what, apparently,
8 it will be a matter for the Chair, wasn't what
9 Fiona Carnan was doing.

10 And I'm interested in your thoughts about the fact
11 that we've heard evidence from Fiona Carnan that isn't
12 the approach she was taking.

13 A. To be fair to Fiona Carnan, she was brought into the
14 team quite late in the day, was given -- excuse me -- a
15 specific task with regard to the writing of part of the
16 precognition. I of course, at the end of the day, had
17 access to the full precognition which includes all the
18 source documents, so I wasn't too concerned with what
19 finally was in the analysis in the precognition, because
20 it was absolutely open to me to make my own analysis
21 with regard to the information contained in the
22 narrative and in the source documents and using my
23 knowledge of the case and the information that I had
24 gleaned in the process of compiling the -- of the team
25 compiling the precognition.

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1 Q. And you have spoken of Crown Counsel being independent
2 and looked at things independently, was that approach in
3 which you read through the narrative and the analysis?

4 A. Absolutely. I needed those source documents, I needed
5 the precognition, the completed precognition, so I could
6 have a full picture so I could know what they knew, but
7 that didn't stop me bringing my own analysis and in fact
8 that's what my job is, to bring my own analysis, not
9 only from the information highlighted in the narrative,
10 but from the source documents.

11 Q. We've heard that the narrative was prepared by
12 Alisdair McLeod and Erin Campbell and the analysis was
13 prepared by Fiona Carnan. And we've heard that the
14 analysis that was undertaken by Fiona Carnan effectively
15 considered criminality alone and then only was going to
16 consider race insofar as it applied to perhaps racial
17 aggravation to an offence.

18 When you received the crown precognition, the
19 narrative and the analysis, did you realise that the
20 issue of race had been dealt with in that way by
21 Fiona Carnan?

22 A. I obviously would have realised that it wasn't mentioned
23 in the analysis. It is mentioned -- there's a section
24 in the narrative and being involved at a higher level
25 for the last -- for the previous two years. It was a

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1 factor that was always there, so whether it was
2 mentioned in the analysis or not really didn't make any
3 difference.

4 Q. Did you consider it was part of your role to ask
5 Fiona Carnan to go back and to review the analysis part
6 or to do any further -- further analysis in relation to
7 race and racial motivation?

8 A. If I had had time in the early and late 2018, I might
9 have done that, but I didn't in this particular case.
10 I am aware that I had some of the early draft narratives
11 in and that as the information was coming in, I had
12 understood that a further expert had, for example,
13 changed our understanding with regard to the CCTV and
14 the audio that went with the various visual clips and I
15 understood that at that point that the draft narrative
16 was to be refreshed from that point of view. So I had
17 an involvement at that kind of level.

18 If I had thought about it subsequently and I hadn't
19 then moved on to something else, I might have said
20 I think you should go back and have a look at that. I
21 did something very similar. I was involved in the M9
22 investigation which started from me almost immediately
23 when this one finished and I did that very thing. My
24 analysis, my analysis of the case and our discussions, I
25 suggested to the team that they go back and look at the

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1 analysis and on the basis of the understanding that I
2 had with regard to criminality there. So it's something
3 that I have done before, but it's not something that I
4 did here.

5 Q. So it would have been open to you in your role as
6 allocated AD?

7 A. If I had thought it was important from the -- I guess a
8 recordkeeping point of view, that would have been open
9 to me.

10 Q. Okay. Did you not consider that an analysis of race and
11 racial motivation was important even from a
12 recordkeeping point of view?

13 A. It was important, but from my point of view, I had --
14 I was satisfied that I had understood and looked at the
15 source documents and had analysed the information that
16 was available to me, the wider information in the
17 correct manner. So from a recordkeeping point of view,
18 then I think that's a fair comment, but, again,
19 Advocate Deputes have to be careful that they are not
20 over-influencing what's in the precognition, that what
21 is coming to us is the work of someone else and not
22 something that we have -- we have channeled and produced
23 ourselves. That's not the purpose of the precognition.

24 Q. When you say you looked at source documents, can you
25 remember now which source documents you analysed in

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- 1 relation to the issue of race and racial motivation?
- 2 A. Well, I won't have looked at all four or five hundred
3 statements in full, I had the summaries available to me,
4 but I do know from my -- from my notes and my subsequent
5 emails and the precognitions that I did and the meetings
6 that I had with the media team at Gartcosh that I had a
7 detailed knowledge of the civilian and police witness
8 statements, because I was involved -- I don't have many
9 memories of meetings, but I do remember going to
10 Gartcosh and speaking to technical people there who were
11 going to produce the body positions and I remember --
12 I think it might actually only have been me that was
13 there that day, so I remember they had produced a
14 provisional CCTV or compilation, I had seen it and then
15 it wasn't quite my understanding of the witnesses'
16 evidence so I had gone back to them and I put detailed
17 propositions to them. So in order to do that I would
18 have had a pretty good working knowledge of the actual
19 statements.
- 20 Q. Which statements in particular did you look at that were
21 most important and relevant to assessing the state of
22 mind and the mindset of the officers?
- 23 A. Okay. Well, from recollection, there was nothing in the
24 independent, the civilian witnesses, that would suggest
25 any overt racism, so there was no shouting at the time

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1 of the incident that would suggest overt racism so I was
2 looked at the individual history of the officers.
3 I think we looked at their disciplinary records. There
4 were a number of officers where there had been previous
5 incidents that we looked at. I looked at some material
6 with regard to another particular live case. I would be
7 looking at the statements of the officers that were
8 given at the time, although I was aware that they
9 weren't given immediately after the incident and there
10 was a time gap in the giving of the statements.

11 So I would be looking at the -- what they said the
12 state of their knowledge was and how that tied in with
13 the information that we knew that went over the
14 airwaves. That was why we were looking really closely
15 as to whether the information that the police officers
16 had was only the airwaves or that they had had access to
17 other forms of communication, because there were things
18 creeping in -- as my recollection is, there were things
19 creeping into the statements that perhaps wouldn't have
20 been in the knowledge of police officers at the time.

21 I also wanted to know a bit more about some of the
22 information that they gave in their statements about the
23 state of alert of the forces in Scotland in general and
24 any associations they had made with other cases and my
25 recollection was that there was an indication that there

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1 was association made with the Lee Rigby case. So those
2 are the kind of things that I would be looking at and
3 all the other facts and circumstances in order to look
4 at the mens rea.

5 Q. And did you look at the statements of the police
6 officers with a view specifically to considering racial
7 motivation?

8 A. Yes.

9 Q. And that was even in the absence of any analysis done by
10 Fiona Carnan within the crown precognition?

11 A. That analysis was coming right at the end of the
12 process. We're talking about much earlier in my
13 involvement. The end of the process was really me
14 saying to the team, "I need you to finish up and I need
15 everything that you're going to give me so that I can
16 move on to the next stage, because this is the time I
17 have got on the rota".

18 Q. Right. Do you feel now, looking back, that you put the
19 team under some pressure to fit in with your diary and
20 your rota?

21 A. It wasn't just pressure to fit in with my diary, it was
22 time pressure. As you've already observed, this linear
23 approach sometimes builds in that extra timeframe into
24 an incident and up until FAI and we were conscious of
25 that. We were conscious of the family, we were

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1 conscious of our duties, we were conscious of time
2 passing and so there was a time pressure.

3 Q. Right.

4 A. We didn't have endless time to spend -- we didn't have
5 endless time to spend on the precognition. We really
6 needed to have it finished and for a decision to be
7 made.

8 Q. Thank you. Now, there was something you mentioned
9 earlier I would like to touch on. You said an expert
10 had changed your understanding and the draft narrative
11 was refreshed.

12 Do you remember what that was in connection with?

13 A. I don't -- the expert didn't initially change my
14 understanding. That was information that came from the
15 team, and it was something to do with what we are seeing
16 on the video and the airwaves messages. My recollection
17 is it might have been something to do with the call-out
18 officer down and the timing. And from recollection an
19 expert, and I don't recall what expert it was, suggested
20 that the way we had been looking at it and synchronising
21 it previously was not quite right and that the officer
22 down was not to do with Nicole Short and that that was
23 actually taking place off camera. That's my
24 recollection, the best of my recollection at this stage.

25 Q. So it doesn't sound like it was a medical expert. Could

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- 1 it have been an expert in relation to training and
2 restraint and matters of those sorts?
- 3 A. I can't remember if it was an OST expert, because,
4 again, I know he came into the case quite late in the
5 day, because it took us quite a long time to identify a
6 suitable expert. I can't remember, but I do know that
7 there are -- again, there are some notes and you have
8 them. I also see in the narrative you've got you have
9 my copy of the papers, so the writing in the narrative
10 and in the papers is mine.
- 11 Q. Right, I see.
- 12 A. And at that stage, there is a bit that says "agreed" and
13 that's to do with the dovetailing of the CCTV and the
14 airwaves. You also have my notes and I was asked about
15 this in my statement, where it says "changes something
16 in the narrative" or "changed something in the
17 narrative" and I think I had pointed out in my statement
18 that it says "changes" and that that was my
19 understanding that I had already had a draft narrative
20 at that point.
- 21 Q. Right. And when did you receive these draft narratives?
- 22 A. I think as we were going along, as Alisdair was
23 completing various sections, he was probably showing
24 them to me and I was reading them.
- 25 Q. Right. So were you reading into the narrative as it was

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- 1 being prepared?
- 2 A. Absolutely.
- 3 Q. And how many draft narratives did you receive?
- 4 A. I can't remember.
- 5 Q. Do you remember when you got your first narrative?
- 6 A. No, and it might not have been a completed narrative, it
7 might have been section 1 or 2 and I will have had sight
8 of those and that's because I was pushing to say I need
9 you to -- I need us to produce something.
- 10 Q. And do your notes provide anything like an audit trail
11 of what you had at what time?
- 12 A. I'm not as well organised as that, I wish I had been,
13 and I wish my writing was a little better as well.
- 14 Q. Thank you. I'm going to move on now to the next issue
15 I want to cover, but I'm conscious it's now 28 minutes
16 past.
- 17 LORD BRACADALE: We'll take a 20-minute break at this point.
18 (11.28 am)
- 19 (A short break)
- 20 (11.57 am)
- 21 LORD BRACADALE: Ms Grahame.
- 22 MS GRAHAME: Thank you. I was about to move on to an issue
23 of admissibility of the officers' statements and we've
24 heard evidence earlier in the Inquiry about the
25 Fiona Carnan, the precognoscer's handling of the

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1 statements from the officers that they had given to PIRC
2 on 4 June 2015, and she explained to the Chair that she
3 had treated them as inadmissible for the purposes of
4 considering criminality against the officers, but she
5 had treated them as admissible for the purposes of
6 looking at their explanations and justifications for the
7 use of force and she described that as a cautious
8 approach.

9 Now, when we explored that with Les Brown in
10 evidence, he said he was aware that Crown Counsel didn't
11 agree with that and that there was an alternative
12 approach that was not the cautious approach but rather
13 as the officers were at all times treated as witnesses
14 that their statements would be admissible, admissible
15 for all purposes, both insofar as it may relate to
16 evidence of criminality against officers, but also in
17 relation to justification for use of force.

18 And I wondered if that evidence from Les Brown
19 accords with your recollection of your views on
20 admissibility.

21 A. I think there are a number of elements there. The first
22 is that I think the cautious approach is to take the
23 crown case at its highest, potentially, and to say that
24 the statements would be admissible. I think that is the
25 cautious approach, so the minimum that we could have in

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1 the available evidence.

2 I formed a view. I don't know if I discussed it
3 with Les before I had the precognition or as it was
4 coming to me or once I had the final precognition, which
5 was including the analysis, but I had looked at the case
6 of Gillroy and I had formed the view that potentially
7 those statements could be admissible. There may
8 subsequently have been an argument about them, but I
9 could see that there was a good argument to support for
10 if the crown ultimately there was a criminal trial and
11 the crown wanted to use those statements, I thought
12 there was a good argument that they would be admissible
13 in terms of at the case of Gillroy.

14 Q. And we have heard evidence that the analysis section of
15 the crown precognition did not contain any real
16 discussion or explanation as to the approach taken by
17 the precognoscer, no reference to case law, no analysis
18 of any arguments, pros, cons, nothing of that sort.

19 Now, I appreciate you have explained earlier before
20 the break that you were the allocated AD. Did you
21 consider in relation to this issue to ask Fiona Carnan
22 to go back and present to draft -- redraft the
23 narrative -- the analysis to present an argument and a
24 conclusion on that or to align that with your thoughts?

25 A. In terms of my earlier answer, no, I didn't ask her to

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1 go and do that.

2 Q. Right. Do you not think now that there may have been
3 benefit in asking for that to be reviewed, redrafted,
4 for a full analysis to be prepared on the question of
5 admissibility?

6 A. I think there would have been benefit in me pointing out
7 that that perhaps should be looked at and to go away and
8 have a look at the case law and come back with the
9 recommendation. I don't think it would have been
10 beneficial for me to say "Here's my viewpoint. Put it
11 in the analysis". That's not what it's about, but it
12 might have been an idea to direct Fiona to say, okay,
13 I think you should go back and have a look at
14 admissibility, without influencing that final
15 recommendation.

16 Q. And thinking now do you think that maybe there was an
17 opportunity for Fiona Carnan to do that and maybe that
18 should have been an opportunity that was taken at the
19 time?

20 A. It was an opportunity. I don't think it's something
21 that would have taken very long, but maybe at that stage
22 I was in a better position to make that argument in my
23 own head, rather than the case preparer, because
24 obviously I had argued that very point in a number of
25 cases, I had followed the various trials where that had

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1 become an issue, so maybe I had more knowledge at that
2 stage, and it may well have been simply a paper
3 exercise --

4 Q. Did you --

5 A. -- when I know that time was short.

6 Q. Did you consider that it may have been of benefit to the
7 precognoscer, not even just for this case, but for other
8 cases for her to -- for you to have shared that
9 knowledge with her?

10 A. In retrospect, yes.

11 Q. Did you put anything down in writing in relation to the
12 question of admissibility yourself? Earlier the Chair
13 asked if you had prepared any notes or any minutes or
14 summaries.

15 A. No, there was no specific request for formal CCI in
16 that, you know, of the type that you are anticipating
17 there. If there had been a request, we're struggling
18 with admissibility, can you give us a bit more -- a bit
19 of help on it, then that's something I might not have
20 prepared an analysis of the law myself, I might have
21 asked the Crown Counsel trainee to go away and do a
22 paper and then I would have incorporated that into
23 Crown Counsel's instructions.

24 Reflecting in the break with regard to the question
25 that the Chair asked me about whether in advance I had

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1 prepared something, I guess something similar to a note
2 in the line or the investigative strategy, that wasn't
3 done by me in this case. Obviously, by the time it came
4 to the meeting of the 15 September, that document or
5 that email or that minute was already prepared, but now,
6 as part of the process in our very large and complex
7 cases, right at the time of reporting, so before there's
8 an SPR from the police, a standard prosecution report,
9 or better one of the other reporting agencies have
10 reported, there may well be an allocated Advocate Depute
11 right at the beginning and there is now a detailed
12 investigative strategy drafted, usually by the case
13 preparation team, and it's revised by the Advocate
14 Depute.

15 So I can think of at least three large ongoing
16 investigations where there has been a detailed lengthy
17 investigative strategy which has been revised by the
18 Advocate Depute and is for the purposes of directing the
19 investigation at the stage of the reporting body.

20 Q. So that wasn't the position in 2015?

21 A. No, and of course by the time I came to be the
22 Allocated Depute, we had long passed that stage.

23 Q. And if that had been in the position we have heard
24 obviously the events happened in May 2015, the interim
25 PIRC report was August 2015 and then the final PIRC

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- 1 report was August 2016, nowadays, when would this
2 detailed investigative strategy be prepared?
- 3 A. You might well get an Advocate Depute allocated right at
4 the stage of May 2015 before anybody has reported in and
5 that Advocate Depute will be involved in the same way as
6 I have described in this case, high level advice and
7 direction, but from -- right from the start.
- 8 Q. And if race was anticipated as being a factor in that
9 investigation, would you anticipate that the
10 investigative strategy prepared would incorporate any
11 detailed investigations in relation to race?
- 12 A. Yes.
- 13 Q. Nowadays?
- 14 A. If you're talking about the type of document that's
15 prepared now, and I have had sight of the three specific
16 documents that I'm talking about before they were
17 issued, and, yes, they are very, very detailed,
18 particularly with directing, for example, police
19 officers in the types of information that we want with a
20 view to looking at specific crimes.
- 21 Q. And that could include mens rea, racial motivation, that
22 type of thing?
- 23 A. That's correct, and over the break I did look at the
24 document that you asked me to look out for.
- 25 Q. Right.

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1 A. I think the witness lady emailed in, but the document is
2 COPFS 05190 and mine has an AE on the end of it so
3 I don't know if yours has as well.

4 Q. Could you repeat that, COPFS 05190 and there's an A?
5 A. AE at the end.

6 Q. That's not reached me yet.
7 A. Okay.

8 Q. What I'll do is over the break at lunchtime I'll look at
9 that document and we'll --

10 A. I can tell you what it is. It's the briefing of the
11 15 September and it looks like I had in advance of that
12 meeting printed out a copy and it's my notes at the
13 bottom and there is a section with regard to mens rea.

14 Q. Okay.
15 A. My recollection is that when I was talking about it
16 earlier was that specifically race was mentioned, but
17 it's not. It's the elements of mens rea that I want
18 investigated.

19 Q. So there was no mention of race?
20 A. There was mention of what was in the minds of the police
21 officer, there was mention of a terrorist act, there was
22 mention of the alert level. You will be able to see it
23 once --

24 Q. I understand there is some technical issue. That's why
25 I don't already have it.

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- 1 A. Okay.
- 2 Q. But I'll look at that hopefully over the lunch break and
3 we can come back to that.
- 4 A. So that kind of develops the question that you were
5 asking me about Crown Counsel's input into the
6 investigative strategy. I didn't have an input into
7 that document being prepared. It was obviously
8 presented to me at the meeting and there are my notes
9 about what further I think should be developed and
10 potentially what I probably should have done in
11 retrospect and been having asked that question, perhaps
12 I could have incorporated that into some written
13 document, but I haven't done that.
- 14 Q. All right.
- 15 A. As far as I'm aware.
- 16 Q. You have talked about a process now where they have a
17 detailed investigative strategy. Now, I asked you to
18 look at a minute earlier today from 15 September 2015,
19 which had been prepared by Les Brown in advance of a
20 meeting he spoke of in evidence. Let me just check the
21 document number. I think it's COPFS 03853A, and this is
22 what we looked at earlier.
- 23 A. That's the document I looked at in the break, but I
24 obviously had a printed out document for the meeting and
25 I'd handwritten on the bottom of it and that's the

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1 reference of the document I have given you.

2 Q. Am I correct in thinking that what you have been
3 describing as a detailed investigative strategy that's
4 drafted and revised by an Advocate Depute, that's not
5 this type of minute?

6 A. It contains -- it will contain some of the similarities
7 with regard to the next process and the actual
8 investigation, but the document that I'm thinking of is
9 at a much earlier stage and involves the reporting
10 agency as well, if they need direction.

11 Q. So it may be similar to this type of minute?

12 A. Yes.

13 Q. Can we look at this minute. We didn't go through the
14 details. We looked at the purpose, the background was
15 given. We've looked briefly at the issue discussion, an
16 incremental approach having been taken. There was a
17 discussion at the bottom of the page we see there:

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

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1 the precognition of this themselves or at least the
2 relevant parts will also require to be disclosed to
3 Aamar Anwar."

4 And then there's mention of Mr Anwar. Then:

5 "During the precognition of the eye witnesses areas
6 of potential conflict with the statements provided by
7 the officers in attendance should be fully explored.
8 One of the main purposes of this exercise is to
9 ascertain the extent to which the account given by
10 civilians coincides with accounts by police."

11 And then:

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

15 And there's mention there of the actions of Mr Bayoh
16 prior to the arrival of the police, discharge of sprays,
17 use of batons, actions of Mr Bayoh towards police
18 officers, the restraint process, issues about the
19 postmortem report, issues about one of the witnesses,
20 Ashley Wyse.

21 So there's a number of bulletpoints. We have
22 discussed all of this with Les Brown who drafted this
23 minute and then at the bottom we did look at page 3 and
24 I asked you earlier about ambulance personnel and the
25 state of mind of the officers, that type of thing.

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1 So this is a sort of detailed list of bulletpoints
2 and they cover a number of different areas on which the
3 crown have an interest. Is this the type of thing then
4 that is contained in a detailed investigative strategy
5 that's drafted nowadays or is it something -- nowadays
6 is it something more longer, more comprehensive?

7 A. It is longer and it's more comprehensive. It depends on
8 the nature of the inquiry, but the particular one I'm
9 thinking of was an approach to issues over a wide range.
10 It wasn't a particular incident, so it was a number of
11 potential failings, and the other one I'm thinking about
12 is, again, wide-ranging and doesn't involve one specific
13 case. So it was how often the investigative strategy
14 will target and instruct the police on how to triage,
15 for example, concentrate on X case, perhaps the other
16 case doesn't need to be concentrated on now, that kind
17 of thing.

18 Q. You've told us before the break today that race, racial
19 motivation was significant and something you were
20 considering from the very beginning. You've told us
21 just now that you had a copy of this minute before the
22 meeting that you attended. And I'll be corrected if I'm
23 wrong, but this minute doesn't explore the issue of
24 race?

25 A. No, it doesn't.

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1 Q. And given your own thoughts about the significance of
2 race and racial motivation and mens rea and the state of
3 mind of the officers, can you explain why there's no
4 mention of that?

5 A. Well, obviously I didn't draft the document.

6 Q. Of course, yes.

7 A. And I came to the meeting. This was essentially the
8 briefing to me. This was the start of my -- as I
9 understand it, the start of my involvement. I was
10 satisfied that the information that was being sought
11 would give me enough to start off with looking at mens
12 rea and race and the notes that I have made at the
13 bottom, which I have referred to and I have given you
14 the number, amplify on how I think the mens rea needs to
15 be developed.

16 Subsequently -- I don't know if I was aware at this
17 time. Subsequently, I was aware that there were the
18 other investigations that were ongoing with regard to
19 race and that was looking into the disciplinary
20 background of the police officers.

21 Q. And we've heard evidence that there was a formal letter
22 sent after the interim PIRC report which the letter was
23 dated 2 September, which did raise for the first time
24 the issue of race by the crown?

25 A. Just before this meeting.

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1 Q. Sorry, 2 September 2015.

2 A. Okay.

3 Q. So this meeting was 2016, after the final PIRC report.

4 Sorry. I should have been clear about that. There was
5 an interim PIRC report in 2015 in the August sent to the
6 crown and then a final PIRC report sent to the crown in
7 August 2016 and you became involved after the final PIRC
8 report.

9 A. That's correct and my understanding is there was a
10 section in the PIRC report dealing with race. That's my
11 recollection. I don't remember the details of it, but I
12 do remember it was in one of the volumes.

13 Q. And that was the final PIRC report?

14 A. Yes.

15 Q. Right. I will move on from the issue of admissibility.

16 I would like to ask you about the issue of causation.
17 We heard evidence from Les Brown that we spoke to
18 Fiona Carnan about causation and she explained that the
19 analysis did not contain any detailed analysis of case
20 law or the test for causation or anything of that sort,
21 and we spoke to Les Brown in evidence about this. And
22 he explained that there was an assumption made and the
23 crown proceeded on the basis that causation was not
24 going to be an issue.

25 And he gave evidence that you and he had had a

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1 conversation about causation and I think at one point he
2 recollected you giving him a copy of a case called
3 Johnston v HMA and that your approach on causation was
4 independent of Fiona Carnan, if I can say that. Does
5 that accord with your recollection?

6 A. It does.

7 Q. Can you remember more about the conversation you had
8 with Mr Brown?

9 A. I can't. I can't remember when it took place, because
10 obviously I'm only coming to a concluded view once I
11 have managed to consult with the experts and any
12 outstanding queries that I had after reading the reports
13 was satisfied. I might have formed an initial view when
14 I'm looking at the case of Johnston and I think the case
15 of Geddes as well I looked at. I suspect those
16 conversations came about the time we were doing the
17 consultations, which is in the May of 2018 just before I
18 issued my CCI.

19 Q. So this was after you had received the analysis from
20 Ms Carnan?

21 A. I think -- I think I probably wouldn't have formulated
22 in my head my final position until I knew what my
23 argument would be. Again, what I'm doing is I'm
24 thinking about -- forward to any potential trial that I
25 would be running. I would be looking at the potential

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1 defence objections with regard to causation, so I would
2 be thinking about all the arguments as to what could be
3 brought up as to objections with regard to making that
4 causal link.

5 So all of those things in my head I'm exploring, I'm
6 looking at. I'm looking at all the expert medical
7 evidence to support whether I could make a strong
8 argument for a causal link and I think -- I think the
9 Geddes case assisted me in that that it doesn't just
10 have to be the medical or expert reports, that the jury
11 is entitled to look at all the circumstances.

12 Q. Right. So that would be the circumstances in
13 Hayfield Road?

14 A. Ye's.

15 Q. At the point at which we've heard evidence that Mr Bayoh
16 was rendered unconscious at one point --

17 A. Yes.

18 Q. -- during the restraint?

19 A. Yes.

20 Q. So that evidence would be relevant for the crown also?

21 A. Absolutely, and that internal process that I'm taking
22 you through is a process of analysing the evidence for
23 the crown at its highest that I would be able to present
24 to a jury, so none of the things about disciplinary
25 records or anything like that, only the factual basis

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- 1 that I could present to a jury.
- 2 Q. What was your view about causation?
- 3 A. I think there was a good argument for a causal link.
- 4 I think it was perhaps not the initial causal link that
- 5 we might have thought -- that I might have thought
- 6 coming into it with regard to the press reports and the
- 7 circumstances on the face of it, but I think,
- 8 ultimately, the preponderance of experts came down to
- 9 the conclusion that the struggling against restraint was
- 10 a significant feature, so rather than asphyxiation being
- 11 a significant feature, there was another medical
- 12 mechanism or explanation.
- 13 Q. And do you remember now what the postmortem stated as
- 14 the cause of death?
- 15 A. I can't remember specifically, but I think it was 1A, 1B
- 16 and while being strained was in there, but I think the
- 17 reviewing expert and some of the other experts indicated
- 18 that they thought that the struggling, the extra oxygen
- 19 requirement for the heart and the other organs, was a
- 20 significant factor.
- 21 Q. And restraint was also a significant factor?
- 22 A. Well, the struggling was in the context of the
- 23 restraint, so I think from memory, there was a
- 24 suggestion that if some others had been doing the
- 25 postmortem or issuing the cause of death that they might

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1 have included the word "struggling". That's my memory.

2 Q. Right. But in terms of your approach to considering the
3 crown's highest case at its highest, that where
4 Les Brown gave evidence to the Chair that causation or
5 the cause of death was a given, would you agree with
6 that?

7 A. It was a given in my thinking. That was the basis that
8 I moved forward on.

9 Q. And then you've mentioned considering potential defence
10 objections, explain that factor for us, please?

11 A. When I'm analysing -- when any Advocate Depute is
12 analysing a case that may well result in criminal
13 proceedings, they're looking to the final proceedings,
14 they're looking to admissibility, they're looking for
15 potential answers that an accused person or defendant
16 would come up with. When I say "come up with", I don't
17 mean simply make up. I just mean avenues that might be
18 presented. Those are the things that we need to think
19 of in advance to make sure that we have got enough
20 information about that and to make sure that we can
21 counter that argument.

22 Q. We'll come on to cause of death again later in more
23 detail when I look at the consultations that you had,
24 but from your description we have a situation where you
25 have disagreed with the analysis in relation to

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1 admissibility, you have potentially had a different
2 opinion in relation to causation from the analysis. I'm
3 wondering were you starting to think that this should
4 have been revised, that you should have gone back to the
5 precognoscer and said, I think more analysis is required
6 here, because here are two very clear examples of where
7 you just completely don't agree with the issue of
8 causation or admissibility?

9 A. I don't think that's a bad thing. I think that's part
10 of the process and that's what independent Crown Counsel
11 brings to the decision-making process. I think that's
12 part of our job and I don't think -- routinely, we will
13 disagree with recommendations and analysis and that's
14 essentially what we're there for, so I don't see that as
15 a bad thing. I see that as checks and balances.

16 Q. And in terms of you've said you had a conversation with
17 Les Brown about causation at least?

18 A. I suspect I had more than one conversation.

19 Q. I'm sure, but in relation to that you had a
20 conversation. Was there anything noted or any analysis
21 prepared by you which would have provided some sort of
22 audit trail of the areas where you disagreed or did
23 not -- your views did not align with those of the
24 precognoscer?

25 A. I don't know if that's something that has appeared as we

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1 go along, because I think this might have been taking
2 place just prior to me issuing my CCI and my
3 recollection is that that is in the report to the law
4 officer, to the Lord Advocate at the time.

5 Q. And for those members of the public who are listening,
6 and we've said CCI means Crown Counsel instruction, and
7 without going into the analysis of that, can you explain
8 to the public who are listening what a CCI looks like,
9 what it is?

10 A. So a Crown Counsel instruction will usually set out the
11 materials that have been considered. They will set out
12 the things that we think needed to be highlighted from
13 the narrative that have been important, any legal
14 analysis to the factual matrix and then a decision about
15 what should be done.

16 The Crown Counsel's instructions are now all
17 standardised. There is a Crown Counsel instruction
18 template. In the very early days, Crown Counsel
19 instructions were handwritten, you may remember, on
20 little blue bits of paper and they were simply attached
21 to the front of hard copy papers. They may well be
22 brief historically. They might just be three words
23 "Proceed High Court".

24 By the time I was writing the CCI in this case,
25 they're a bit more detailed, but they're even more

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1 detailed now. So now Crown Counsel are directed to the
2 materials that they have considered, the information on
3 the knowledge bank, so the marking instructions, any
4 operating instructions, any other published directives
5 by COPFS. They are directed to apply their mind to the
6 Prosecution Code, to the materials that have been
7 considered, to -- for example, Article 2 considerations
8 and UNCRC and then, ultimately, at the bottom of the
9 CCI -- at the top of the CCI is the summary, then they
10 go through all that process and then at the bottom any
11 further instructions that follow on from their marking
12 decision. So that wasn't a format in those days, but it
13 was fuller than the handwritten "Proceed to High Court".

14 Q. And in terms -- again, thinking just from the process
15 and procedural side of things, if there were areas where
16 Crown Counsel took an independent view from that
17 expressed in the crown precognition, is that the type of
18 thing that was included within your CCI?

19 A. Yes, including an analysis. If I disagreed with
20 something in the analysis of recommendation, then
21 ordinarily I would put that in the CCI.

22 Q. And that was occurring in 2015?

23 A. It was.

24 Q. 2016?

25 A. It was.

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1 Q. 2018?

2 A. Yes, but now there is a particular section in the CCI
3 template which directs an Advocate Depute to the legal
4 and factual analysis and any case law that they have
5 taken into consideration.

6 Q. And is that in addition to what is in the
7 crown precognition?

8 A. It's now meant to be a stand-alone document, so although
9 if we were -- if I was doing that now, I couldn't refer
10 to 126 pages of the narrative, but I may -- I may
11 summarise the narrative and outline the factual basis
12 that I was taking into account and making my decision
13 on. I did that in the CCI in some detail, but not
14 particularly -- not quite to the extent the way that
15 we're directed now.

16 Q. Right. Can I ask you about some evidence we've heard
17 from James Wolffe in relation to his Inquiry statement
18 and, unfortunately, I don't seem to be able to see the
19 document. Here it is, SBPI 00529, and this was a
20 statement given to the Inquiry by the former
21 Lord Advocate, James Wolffe. He was the Lord Advocate
22 at the time that you were allocated as an AD. Can we
23 look at paragraph 90, please.

24 And he said:

25 "I have been provided with the narrative and

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1 analysis sections of the crown precognition. The
2 narrative describes, albeit in summary form, the
3 findings of the PIRC in relation to both the allegation
4 of racist behaviour on the part of one of the officers
5 and the question of racism within the former
6 Fife Constabulary. I have no involvement in directing
7 or influencing the content of the crown precognition.
8 I had no preconception or expectation about the way that
9 the issue of race would be investigated and analysed.
10 This was, in the first instance, for the professional
11 prosecutors charged with preparing the precognition,
12 subject to any direction or instruction from
13 Crown Counsel."

14 I'm interested in, given your evidence about the
15 narrative and the analysis, the areas where your views
16 did not align with that of the analysis detained within
17 the crown precognition. We've heard evidence from
18 Mr Wolffe that he was sent a copy of the narrative and
19 the analysis and the Chair has some evidence available
20 regarding what parts of that he considered.

21 Did it concern you that there was an analysis
22 prepared which you just simply did not agree with parts
23 of that that information was being sent to the
24 Lord Advocate for his consideration?

25 A. At the time, no, because it was accompanied by what I

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1 think I called in my statement was a draft CCI. I
2 thought that's what I had given the Lord Advocate at the
3 time that I reported to him, but now I have had access
4 it is actually headed "A report to the Lord Advocate"
5 and it wasn't a draft CCI. My recollection is that in
6 that report I included my thinking with regard to the
7 various potential issues.

8 Q. And that included the analysis on or the lack of
9 analysis on admissibility and the issues regarding
10 causation?

11 A. I don't think I pointed out that there was a lack of
12 analysis. I think I probably said "this is my view" or
13 "that's my view" and the Lord Advocate, of course, will
14 have been able to see the same things that I saw and may
15 well have come to the same legal conclusion as me.

16 Q. So in terms of the completed crown precognition, which
17 contains the analysis, was it of any concern to you that
18 there were aspects of that that you clearly didn't agree
19 with?

20 A. No, as I said earlier that I think is part of
21 Crown Counsel's job.

22 Q. Right. Did you consider going back to the precognoscer
23 to ask for any review in relation to race before matters
24 were then forwarded to the Lord Advocate?

25 A. No.

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1 Q. Did you consider asking for a more thorough analysis of
2 Article 14 before matters went to the Lord Advocate?

3 A. No. I was happy from the narrative and the source
4 documents that I had that I had as much information as
5 could be gleaned from the opportunities that were
6 available to the crown at that time.

7 Q. All right. Could we look at your Inquiry statement,
8 please. SBPI 00445. And I'm interested in paragraph 16
9 first of all:

10 "Race was looked at as part of the investigation,
11 with particular emphasis on the previous disciplinary
12 record of the restraint officers. Race did not really
13 feature in the examination of the actual restraint or
14 the medical evidence, except with regard to the
15 prevalence of the genes associated with sickle cell
16 anaemia in the Afro-Caribbean population."

17 Now, we have heard that Mr Bayoh was not part of an
18 Afro-Caribbean population. He originally came from
19 Sierra Leone.

20 A. I knew that and I knew that he had come from
21 Sierra Leone and I think I indicated to you that I had
22 done some research about the country and how it came
23 into being. I think where -- you will recall I didn't
24 have the papers at the time. My memory was that I had
25 looked at -- following a consultation with the expert,

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1 I think it was Professor Lucas or Soilleux, one of the
2 two, with regard to sickle cell anaemia, I had looked at
3 an academic paper where the prevalence of the sickle
4 cell gene, the recessive gene in the Afro-Caribbean
5 population, had been discussed and my recollection was
6 I had done a bit of research on that with regard to the
7 makeup of the population in Sierra Leone and there was a
8 significant proportion of Afro-Caribbeans in
9 Sierra Leone because of the way the country had come
10 into being. There were resettled slaves from South
11 America and that I think was why I was thinking of the
12 Afro-Caribbean. That of course and the name, Mr Bayoh's
13 name, which may be considered to have sort of Creole
14 influences. That was what triggered my memory of
15 Afro-Caribbean, so it was from a genetic point of view.

16 Q. I see. Thank you. Looking at that where you say race
17 didn't really feature in the examination of the actual
18 restraint, I'm interested in this, we have heard
19 evidence, and you have told us about your training in
20 relation to Article 2 in conjunction with Article 14 and
21 a number of witnesses have agreed that and I think you
22 have also agreed that as part of that investigation
23 there have to be reasonable steps taken to unmask racial
24 motivation and that we have also heard evidence from
25 witnesses that that part of the investigation should be

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1 pursued with vigour.

2 And I'm interested in this comment here in your
3 statement that "race did not really feature in the
4 examination of the actual restraint". Can you explain
5 why that wasn't considered to be significant, given not
6 just Article 14 and Article 2, but your own evidence
7 about the importance of race and racial motivation?

8 A. My answer to question 16 came on the back of the
9 question that I was asked at paragraph 15.

10 Q. Let's look at paragraph 15. We can look at actual
11 questions. Here we are. 15:

12 "I have read my page 3 of any notebook 2. I'm not
13 sure if it was just Mr Nelson's account [that is Kevin
14 Nelson, one of the eye witnesses] that was being
15 discussed at that time. I also wanted to explore what
16 the witness Ashley Wyse could see from the
17 window/windows. In addition, I wanted to explore a
18 number of other witnesses' sightlines. When I wrote the
19 abbreviation 'recon', I presume I was thinking about a
20 reconstruction to assess and review all available
21 sightlines because of the differing recollections of
22 witnesses and sometimes how those recollections change
23 over time. I wanted insofar as possible to establish
24 fixed reference points as a crosscheck to either support
25 or challenge the witnesses' evidence."

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1 Now, you said earlier in evidence there were no
2 overt examples of race, no shouting or particular
3 language used and that that wasn't specifically
4 significant in relation to racial motivation. But when
5 we look at paragraph 16 and you say "race did not really
6 feature in the examination of the actual restraint", I'm
7 interested in what you meant when you said that?

8 A. So I meant about that was as a background to the
9 question that I was asked previously which was the
10 reconstruction of the factual matrix, so who did what,
11 when, what could we -- what could we ultimately say was
12 the crown theory, something that I could take forward to
13 present to a jury. So it was the individual elements of
14 the actual restraint that we were trying to tease out
15 there, so the actus reus rather than the mens rea.
16 That's what I meant in response to that answer.

17 I have subsequently gone back and looked at question
18 and the question is not as specific as that. It does
19 just ask about race, so I have misunderstood the focus
20 of that question.

21 Q. Well, that's very helpful. So when you said here "race
22 didn't really feature in the examination of the actual
23 restraint", you were focusing on the actions?

24 A. Yes, so the actus reus as opposed to the mens rea.

25 Q. Right. So did race feature in the examination of the

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- 1 mens rea, the state of mind?
- 2 A. It did and you have asked me that already and I've said
3 absolutely. So the questions that I'm asking in my
4 head, why did that officer do that, why did he do that
5 at that particular time, but what I needed to be clear
6 in my own mind, first of all, was, what was that? What
7 was the -- as much as possible we could ascertain was
8 the factual matrix? So once we had that and there might
9 have been points where we just couldn't say this
10 happened or that didn't happen, but that's what we were
11 trying to get to by a thorough investigation of the
12 actual facts, what could we say were the elements of the
13 actual restraint and then once that was in place,
14 I could ask that question, why did that happen, why did
15 that officer do that, why did that take place then, why
16 was something else not done, was that reasonable?
- 17 Q. And in terms of this you said it was going on -- that
18 was the thought process going on in your own head.
- 19 A. Yes.
- 20 Q. Was there any analysis that we could look at on paper
21 where we could follow that rationale, that process? You
22 have said you were asking yourself why did the police
23 officer do that, was that reasonable?
- 24 A. So the thing that ultimately came to help me with
25 that -- so when I'm looking at a case, I'm

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1 reconstructing in my head, I'm asking questions and if
2 there is a gap where I don't know the answer, it's
3 either because I'm not understanding what has been told
4 to me or I simply don't have that information, that's
5 when I look around and say, okay, I need further
6 information on that or I need an expert to help me with
7 that. I might be satisfied that as far as we can go I
8 have understood the factual matrix, but I don't
9 understand necessarily what's coming into play and then
10 I need an expert to help me.

11 Q. And can you explain to the public listening how on the
12 one hand you're looked at the state of mind and what's
13 in the head of the officer, why he may have done
14 something, and how an expert can help you make that
15 assessment?

16 A. So the expert, and the particular one I'm thinking about
17 is the OST expert, the expert will help me understand
18 what is normal or reasonable, when a particular officer
19 is faced with situation X or situation Y.

20 Q. Now, we may come back to this after lunch, but you're
21 talking about situation X or situation Y and if you've
22 listened to any of the previous evidence from Mr Wolffe,
23 you may recollect that I asked him about a technique
24 that's used by lawyers when perhaps there's a dispute as
25 to what the correct or the true factual position is and

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1 that sometimes lawyers will adopt hypotheses, when you
2 talk about situation X or situation Y is that what
3 you're talking about?

4 A. Yes, if there's a dispute about the precise factual
5 matrix, then we would want to explore that with an
6 expert.

7 Q. And when you say you would explore it with an expert,
8 again, can you explain to people what you mean by that?

9 A. Well, it might be in the source documents that the
10 expert has been given and so the information that's
11 available to me is already available to the expert, or
12 it might be something that is specifically asked in the
13 letter of instruction.

14 Q. Okay. So if there are say two alternative possible
15 factual positions, you can explore situation X with the
16 expert as one hypothesis or you can explore the other as
17 this is -- assume these are the facts, the true facts,
18 and we will look at that with the expert; is that the
19 approach that you would take --

20 A. Yes.

21 Q. -- with the experts at consultation?

22 A. Yes. By the time of consultation, I would have hope to
23 have in my own head a crown theory, at least a core
24 theory, and so I would hope to be able to put that
25 position to an expert, if that's not already been

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1 addressed in the report.

2 Q. Would you exclusively look at that core theory or would
3 you say there are two versions of events here, and I
4 want to explore both of them with you as an expert?

5 A. From memory, I'm not even sure here that there was two
6 versions of a particular theory. I think there was lots
7 of interconnecting, but not necessarily consistent
8 pieces information and I would want at least -- perhaps
9 not at the stage of deciding criminality, but by the
10 time I went to a trial, I would be wanting to make sure
11 that I had explored all avenues with an expert, because
12 that's how I would prepare for a trial because I would
13 know that counsel for the accused would be putting
14 particular scenarios to an expert so I would want to
15 deal with that.

16 At the stage of a pre-petition, it's not often that
17 Crown Counsel would consult with experts, only in the
18 bigger cases, although now it's routinely done before we
19 mark section 1 road traffics. At that time, what I was
20 looking at again was the crown evidence at its highest,
21 so something potentially that would be most prejudicial
22 I would be wanting to make sure that the expert has that
23 information, so, if you like, looking at the crown
24 evidence which supports criminality to the greatest
25 extent. That would be what at that stage I would be

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1 hoping to get from an expert.

2 It might be later down the line in preparation for
3 trial that I would start looking at different
4 hypotheses.

5 Q. So you look at the most prejudicial version of the facts
6 and prejudicial being prejudicial against the potential
7 accused?

8 A. Exactly.

9 Q. So that is the crown's case at its highest?

10 A. Yes.

11 Q. That's the best evidence the crown would potentially be
12 able to present at a trial --

13 A. Yes.

14 Q. -- to prove a criminal charge against the accused?

15 A. Yes.

16 Q. And at the point of assessing criminality, I think you
17 said, that is what you look at, the best crown case?

18 A. Yes, because this is a pre-petition precognition.

19 Nobody has appeared on petition. There hasn't been a
20 decision at this stage with regard to criminality.

21 Q. So the one where the facts look the worst for the
22 accused?

23 A. Yes.

24 Q. Can I ask you to look at paragraph 35, please. Your
25 statement is on the screen:

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1 "I do not think that race was a particular focus in
2 the crown precognition, aside from those areas mentioned
3 above. It was however a fact that Mr Bayoh was of
4 Afro-Caribbean descent and was therefore one of the
5 matters I took into account when assessing the
6 reasonableness of the officers' decision-making
7 process."

8 And again, I wonder if you would wish to further
9 expand on this paragraph, because what you say here is
10 that race wasn't a particular focus in the crown
11 precognition. Obviously you have been explaining the
12 distinctions between actions and mental state, but do
13 you feel this fairly reflects your position now?

14 A. It probably doesn't. It probably does not give
15 sufficient emphasis as to what we were looking at with
16 regard to the mental element. I do remember that there
17 was a lot of work put into the actus reus that something
18 that we could say was the evidence at its highest.
19 There was really a huge amount of work trying to tease
20 out all of the individual elements, trying to get as
21 much as possible from the technology and from the
22 material that we had, so enhancing CCTV, linking up the
23 CCTV with the dash cam, with the Snapchat, with the
24 airwaves. I recollect also that the CCTV from the pub
25 I think on the corner, there was a huge amount of work

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1 put into that to see if we could maximise the
2 information that we could develop that to see if we
3 could do anything about enhancing it. It was ultimately
4 enhanced. It didn't really help much, but there really
5 was a huge amount of work went into that. So that's
6 what I meant when there was a focus. A lot of work went
7 into trying to establish the factual matrix.

8 That doesn't mean that there wasn't work going into
9 the mental element, but the mental element was going to
10 come from the facts and circumstances, because the only
11 other place that it could come from, apart from the
12 history, was from the officers themselves and that
13 wasn't an option available at that stage. So the
14 further exploration by us about what they were thinking,
15 what they knew, we were constrained by what had been
16 given to us and we weren't allowed -- we couldn't go
17 back after that, because by that time it was a criminal
18 investigation, suspicion had crystallised and so it
19 would not have been proper to go back and take a further
20 statement.

21 Q. So A huge amount of work was being done in relation to
22 the timeline, what happened, when it happened and the
23 actions that were taken by the officers in relation to
24 Mr Bayoh and that is going to be crucial for any
25 analysis, not just in relation to the events themselves

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1 and how they unfolded, but also in relation to possible
2 conclusions to be drawn or inferences to be drawn in
3 relation to their mens rea, their mental state, their
4 state of mind?

5 A. Yes.

6 Q. So you've talked about having a timeline at different
7 stages. We've also had the benefit of hearing evidence
8 about the timeline and the points at which events
9 unfolded and when they unfolded. And we've heard
10 evidence that between the officers parking the first van
11 at the scene and Mr Bayoh being shoulder charged or
12 wrestled, bear hugged, to the ground on Hayfield Road
13 was a particularly -- a particular length of period of
14 time. Now, depending on how you analysing it it could
15 be 59 seconds or it could be just over 70 seconds and
16 that will be a matter for the Chair to draw conclusions
17 on that but --

18 A. My recollection, as I sit here now, was about two
19 minutes.

20 Q. Well, our evidence is slightly different to that, but a
21 short period of time between the first van being parked
22 and Mr Bayoh being restrained on the ground, shoulder
23 charged to the ground and reaching the ground, if I can
24 call it that.

25 And during that short period of time, he had --

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1 officers had attempted to discharge sprays, PAVA and
2 CS spray up to six times, that he had been battoned to
3 the head two or three times, that he had been battoned
4 to the arms or the body two or three times and all of
5 that occurred in what appears to be a short period.

6 Now, if you were doing a huge amount of work in
7 relation to the timeline, was it part of your
8 consideration, was it part of the investigation that the
9 speed at which the officers elected to adopt force and
10 to use force against Mr Bayoh may have given rise to
11 inferences or conclusions in relation to bias?

12 A. That's exactly what I was talking about earlier in you
13 taking to me with regard to the establishing the facts
14 and circumstances, because that's the only way that we
15 could tease that out without having to actually speak
16 directly to the officers. So my recollection is that
17 when the final timeline is produced, it has a counter on
18 the right-hand side and there's a counter running all
19 the time and so for each individual stage, we know -- we
20 think we know as much as we can what's happening in each
21 individual part and where the evidence of Ashley Wyse's
22 Snapchats fit in, where the evidence of I think one of
23 the neighbors, is it Mr Nelson, where his evidence fits
24 in, so that was the process in the timeline.

25 That was something that it was very important that

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1 the OST expert assisted us with regard to what's normal,
2 what's reasonable, what would you expect when a police
3 officer arrives with the information that he has. So
4 that was why it was important that we knew exactly what
5 the first officers knew. So those are the kind thing
6 that we're looking for the expert to assist us with. We
7 can look at the factual matrix, we can establish that as
8 much as we can, but we need that little bit of further
9 help to understand whether that's reasonable or not,
10 apart from applying common sense.

11 Q. Looking at that issue about the speed at which events
12 unfolded, would you agree there was nothing in the
13 analysis that really focused on the speed at which
14 events unfolded and potential inferences regarding race
15 or bias or racial motivation that could have been drawn?

16 A. I don't remember whether it's in the narrative or not,
17 because I think there's quite a detailed part of the
18 narrative about what happened in the timeline. I don't
19 think that -- the narrative as I recall is 126 pages
20 long, the analysis is very much shorter and I'm not sure
21 that it was necessary to take it stage by stage through
22 that.

23 Ought there to have been a final conclusion
24 potentially with regard to the OST expert? Perhaps.
25 But I don't remember whether the final consultation with

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1 the expert -- in fact, that took place because
2 Lord Advocate asked me to go back and consult with the
3 expert, so that final stage didn't come into play so the
4 final consultation with the expert was long after the
5 analysis was prepared.

6 Q. Right. I think we'll have to break this down slightly.
7 If I may, you have been prepared with a narrative and an
8 analysis when you -- in early 2018 and then you embark
9 on a series of consultations.

10 A. I do.

11 Q. And at some point in August 2018 you do your
12 Crown Counsel's instructions and you discuss that with
13 the Lord Advocate and I think James Wolffe gave evidence
14 that he asked you to go back and to speak to an expert?

15 A. I think it was the OST expert.

16 Q. That was the OST expert?

17 A. Yes.

18 Q. Do you remember when that was?

19 A. In between the report to Lord Advocate and issuing the
20 final CCI.

21 Q. Right.

22 A. I was in a trial in July, so I suspect it was towards
23 the beginning of August.

24 Q. And what was the specific issue that you were addressing
25 with -- we know him to be Martin Graves, the OST expert.

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1 What was the specific issue you were addressing with him
2 at that consultation?

3 A. I'm sorry. I can't remember.

4 Q. We'll maybe come back to this. Do you now --

5 A. It might -- sorry to interrupt you. It might be that I
6 hadn't consulted with him at all.

7 Q. We'll come back to this.

8 A. I can't remember.

9 Q. Is it your recollection now that in the narrative part
10 of the crown precognition that this issue about the
11 speed at which events unfolded and the issue of race or
12 racial motivation, the issue of potential bias, was
13 analysed, considered, discussed, either within the
14 narrative or in any other part of the crown
15 precognition?

16 A. I don't think specifically with regard to the time --
17 the timeline of the restraint.

18 Q. So that was never considered?

19 A. I'm sorry it was -- it was considered by me. I'm sure
20 it was -- it was considered by the investigating team,
21 because we poured over the timeline and we looked in
22 detail at the officers, what their mens rea was, whether
23 that was reasonable, whether it was justifiable, and
24 then, ultimately, the final piece of that picture is the
25 expert.

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- 1 Q. And when was that done?
- 2 A. The consultation with the expert?
- 3 Q. When did you consider the issue of mens rea and the
4 issue of speed?
- 5 A. All the way through when we're looking at the timeline
6 about what's happening and what the officers are doing.
7 I think what you're asking me was, did I specifically
8 say let's discuss Article 2, Article 14 with regard to
9 what happened at three minutes and ten seconds or what
10 happened at four minutes and two seconds? No, I don't
11 remember that kind of consultation, but it was there all
12 the time. The consideration was there all the time.
- 13 Q. Do you remember asking yourself -- you've talked about
14 whether actions taken were reasonable, why police
15 officers did that, did you ask yourself why officers
16 elected to use force within such a short period, a short
17 timescale?
- 18 A. Yes, because that comes into the question was that a
19 reasonable reaction. If you are faced with scenario X,
20 is it reasonable to do Y, or is there another option?
21 Would that other option have worked? And that's again
22 something that we explored with some of the other
23 experts.
- 24 Q. Did you consider racial motivation or bias?
- 25 A. It -- as a baseline, yes, because it was there all the

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1 time. What's in the officer's head? Why did they do
2 that? Is it because Mr Bayoh is black? That was a
3 question that was -- overarching question over the whole
4 investigation.

5 Q. And is that a topic that you discussed with
6 Martin Graves, the OST expert?

7 A. I can't remember, because I can't remember the actual
8 consultation.

9 Q. Was there any other expert that you discussed that issue
10 with?

11 A. The other experts that I'm talking about was this idea
12 that it's potential to talk someone down in those
13 circumstances, and so that -- that's when we were
14 exploring the potential acute psychosis as a result of
15 potential drug ingestion. Did we specifically with
16 those medical experts explore race? No, I don't think
17 so. I think their answers to the questions I was asking
18 on the factual matrix would have influenced the way
19 I was analysing the information.

20 Q. Did you provide a factual matrix to Martin Graves when
21 you recall consultation with him, from which you then
22 asked for views about whether the police could have
23 acted out of racial bias?

24 A. I don't think so.

25 Q. And why would you not have done that, given the issue of

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1 mens rea and racial bias was of such significance?

2 A. As you are asking me the question now, I think the
3 answer I would give is that that might not be something
4 for that particular expert, that that's something at the
5 end of the day for a fact-finder. So if that expert
6 says to me "that is not a reasonable response", then the
7 follow-up question is "why not?"

8 Most of the answers that we got from the OST expert
9 was "That is a reasonable response." Given the range of
10 options and the factual matrix and the circumstances
11 that the officers were faced with, then that response
12 was reasonable. If the answer had been "That was not
13 reasonable", then it would be a matter for the
14 fact-finder ultimately why that wasn't reasonable, what
15 was the motivation, what was the mens rea, what was the
16 thinking in the officer's mind?

17 Q. Did you put to Martin Graves a factual hypothesis where
18 you explored the limits of a reasonable response from an
19 unbiased hypothetically reasonable police officer?

20 A. Yes, I think we did because my recollection was that the
21 information that he gave us at consultation was -- we
22 put a number of elements from the evidence. Now, my
23 recollection is he had the evidence because he had the
24 statements and he had the CCTV and the timeline, but my
25 recollection is that we specifically asked about

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1 observations of civilian witnesses who might be
2 describing a pileup, lots of people on top of Mr Bayoh,
3 people -- essentially everyone piling up, and I remember
4 that his answer was often in those types of situations
5 the gold standard for restraint, which is someone at the
6 head, someone at each arm, one person at each leg, five
7 people that -- my recollection is that was what he said
8 was a gold standard often looks like overkill from an
9 impartial observer's point of view.

10 Q. I can understand the issue of restraint and excessive
11 force. The point I'm asking you about is the speed at
12 which the officers elected to use force and whether you
13 painted a factual hypothesis to Mr Graves for his
14 consideration about whether their election to use force
15 within that short timescale was within the range of
16 reasonable responses by a reasonable officer?

17 A. Absolutely that was explored.

18 Q. You absolutely explored that with him.

19 A. Absolutely. So the timing, so an officer arrives at the
20 scene, sees X, does X, what's your response to that, is
21 that reasonable or not? An officer does X at X time, is
22 that reasonable?

23 I think you have asked me earlier on did I then ask
24 him about race in that discussion. No, I don't think I
25 then went on to ask about motivation.

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1 Q. I'll have to come back to this. I just -- I apologise,
2 I have gone over the time.

3 LORD BRACADALE: That's all right. We'll stop for lunch and
4 sit at 2 o'clock.

5 (1.05 pm)

6 (Luncheon adjournment)

7 (2.06 pm)

8 LORD BRACADALE: Ms Grahame.

9 MS GRAHAME: Thank you.

10 Just before lunch I was asking you questions about
11 the issue of the speed at which officers elected to use
12 force in relation to Mr Bayoh. And I was about to come
13 on and ask you, against that background, about whether
14 you directed any lines of investigation or instructions
15 to be given in relation to that issue of unconscious
16 bias and how unconscious -- particularly how unconscious
17 bias could manifest itself in the actions and behaviour
18 of individuals.

19 A. I think the investigations that were taking place around
20 that unconscious bias were directed initially at the
21 background of the police officers, so that was the part
22 that was informing me about their potential thinking.
23 The unconscious bias that I was looking at or potential
24 areas I was looking at at how the actual restraint
25 played out was in the specific actions of the officers

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1 and that of course fed into the -- their decisions that
2 they made at particular times.

3 Q. Right.

4 A. And you asked me specifically if I gave any particular
5 instructions. I gave instructions with regard to the
6 restraint expert. My recollection was that it was me
7 that specifically said we needed someone to look at the
8 restraint aspect because I felt I didn't have enough
9 information. I saw in the documentation that I looked
10 at in preparation for today that there was a discussion
11 about going back to one of the other experts to see if
12 we could get a bit more information and I had indicated
13 in the particular email that I'm thinking about, which I
14 think was in the 2017 batch of emails, in particular
15 29 November 2017, it was an email from me either
16 specifically to Les Brown or to the team in response to
17 a suggestion that we should go back to one of the other
18 experts to explore that area and I indicated that I
19 still thought we needed a further OST expert to explore
20 the specific details of the reactions of the officers.

21 Q. And was that in relation to the restraint and the
22 actions taken by the officers regarding restraint or was
23 it specifically in relation to unconscious bias?

24 A. It wasn't specifically -- there's something wrong with
25 my microphone.

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- 1 Q. I know. That's some feedback here.
- 2 A. I did wipe my screen at lunchtime. I might have moved
3 it.
- 4 I've lost my train of thought now. You were asking
5 me about the officer and restraint and the OST expert.
- 6 Q. Could you maybe wait for a second. I think the cavalry
7 have arrived. Thank you.
- 8 A. So you asked me about the instructions and whether it
9 was specifically to do with the restraint. It wasn't
10 just the restraint.
- 11 Q. I asked you if it was specifically in relation to
12 unconscious bias.
- 13 A. Okay. It was -- part of that information that I would
14 get from the reactions of the officers would feed into
15 their potential for unconscious bias so their mens rea.
- 16 Q. Did you investigating or direct the team to investigate
17 the issue of unconscious bias?
- 18 A. No, I don't think I ever said specifically those words
19 "unconscious bias".
- 20 Q. When you were -- you've told us how you were considering
21 the issue of mens rea and the mental state of the
22 officers. In relation specifically to unconscious bias,
23 did you explore this with any expert that the crown
24 instructed?
- 25 A. I think, as we have discussed earlier, what I saw was

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1 the source material for unconscious bias would be the
2 surrounding facts and circumstances and a full analysis
3 of the decision-making process and whether those
4 decisions were reasonable or not in the circumstances
5 and all that information would allow me to analyse the
6 mens rea and the potential for unconscious bias.

7 Q. But did you feel yourself that you were in a
8 sufficient -- a sufficiently trained and educated place
9 at that time to analyse the question of unconscious
10 bias?

11 A. I knew about the concepts. I knew what to look for.
12 Was I an expert in the field? Absolutely not.

13 Q. What were you looking for then?

14 A. I was looking for the actions of the police officers,
15 whether they would be the action of a reasonable police
16 officer. If the answer to that was these were not the
17 actions of a reasonable police officer given the set of
18 circumstances, why not? What things were causing that
19 officer to act unreasonably?

20 Q. And did you consider unconscious bias as one of those
21 things?

22 A. Of course, because the fact was that Mr Bayoh was black
23 and so that was part of the factual matrix that I was
24 looking at and as to whether the decisions that they
25 made were affected by any racist views that they might

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- 1 hold, consciously or unconsciously.
- 2 Q. And you said a moment ago that you are not an expert in
3 the field and did that in itself give rise to
4 consideration on your part that you should seek some
5 assistance from an expert in the field?
- 6 A. It didn't, but subsequently I have thought that that
7 perhaps might have been something that was useful and I
8 have already said to the Inquiry this morning in another
9 case that I was running almost at the same time, it was
10 at a much later stage, it was a trial, I did have an
11 expert and I consulted at length with that expert and
12 that expert assisted greatly in explaining some of the
13 material which had been recovered in that case and about
14 right wing views and the history and just a broad
15 knowledge of that particular topic and it may well have
16 been that that's something we should have looked at.
- 17 Q. So given your subsequent experience with that expert
18 looking back now --
- 19 A. I think actually it might have even been before because
20 I think that might have been the trial that I was doing
21 in the July, so that's in between issuing my final CCI.
- 22 Q. So in a previous trial you had utilised and used the
23 assistance of an expert in relation to issues of bias or
24 discrimination, why then did you not consider using that
25 in this matter in relation to Mr Bayoh's death?

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1 A. In that other case there was a wealth, a massive amount
2 of material that was covered, and that material I really
3 needed assistance in explaining what it all meant and to
4 put it all into context. We didn't have that material
5 here.

6 Q. But in a situation where there's a limited amount of
7 material or the material is not obvious to you, not
8 being an expert, does that not make it more important
9 that you seek out the assistance of an expert who may be
10 able to identify relevant evidence and assist you,
11 important not to miss anything?

12 A. Well, again, as I have already said this morning, we
13 were really alert to not missing something. We were
14 following all lines of investigation. With hindsight,
15 I can now see that it might have been of assistance to
16 have an expert come in and give me a general overview
17 about the types of issues, talk about racial
18 stereotyping or racial tropes. It might have been a
19 good idea to have someone in just to give a very brief
20 report. It might not have been something that we would
21 subsequently use to a trial, because there was no
22 material to base it on at that stage, so for example the
23 trial that I'm talking about there was a great deal of
24 written material which was used in the trial and
25 required the expert to assist the fact-finder. What I

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1 think you're maybe anticipating or asking me about is
2 whether that's something that might have assisted me at
3 the time or the team.

4 Q. Possible of course that there may have been material --
5 you not being an expert, there may have been material
6 you overlooked, didn't see, that was there. An expert
7 could perhaps have helped you to flush that out?

8 A. I don't think there was any material that we didn't
9 have, because we followed everything that we could get
10 with regard to the actual factual matrix. I was
11 satisfied at the time that I was in a position to
12 analyse all the material that we had.

13 Would it have been of benefit for me to have had
14 that extra layer for an expert? Possibly. I can see
15 now with hindsight, yes, that might have been a good
16 idea. Would it have made any difference in my analysis
17 of the factual matrix? I'm not sure. I might just have
18 been better educated about it.

19 Q. I'm not asking you to second-guess your decision, but if
20 the crown were wishing to pursue all lines, then the
21 issue of unconscious bias could have been pursued at the
22 time. You had experience of using an expert in a
23 previous trial, but that wasn't something that you did
24 in this occasion?

25 A. I think unconscious bias was pursued. Did we have an

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1 expert to that effect? No. So I think there's a
2 distinction there. I think there's two answers to that
3 question.

4 Q. Okay. Sorry. I'm just reviewing my notes there. Can I
5 move on, please.

6 You have mentioned the phrase "racial tropes" and we
7 have heard evidence from a number of witnesses in
8 the Inquiry where we have talked about racial tropes.
9 We have heard evidence, first of all, from Fiona Carnan,
10 the precognoscer, that she made no reference in her
11 analysis of evidence regarding the use of racial tropes
12 or negative stereotypes. She took the view that
13 evidence about negative attitudes of officers to
14 Mr Bayoh's race would not be relevant to the analysis,
15 unless criminality was identified. And I think I
16 explained to you this morning that she had taken the
17 view that unless there was criminality, at which point
18 she would consider a racial aggravation that was the
19 only situation in which she would consider race as being
20 relevant and she, not having found criminality, didn't
21 look at race.

22 We have heard evidence that there was information
23 available within the officers' statements that they gave
24 to PIRC on 4 June 2015 that some officers were concerned
25 they were attending a terrorist incident and there were

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1 a number of comments about the threat level that was in
2 place at the time. Some officers made comments about
3 concerns about an attack on police officers. One of the
4 officers talked about -- "it ran through my mind that
5 this male could be part of a terrorist plot."

6 And in evidence Fiona Carnan was asked about these
7 comments within the officers' statements, which she had,
8 whether she considered why there was a possibility of
9 terrorism that had crossed the minds of officers. She
10 was asked, did you consider whether they would have
11 thought about terrorism if Mr Bayoh had been white? She
12 said, no. She was asked did she consider whether they
13 thought about terrorism every time they went to a knife
14 call? She said, no. She was asked why one of the
15 officers, Constable Paton, had thought about Lee Rigby
16 in particular and she said she simply noted that. She
17 didn't give it any thought as to why he thought about
18 Lee Rigby and she said "I didn't interpret it as being
19 influenced by his race, no".

20 She was asked if she had considered whether
21 Constable Paton would have been thinking about Lee Rigby
22 if Sheku Bayoh had been white. And she said "I didn't
23 ask that question". And she was asked did she consider
24 whether there was evidence from which the inference
25 could be drawn that the colour of Mr Bayoh's skin was

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1 relevant to the concern that the incident was related to
2 terrorism and she said "I did not make that assessment".

3 Now, you have explained earlier today that you had
4 the officers' statements and you read them and you said
5 a moment ago you felt capable of making assessments
6 regarding unconscious bias. Did you ask yourself these
7 questions?

8 A. Yes, is the short answer.

9 Q. And when was that done?

10 A. All the way through, right from the beginning, you're
11 looking and analysing. As I've set out this morning in
12 my evidence to the Inquiry, you're looking and analysing
13 and seeing if you can find answers in the factual
14 matrix. I have all the source material. The fact that
15 in her own mind the person who prepared the analysis was
16 not asking those questions, that didn't mean that I was
17 not able to ask those questions, in fact that was my
18 job.

19 Q. And so in this process of when you were asking all these
20 questions about the content of the officers' statements
21 where terrorism is mentioned or the possibility of that
22 is mentioned, did you prepare a paper which set out what
23 each individual officer said about terrorism or any
24 connection they made with terrorism and whether there
25 was any further exploration within the statements about

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- 1 that?
- 2 A. No, but I had the statements available so I would be
3 looking at the information that I could get. The ideal
4 thing from the point of view, my point of view, would
5 have been to be able to ask the officers themselves,
6 because that's -- those are the kind of probing
7 questions that would give me a real insight into their
8 thinking but I was limited to what I had on paper and so
9 I was looked at the information that I did have,
10 together against the background of the further
11 information that had -- perhaps some of it had put
12 certainly me for sure on alert with regard to the
13 history of particularly one of the officers.
- 14 Q. I appreciate you only had the statements to some extent.
15 Did you ask for my lines of investigation to be explored
16 to see how often officers attended knife incidents?
- 17 A. No, I didn't ask for any of those comparative exercises.
- 18 Q. Did you ask about how often they had attended knife
19 incidents and drawn their batons?
- 20 A. No.
- 21 Q. Used their sprays?
- 22 A. No, my recollection was that there was -- there was some
23 information with regard to the use of sprays and that
24 was in the history of each officer. That's my
25 recollection. I think on some occasions the forms

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1 weren't filled out entirely correctly, but I understood
2 that every time you used your PAVA or CS spray there was
3 a proper post-incident analysis and recordkeeping, or
4 supposed to be, with regard to the use of that spray and
5 my recollection is that I had that information as part
6 of the -- each individual officer's records.

7 Q. Did you consider a line of investigation into looking at
8 the use of force by the individual officers where the
9 subject had been a black man compared to where the
10 subject had been a white man?

11 A. No, I didn't ask for those further investigations to be
12 done.

13 Q. Did you consider comparing their individual responses to
14 knife incidents where they had used spray, used force or
15 not and any comparison with whether the subject was a
16 white man or a black man?

17 A. No, I didn't consider asking for that information.

18 Q. The fact that there was no analysis of this done by
19 Fiona Carnan, which she's accepted, did it surprise you
20 that that hadn't been explored or addressed in any way
21 in the work that she had done?

22 A. I suppose it did surprise me because there was a great
23 deal of focus throughout the two years on the issue of
24 race and how it could fit into the factual matrix, but I
25 took that on board along with the fact that the person

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1 who prepared the analysis only really came in towards
2 the end and she was looked at the information. She
3 didn't live with the case throughout it. She was
4 looking at what was down on paper.

5 Q. You thought that excused a failure to address race in
6 any way in her --

7 A. I'm not saying that it excused it, it was certainly a
8 reason. If the analysis was not as full as we might
9 have expected, if it had been done by a person who was
10 in the team right from the beginning, then I would --
11 I would see that there was potentially a reason for
12 that.

13 Q. Do you think there's merit in the same person or persons
14 being involved from the beginning and being involved in
15 the narrative and the analysis and not to have those two
16 aspects separated?

17 A. Absolutely 100 per cent. I don't remember whenever
18 that's happened before. If it has, it's only been on
19 one particular occasion and I think where the roles have
20 been separated out, but I still think that the person
21 who was doing the narrative was still involved in the
22 next section. It's usually just one person or the team,
23 everyone prepares it.

24 Q. Do you think there is a disadvantage if the roles are
25 separated and different individuals are responsible for

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1 the narrative and the analysis?

2 A. I think so. At the time I was not particularly involved
3 in resourcing and the amount of people in a team.
4 I was -- I did recollect that I was trying to push it
5 forward, not just from my own timetable, but also
6 because of the time elapsed since Mr Bayoh's death and
7 so I was pushing to have more people on it so it can be
8 completed, but, yes, there is an absolute advantage to
9 having the same team all the way through. I'm also
10 aware that there were a huge amount of inquiries and
11 only a finite amount of resources.

12 Q. You've talked to us about Article 2 and the
13 responsibilities in relation to Article 14 and I
14 explained to you that we had heard that others had
15 agreed there was a duty to identify racial motivation
16 from the beginning with -- in relation to this type of
17 case.

18 In light of what you knew about the obligations
19 under Article 14 and Article 2, did you not consider
20 that this was a topic that should be explored in the
21 crown precognition, that it shouldn't be left to the
22 Advocate Depute, the allocated AD, to consider issues of
23 race, racial motivation, unconscious bias, with no
24 mention of that in the analysis at all?

25 A. Did I think about it at the time? No, I don't think I

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1 did. Now that you're asking me the question, yes it
2 might have been an idea for me to go back, but by the
3 time the analysis was being prepared, I have already
4 lived with the draft narrative for quite a while. I
5 have lived with the source documents. I am trying to
6 get to a stage where I'm in a position to make a
7 decision and so the narrative -- the analysis is perhaps
8 coming at quite a late stage.

9 In often in an allocated case, as you pointed out
10 this morning, the precognition comes to you and that's
11 the first that you know about. I had been involved,
12 towards the latter stages anyway, in the sight of the
13 draft narrative, the timeline, the multimedia, the body
14 positions. I had seen the bulk of the expert reports.
15 So by that time, by the time Fiona Carnan was coming to
16 prepare her analysis, I'm already quite far into my
17 reading, so I didn't think about saying to her can you
18 go back and change that or add to it, because I'm
19 already there, I'm already thinking about those things.

20 Q. We've asked Stephen McGowan about this and

21 Lindsey Miller about this and Stephen McGowan said his
22 view was that it would have been relevant to ask why it
23 was that the officers thought terrorism and to consider
24 whether Mr Bayoh's race had anything to do with that and
25 whether or not had Mr Bayoh be white, they would have

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1 wonder the same thing. That's a relevant question and
2 Lindsey Miller agreed that was a relevant question to
3 consider this motivation. Was it a racial motivation?

4 Is there -- they recognised it was relevant.
5 Fiona Carnan didn't do that. You've come in looking at
6 the precognition, it's not there, it's not been
7 analysed, it's not been considered on the face of the
8 paper, but you are going to go through that process. Is
9 there anything written down by you, any notes, there's
10 mention of a notebook that you had, any notes or
11 anything at all where the Chair could look at your
12 analysis of this issue to do with racial motivation?

13 A. No, I don't think there's one document that I can point
14 you to. I think throughout the notes, my to-do list, my
15 notebooks, there are to-do lists of things that I want
16 answered or questions that I'm obviously asking myself
17 and a significant amount of those notes go towards the
18 actings of the officers and their motivation.

19 I can't point you to a particular document that
20 says, I am looking at race here, I'm looking at
21 unconscious bias, I'm looking at racial stereotyping.
22 There's not a document that I produced and we talked
23 about that before lunch, because one of the things I
24 might have done, if I had thought about that or thought
25 it was necessary, was to ask the Crown Counsel trainee

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1 to go away and provide me with some source documentation
2 so that I could then produce a note on it. That's not
3 something I did. It's something I have done in other
4 cases, but not this case.

5 Q. Cases that you had dealt with before the case involving
6 Mr Bayoh's death?

7 A. Before and after.

8 Q. Right. So we have heard that there were a number of
9 officers who attended, described as nine attending
10 officers. They gave statements. Some gave more than
11 one statements, some had self-penned statements, some
12 they gave statements to PIRC and they're of varying
13 lengths.

14 When you were considering the issue of terrorism and
15 the issue of bias or potential bias, was this all going
16 on in your head, all these questions just being asked in
17 your head? There was nothing written down as you went
18 through the statements?

19 A. There might have been notes on the statements. There's
20 certainly notes in my notebooks. I can see notes on the
21 narrative. I can also see notes on some of the expert
22 reports. So there are notes, but there's no official
23 Crown Counsel analysis of a particular area involving
24 race.

25 Q. Do you remember any of the notes? We've seen notes in

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- 1 margins and scribbles, are there any --
- 2 A. Unfortunately that's my writing.
- 3 Q. Sorry. Are there any areas in particular where you
- 4 recollect considering these issues and noting anything
- 5 down at all?
- 6 A. I was aware from an earlier stage about the threat level
- 7 and the potential briefing, so I had seen that in the
- 8 statements and there was further work done on that. I'm
- 9 not sure if there was an exchange of emails, but
- 10 certainly there was further work done with regard to the
- 11 factual basis for that information and exactly what the
- 12 officers had been told.
- 13 Q. I'm interested in the comments within the officers'
- 14 statements about a potential terrorist link, Lee Rigby,
- 15 terrorism, that type of thing.
- 16 A. That's how I find out about it, because it was in the
- 17 officers' statements.
- 18 Q. Yes. Are there any other notes that you recollect
- 19 making, whether in a margin or in a notebook, that would
- 20 show -- demonstrate to the Chair that you have gone
- 21 through this process of analysis in relation to issues
- 22 regarding racial motivation, primarily connected to
- 23 comments about terrorism or potential terrorism in the
- 24 officers' statements?
- 25 A. There's nothing that I can think of. That's not to say

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1 that they're not there, because I did go through that
2 process and I may well have made notes, but I can't --
3 there's nothing that I have reviewed for giving evidence
4 in a way that I have managed to point you towards
5 documents beyond my notebooks and my to-do list, which
6 tell me what I'm thinking at the time that reminds me of
7 how I approached it.

8 Q. Was there anything that you saw from the documentation
9 you were given that reminded you that you have gone
10 through this process?

11 A. I'm just trying to think because I have seen a lot of
12 documents over the last few days. Some of it I just
13 went through very quickly, because I didn't have a lot
14 of time. Some of it is -- the information I looked at
15 was notebooks and I have seen the lists in the
16 notebooks. There are also, as I said, notes attached to
17 expert reports and there are quite a lot of emails. I
18 have been through those. There's no annotations
19 obviously on the emails, because those were electronic
20 documents. So beyond the content of the emails I don't
21 think there's any handwritten notes that would assist.

22 Q. All right. Let me ask you about another entry in one of
23 the PIRC statements. This came from one of the officers
24 Kayleigh Good, and if you have listened to other
25 evidence you may be aware of this. PC Good had also

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1 talked about Lee Rigby. She said:

2 "I was also thinking at the point of the Lee Rigby
3 incidence in London mainly due to the fact of the
4 coloured male and the potential terrorist connotations."

5 So it will be a matter for the Chair, but it appears
6 she makes a direct link between the colour of Mr Bayoh's
7 skin and the thought of terrorist connotations. Was
8 that something that you took into account when you were
9 considering the issues of race?

10 A. Yes, because that was part of the whole area that we
11 looked at with regard to briefing, the comments about
12 Lee Rigby. I went back and refreshed my memory.
13 I think I have seen on a couple of notes that I have
14 made that I have put "Lee Rigby?" and then I recall
15 going away and having a look on the internet just to
16 remind myself.

17 So yes, that's something that I looked at, I
18 factored in. At the time, I don't think I called them
19 racist tropes, but I was aware of racial stereotyping,
20 you know, the big scary black man or the angry black
21 man, so I was aware of those type of racial stereotyping
22 and I was aware that there could have been a connection
23 between the colour of Mr Bayoh's skin and the connection
24 with Lee Rigby.

25 Q. And when you were considering issues of mens rea, as you

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1 have described and the mental state of the officers, to
2 what extent were you factoring in these entries from,
3 for example, Ms Good's, PC Good's statements?

4 A. These were the only thing that I had to work with, so
5 that and the background information were the things that
6 I had to work with. As I have said before, the ideal
7 would have been able to go and ask the officers, to
8 question the officers, to probe, to understand better,
9 but that was not a -- that was not something that was
10 open to me.

11 Q. We have asked --

12 A. It would have been something that would be open at a
13 later stage.

14 Q. We asked Fiona Carnan about this entry in PC Good's
15 statement and she was asked about whether it caused her
16 to wonder whether PC Good or others had thought about
17 terrorism and Lee Rigby, because they had done so
18 because of the colour of Mr Bayoh's skin and she said,
19 no, she'd considered that. "No, I didn't", she said.
20 So she didn't consider that at all.

21 Was there any discussion between you and
22 Fiona Carnan about these issues that were in the
23 statements?

24 A. No, I didn't have any -- my recollection beyond simply
25 touching base, I didn't have any discussion, as I can

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1 recall, with Fiona Carnan about the -- about the
2 analysis, except to find out what the timelines were and
3 I had a look at one of my -- the meetings I think in
4 Hamilton in the January of 2018 and there is a
5 discussion about what -- about the timeline, not the
6 incident timeline, but the timeline for the preparation
7 of the precognition and there's an indication of me
8 asking for timelines with regard to the narrative and
9 the analysis. And I had been given dates at that point,
10 I think, for the receipt by me of the final narrative
11 and the final analysis and, from recollection, I don't
12 think that it was anticipated that they would come
13 together, which is not ideal.

14 Q. No. You mentioned a moment ago racial stereotyping.
15 Explain to us what you were looking for when you were
16 looking for racial stereotyping?

17 A. Examples of what I just explained, the angry black man
18 or the big scary black man and there were elements here
19 of both those things in the statements of the police
20 officers.

21 Q. And were those factored into your own personal
22 assessment of the paperwork?

23 A. I'm not sure what you mean by "the paperwork", but they
24 were factored into my assessment of the information
25 that I had, the statements, the further investigations

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1 that had been done, the background information, the
2 disciplinary records, all those things were things that
3 I was looking at, we were looking for.

4 Q. And when you found examples of what you considered to be
5 racial stereotyping, and you're obviously assessing and
6 considering the issue of racial motivation, mens rea,
7 what did you do with that information? Did you gather
8 it together and consider it separately or --

9 A. It all factored into my final analysis of all the
10 papers, but also informed me with regards to what I
11 would need from an OST expert and that I think brings me
12 back to the idea that I wasn't satisfied that the expert
13 that we already had, who I don't think was particularly
14 a restraint or an officer training expert, although
15 I had agreed that that expert, whoever he was, I'm sorry
16 I can't remember, we should go back and ask some further
17 questions. I did form the view that with the
18 information I had that re -- taking a re --
19 re-precognosing that expert wasn't sufficient and
20 wasn't going to take me far enough.

21 Q. And in terms of the process that was followed in
22 Crown Office at this time, we have heard from
23 James Wolffe that he was provided with a narrative and
24 an analysis and that he had a meeting with you and, in
25 terms of the process you developed in your role as the

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1 allocated AD, was part of that to explain your thought
2 processes about racial tropes, potential terrorism,
3 racial stereotypes? Is that something that was
4 addressed?

5 A. My recollection is that I had a -- a set of hard copy
6 papers, so it wasn't electronic, it was a full set of
7 papers, which I think perhaps is supported by the fact
8 that I have got -- there's -- my writing is on the
9 narrative and the analysis and presumably, although I
10 haven't seen them, the statements.

11 So here, and I have got to be careful not to mix
12 this case up with the one that follows, my understanding
13 was that there would be a significant input from the
14 Lord Advocate and that he had the full set of papers and
15 was going to review them. I want to be really careful
16 that I don't mix it up with the M9, which came
17 afterwards, because the same situation was there and I
18 can't remember whether it was understood by me that he
19 would actively look at all the papers or whether that
20 was the case afterwards.

21 Q. Forgive me if I'm wrong, but did the issue of race or
22 racial motivation arise in relation to the M9?

23 A. No, it's just the process that we're talking about,
24 because this is quite an unusual process. Even in the
25 big allocated cases, Advocate Deputes routinely make

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1 decisions without recourse to the law officers, but this
2 was a different case. This was a case that had
3 significant law officer and senior civil service
4 involvement long before Crown Counsel was involved and
5 that was carried through throughout the process, so much
6 so that my contact with the family was not the normal
7 process, because there had been something else running
8 and in place before I came in.

9 Q. Talking about this process or the procedure that was
10 adopted here, if we for these purposes assume that the
11 Lord Advocate James Wolffe did have a full set of
12 papers, that he had the narrative, he had the analysis
13 and the full set of papers, he had a meeting or a number
14 of meetings with you, he had your Crown Counsel
15 instructions to consider --

16 A. A report. Although I said it's Crown Counsel
17 instructions in my statement, it was a report. Once
18 I had access to the materials, I could see that it
19 wasn't CCI, it was a report.

20 Q. It was a report. And you had said in your statement you
21 had a number of draft CCIs. Was that a number of draft
22 reports?

23 A. They weren't draft. They were just reports. They gave
24 rise to the final CCI. I had it in my head from memory
25 that I had produced simply a draft CCI so this is --

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1 this is the instructions I'm going to give and looking
2 for law officer's authority to give those instructions,
3 but actually that's not what it was. It was a series of
4 reports.

5 Q. Those papers have gone to the Lord Advocate. He has
6 your reports, but what he did not have was your -- the
7 advantage you had of your involvement since 2016. He
8 hadn't attended consultations with experts, he hadn't
9 directed lines of investigation, he hadn't been involved
10 with the precognoscer, the solemn legal manager or any
11 of those people.

12 A. Agreed.

13 Q. So you have had that advantage. We appear to have a
14 situation where the precognoscer has prepared an
15 analysis that does not contain a detailed analysis of
16 race or racial motivation or any of that. There's no
17 analysis by Fiona Carnan of racial tropes, racial
18 stereotyping, any of that, and that's evidence we've
19 heard from her, but you have given evidence today saying
20 you were considering those matters from the beginning.

21 How did you plan to share your thought processes on
22 racial motivation and the analysis that you had applied
23 with the then Lord Advocate who hadn't got that benefit?

24 A. I don't think I separated that out into the analysis of
25 the individual parts of the mens rea in order to provide

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1 a more detailed report for the Lord Advocate.

2 Q. And why was that?

3 A. I didn't think of it at the time. I thought my report
4 was detailed enough for the Lord Advocate to use as a
5 starting point and he had the full set of papers. Now,
6 of course I wasn't expecting the Lord Advocate to go
7 away and look at all the source material and to know all
8 the information that I had gleaned over the previous two
9 years, but I had understood that I had been chosen to be
10 the allocated Advocate Depute and that was because of
11 the experiences I had and I had understood that I had
12 the confidence of the Lord Advocate to make those
13 decisions in his name and that if he had felt that there
14 was something missing in the information that I provided
15 to him, he having of course had the benefit of
16 information again throughout the life of the case,
17 because the Lord Advocate, the law officers were
18 regularly updated through law officers briefing and
19 minutes, I was confident if there was something that he
20 was not satisfied with, he would ask me.

21 Q. Right.

22 A. If I had thought about it and thought perhaps it was
23 necessary to put it in writing, then I would have done
24 it. With hindsight, it might have been a god thing to
25 do.

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1 Q. Was there anything in writing from you to the
2 Lord Advocate regarding race and racial motivation?

3 A. No, I don't think so, apart from my report to the
4 Lord Advocate and I can't now remember what that
5 specifically dealt with.

6 Q. Given the -- we have heard a number of witnesses explain
7 how race was very significant from the very beginning
8 and we've -- as I've said to you earlier today, it's
9 been accepted that routing out racial motivation --
10 there's a duty on the -- in relation to the
11 investigation itself that that be done.

12 Given the importance of race, how was it -- and
13 given you were not going to prepare a separate report on
14 race and given Fiona Carnan didn't deal with race and
15 that was countersigned by Les Brown without addressing
16 the issue of race, how was the Lord Advocate expected to
17 become aware of race and racial motivation issues,
18 insofar as they related to this investigation?

19 A. Well, he had all the material, he had the narrative, he
20 was able to -- he knew the steps that the investigation
21 team had carried out. He was aware from the beginning
22 that race was a feature of the investigation and that
23 was one of the things that underpinned all the avenues
24 of investigation that we undertook.

25 Q. But we've heard that there was nothing about race in the

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1 analysis and there was nothing about racial tropes or
2 racial stereotypes which had -- which you were able to
3 identify from the statements of the officers. Was it
4 your expectation that the Lord Advocate would take those
5 papers and read through them all himself and make his
6 own assessment, as you say you have -- you carried out
7 about issues to do with racial motivation?

8 A. I think it was my understanding that he would be
9 satisfied that I had gone through all the correct
10 processes and that if there was anything from the --
11 from the narrative and the body of my report which
12 caused him concern, then he would ask for further work
13 to be done, in the same way as I had done when I was
14 preparing my report and reading the precognition.

15 Q. Was it your expectation that the Lord Advocate would say
16 to you "Why is there no mention of race here?"

17 A. No, because if I had thought he was going to ask me
18 that, I would have made sure that I had done it in the
19 first place.

20 Q. Right. So why didn't you do it in the first place?

21 A. Because we would -- I was doing it as part of all the
22 information gathering. It was something that was
23 overarching.

24 Q. But not mentioned in the paperwork?

25 A. I think analysed out, no, but it was -- it was being

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1 looked at in all the information that we were gathering.
2 I'm not sure quite sure beyond mentioning racial
3 stereotyping or racial tropes how much more could have
4 been said if we were actually looking at those areas.

5 Q. Did you consider what inferences could -- I'm not asking
6 you what you did, but could you have considered what
7 inferences could have been drawn from the existence of
8 racial tropes, racial stereotypes, links being made to
9 terrorism? Did you consider and ask yourself that
10 question what inferences could be drawn here?

11 A. I think if I had got to the position where the factual
12 matrix had led us to the point where the actions were
13 unreasonable or not justifiable or unusual or out of the
14 norm, then that would have required that next step.
15 It's not that we weren't asking the questions, but once
16 you have the -- once you have the actus reus of a crime,
17 then you want to look at the mental element.

18 Q. Did you consider whether the actions of the officers
19 were justifiable?

20 A. I did. But I needed help with that and that's why we
21 wanted the further expert. It had been dealt with I
22 thought on a less than satisfactory level for my
23 purposes in the experts that we already had and I didn't
24 think that what we had went far enough and my
25 recollection is that we didn't get round -- get -- have

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1 the ability to instruct the OST expert until quite late
2 in the day. That was partly because of the continuing
3 analysis of the expert information that we had, but also
4 partly because of the difficulty in identifying a
5 suitable expert.

6 Q. Looking back now, are you satisfied yourself that all
7 the steps that were taken as part of that crown
8 precognition process by you, by other members of the
9 team, that all reasonable steps were taken to unmask any
10 racist motivation?

11 A. I have thought about this quite a lot and I have to say
12 that my overriding feeling when I came out of the
13 investigation was that we went above and beyond what we
14 would normally do, extra, and that felt a little
15 uncomfortable, because it felt like that's not something
16 we should be saying when we're looking at different
17 investigations, but perhaps now looking at it with
18 hindsight that is what we were doing. We were going
19 that extra mile to try and unmask something, because we
20 were following things in a pre-petition precognition in
21 such detail that we might not normally have done if it
22 hadn't been the circumstances that were facing us. So
23 that I have to say is with hindsight an explanation for
24 my feeling that when we came out of the investigation
25 that we really went further than we would normally do.

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1 Q. Certainly we've heard from Mr Stephen McGowan and he was
2 asked in relation to this. He said "With the benefit of
3 hindsight, did the crown investigation take all
4 reasonable steps to unmask any racist motive?" He was
5 of the view that he thought further steps could have
6 been taken.

7 A. Well, what I've already agreed with you is that one of
8 the steps is we could have had an expert to inform me
9 and the investigative team about racial stereotyping,
10 racist tropes, unconscious bias. That might have been
11 helpful and that might have been a step where we could
12 have said that's something that should have been done.
13 Would it ultimately have assisted in my assessment of
14 criminality? I don't think so.

15 Q. Right. I don't need to ask you that question.

16 A. Perhaps it's a step that we might have done at the next
17 stage, but would it have been helpful at the time?
18 Possibly.

19 Q. Would it have been reasonable to perhaps seek out
20 further expert assistance in relation to identifying
21 racial motivation?

22 A. I think -- I think with hindsight that might have been a
23 good thing to have done.

24 Q. Right. And certainly I think Lindsey Miller also gave
25 evidence and she described that there were other

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1 opportunities for exploration that could have been
2 carried out. I asked her or my learned junior asked
3 her:

4 "With the benefit of hindsight, do you consider that
5 all reasonable steps were taken to unmask any racist
6 motive by crown?"

7 And Lindsey Miller's evidence was:

8 "I think on the basis of Ms Carnan's evidence, no."

9 Would you disagree with that, knowing what I have
10 told you about Ms Carnan's approach?

11 A. If you were asking her that discrete question on the
12 basis of the analysis, then I don't disagree with her
13 agreement in that. I do disagree about the -- our
14 general approach and the wider investigation.

15 Q. I would like to move on now to your consultations with
16 the experts, but I'm conscious it's a minute to three
17 and we often have a break at this time.

18 LORD BRACADALE: We'll take a 15-minute break.

19 (2.59 pm)

20 (A short break)

21 (3.21 pm)

22 LORD BRACADALE: Ms Grahame.

23 MS GRAHAME: Thank you. Before the break, we were talking
24 about when you had prepared your reports or draft CCIs,
25 as we were calling them before, and you had spoken to

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1 the Lord Advocate and I asked you about what you had
2 prepared in writing and you have explained your position
3 on that.

4 Can I ask you, when you met with the Lord Advocate,
5 did you have a discussion or raise the topic of race,
6 racial motivation with him?

7 A. I can't remember the meeting with the Lord Advocate. I
8 can't remember any details. I remember the lead up,
9 I remember -- I remember sending the materials to the
10 private office. In fact, I think the private office
11 asked me for the materials. I saw somewhere in the
12 emails an email to Giles, who was at that time the
13 private secretary to the Lord Advocate, so I remember
14 sending in the papers, I remember the Lord Advocate
15 asking for a meeting, I remember there was further work
16 to be done after that meeting, but I don't actually
17 remember who was at the particular meeting, whether it
18 was just me and the Lord Advocate or whether it was the
19 whole team.

20 Q. When you say you were asked to send the materials, what
21 do you mean by materials?

22 A. So the precognition.

23 Q. And was that the precognition itself plus the
24 accompanying documents or was it only the precognition?

25 A. No, the accompanying documents are part of the

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1 precognition. The whole --

2 Q. So the full thing?

3 A. The full thing is the precognition.

4 Q. And do you remember anything about the meeting?

5 A. I remember a number of meetings in the Lord Advocate's
6 office about this case. The ones that stick in my mind
7 are the ones where there were -- there was a whole team
8 of people. I remember that there were meetings
9 subsequent to the issue of my CCI with regard to next
10 steps. I think even before issuing my CCI there might
11 have been meetings with regards to the further work that
12 were required as part of the whole investigation, so, in
13 other words, is it going to go to FAI and further work
14 requires to be done for that or is -- are the issue --
15 are these issues for a public inquiry?

16 So I remember all those and I remember the -- the
17 discussions in those particular bigger meetings, but
18 I don't remember specifically the discussion between me
19 and the Lord Advocate. If it was a one-to-one, I don't
20 remember that.

21 Q. Do you remember if you prepared any notes or an agenda
22 or were any minutes prepared or anything prepared by you
23 to allow you to prepare yourself for that discussion or
24 that meeting?

25 A. I think the report would be the basis of the

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1 discussions, so my report to the Lord Advocate will be
2 the basis of the discussions. I don't remember at that
3 time with regard to note-takers. Usually now in any
4 meeting that I have or certainly a wider meeting that I
5 have with the Lord Advocate, there's always somebody
6 from the private office who's taking notes and the same
7 thing happens at law officers briefing, but I don't
8 remember whether that was an informal discussion or a
9 formal meeting with a number of personnel and a formal
10 note-taker.

11 Q. So you've said you can't remember the meeting, but is
12 there any part of you that recollects whether race was
13 discussed, racial motivation, racial tropes, racial
14 stereotypes, terrorism or any of that type of topic?

15 A. No, because I can't remember the actual discussion. I
16 did see in the material that there was an official
17 instruction that came out from private office post that
18 meeting which instructed me via the private office to
19 have a consultation with the OST expert and I have seen
20 that in the materials recently.

21 Q. And do you remember what was the purpose of the
22 consultation?

23 A. No, and I don't think -- the instruction is pretty
24 brief. I think it's only from memory a couple of lines.

25 Q. All right. And you did subsequently consult?

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- 1 A. I did.
- 2 Q. Thank you. I was going to move on to ask you some
3 questions about consultations. We've heard evidence
4 about something called the Precognoscer's Handbook.
5 Fiona Carnan and Les Brown have given evidence about
6 that. There is a chapter -- we can have it on the
7 screen, COPFS 05681. It's a chapter entitled "Expert
8 Witness" and I don't know if you have seen that or
9 you're familiar with it in any way?
- 10 A. I'm aware of the Precognoscer's Handbook. I haven't
11 studied it recently, but I'm aware of its content. It
12 is a source of knowledge that's available on the
13 knowledge bank should I require to look at anything in
14 particular. I did start out my career with COPFS and
15 I was at one stage a Fiscal Depute in Dundee, so I did
16 do a limited amount of High Court precognitions for
17 submitting to Crown Office.
- 18 Q. So you have actually been a precognoscer yourself?
- 19 A. I have.
- 20 Q. Legally qualified?
- 21 A. Yes.
- 22 Q. In the past?
- 23 A. Not for a very long time, but, yes, I did do a short
24 period as a Fiscal Depute.
- 25 Q. Thank you. Could we look briefly at page 3, paragraph

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1 4. This chapter of the handbook gives some guidance to
2 precognoscers about experts and the use that's made of
3 experts. I'm interested where it is at the start of
4 there:

5 "Although not essential, it is obviously useful if a
6 report can be produced by an expert witness which can be
7 listed as a production and which she or he will be able
8 to speak to in court. Such a report should contain
9 information on the following points: the witness's
10 qualifications and experience and expertise, the factual
11 basis on which their views are based, the conclusions
12 the reasons for discounting other explanations."

13 And it says:

14 "A good report will also set out clearly, if
15 appropriate, the scientific background and the
16 presumptions on which his conclusion are based. If the
17 report is lacking in any such respect then this should
18 be made good by precognition."

19 And would you agree that that is good practice
20 primarily to obtain that information from an expert
21 either in the report or at precognition or by an AD in a
22 consultation?

23 A. So this I understand is instructions to a precognoscer
24 with regard to what an expert report should look like.
25 So when a precognoscer is looking at the report, then

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1 those are the things that should be in the report. If
2 they're not in the report, then sometimes reports come
3 in draft form and so there's the opportunity to have a
4 further report. Often the draft form now will be
5 disclosable so it's not something that causes a problem,
6 but you can go back to the expert and say, actually, no,
7 could you include X, Y and Z in the report. So this is
8 at an early stage and this is part of the preparation of
9 the precognition.

10 I think basically this is targeted at post-petition
11 precognitions, so preparing cases once there is a
12 decision on criminality and the cases are being prepared
13 in my experience for Crown Counsel for the High Court.
14 So it's being prepared in High Court format.

15 Q. Right. And would it be your expectation that a
16 precognoscer would be ensuring that an expert was
17 suitably qualified and experienced in order to provide
18 an opinion?

19 A. Yes.

20 Q. And in terms of determining whether the expert witness
21 is fully qualified and has the necessary experience, is
22 that something you would expect the precognoscer to do
23 or someone else?

24 A. I think it depends on each individual case and the team
25 that's preparing the case for precognition. Sometimes

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1 it might be the precognoscer, sometimes it might be the
2 senior legal manager, the person who's in charge of the
3 precognoscers, sometimes it might be Crown Counsel,
4 Crown Counsel who is suggesting a witness or
5 Crown Counsel who's involved in areas that are difficult
6 to get a witness. A Crown Counsel might bring their own
7 experience to bear on experts that they've come across
8 in the past or you might ask some, you know, one of your
9 colleagues to suggest witnesses, so those are all the
10 circumstances where it's important to identify an expert
11 with the correct expertise.

12 Q. As part of this work being carried out by the
13 precognoscer, would you also expect them to determine
14 whether the expert was conflicted, whether there were
15 any possible conflicts of interest that should be
16 addressed, anything of that sort?

17 A. That will all in my experience be bottomed out at the
18 time of choosing the expert and that's sometimes why
19 it's difficult to get experts, because you go through
20 that process and experts are put to one side because of
21 one reason or another.

22 Q. Of potential conflicts?

23 A. Yes, or, for example, the defence already have that
24 expert and so that expert is not available to the crown.

25 Q. Right, thank you.

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- 1 A. And that's the sort of situation I'm thinking about is
2 at the stage where you have criminality and you're
3 looking to indict.
- 4 Q. When there's an allocated AD involved, as there was in
5 the death of Mr Bayoh's investigation, do the roles or
6 responsibilities of the precognoscer regarding the
7 expert alter?
- 8 A. No, I don't think so. As we have discussed earlier in
9 my evidence, a lot of the investigations are
10 fact-specific with regard to the makeup of the team and
11 who's leading on it and the stage that it's at and, as I
12 have indicated, this is a pre-petition precognition so
13 slightly different.
- 14 Q. And when you use the phrase "it depends who's leading on
15 it" who was leading on this investigation in relation to
16 Mr Bayoh?
- 17 A. When I came into it which was quite considerably far
18 down the line, there was already the team in place.
19 There had been significant input from some of the senior
20 civil service and from two Lord Advocates, so lots of
21 input at the point I came in.
- 22 Q. Who would you say was leading the investigation prior to
23 your involvement?
- 24 A. I think to a certain extent Les Brown was leading on the
25 day-to-day elements of the investigation.

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- 1 Q. And after you became the allocated AD here, who was
2 leading?
- 3 A. Still Les Brown.
- 4 Q. Still. So at any point were you leading the
5 investigation?
- 6 A. No, because I'm not a precognoscer and not part of the
7 precognition team and, as we've discussed earlier, it's
8 very important for Crown Counsel to remain independent
9 of that process.
- 10 Q. Right. Thank you. Could I ask you to look at another,
11 please, COPFS 05687 and this is "Serious and Complex
12 Case Guidance: Chapter 8", which relates to expert
13 evidence and the role of expert witnesses. I'm
14 interested in particular on page 8 of this document and
15 particularly 8.6.1, so "Consultation with an Expert
16 Witness", "Background". There is -- you see second
17 paragraph:
- 18 "There is a presumption that crown experts will be
19 consulted with in High Court cases."
- 20 A. And if we can just pause there, this at this stage was
21 not a High Court case, because we had not got to the
22 stage of establishing criminality so this was a
23 pre-petition precognition.
- 24 Q. So this guidance here about a presumption that
25 consultations would taken place did not apply to this

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- 1 particular situation with Mr Bayoh?
- 2 A. I don't think so, because this is in the precognition of
3 a High Court case in High Court format. So this is
4 what's -- we now have something called "the minimum
5 standards" and Crown Counsel have inputted into those
6 minimum standards and the minimum standards are what
7 Crown Counsel expects to come to them in a High Court
8 case, but this is prior to that document and this is
9 setting out to precognoscers what Crown Counsel is
10 looking for in the preparation of a High Court case, so
11 a case that's coming to them to prosecute or potentially
12 to indict.
- 13 Q. What is the -- sorry. What is then the normal practice
14 or the expectation in relation to consultations with
15 experts in the case that you were dealing with here
16 regarding the death of Mr Bayoh?
- 17 A. I think that phrase "There is a presumption that crown
18 experts will be consulted with in High Court cases", I'm
19 not sure that that particularly specifically applies in
20 pre-petition precognitions. The pre-petition
21 precognition is to look for potential criminality so
22 that we can then lead to the stage if there is
23 criminality, then there would be placing an accused or
24 accused on petition. I think for pre-petition
25 precognitions it's targeted as to what is necessary in

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1 that particular circumstance.

2 Q. And who decides in relation to that situation, such as
3 that involving the death of Mr Bayoh, what consultations
4 are necessary in the circumstances? Whose decision is
5 that?

6 A. I think that will be part of the case preparation team
7 as they're going along. If there are issues with regard
8 to the reports in the reports -- there was reports that
9 were already in place when I came in, but there were
10 subsequent reports. I probably got them at the same
11 time as the precognoscer. If there were issues, it was
12 perfectly open to me to say go back and speak to that
13 witness. I think some of the witness were precognosed
14 before reporting to me, the expert witnesses, but I'm
15 not able to tell you which ones, but if I wanted
16 something at that early stage clarified or I spotted
17 something or the case preparer or the SLM or the person
18 directing the investigation wanted something clarified,
19 they could either go ahead and precognosce the expert or
20 come to me and we could discuss it.

21 Q. In terms of consultations with experts, whose decision
22 would it be in terms of whether it was necessary to
23 consult with an expert at that stage?

24 A. At the stage before it was reported to me?

25 Q. Yes.

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- 1 A. Once they were preparing the precognition before it's
2 reported to me?
- 3 Q. All right. Well, let's deal with it in two phases.
4 Prior to you actually being an allocated AD, who decides
5 whether or not it's necessary to consult with an expert?
- 6 A. The case preparation team and that's really what's
7 anticipated in that document, even though it's not for
8 pre-petition, particularly targeted at pre-petition,
9 that is targeted at the precognoscer.
- 10 Q. Once you became the allocated AD, who would decide
11 whether it was necessary to consult with an expert?
- 12 A. If it was in advance of providing me with the
13 precognition, then it was the case preparers -- the case
14 preparers, so the team.
- 15 Q. Would you be expected to attend that consultation?
- 16 A. Not necessarily, no.
- 17 Q. Right.
- 18 A. There would be subsequent consultations where I would
19 attend so in the preparation of the precognition. So
20 for example, I hadn't -- I didn't know any of the
21 details or I have not seen the precognition, I'm not
22 involved as we go along, this would be done entirely
23 independently of Crown Counsel and precognitions in the
24 format that's anticipated here of experts would be part
25 of the full precognition.

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1 Q. Right. This is about a presumption experts will be
2 consulted with. Are you saying that -- what was the
3 practice in terms of consultation with the experts, not
4 simply precognosing them, but consulting with them
5 prior to a case, prior to petition, prior to a case
6 going to the High Court? What was the normal practice?

7 A. The normal practice would be the preparation of a case
8 post petition, so the case will be prepared after a
9 person has appeared on petition and then it will be
10 provided -- a precognition will be provided to
11 Crown Counsel, Crown Counsel will make a decision on
12 criminality, the case will be indicted and thereafter
13 the Crown Counsel would take that case through the
14 various court stages. So at the stage of reporting post
15 petition before the decision on indicting, the
16 precognitions will be subject to the presumption here
17 that the experts would be precognosed by the case
18 preparers and then a full note. There's a format on how
19 that precognition or that consultation is recorded,
20 precognition.

21 Q. Was the expectation that there wouldn't be consultations
22 with the experts until after the case has been indicted?

23 A. Well, I guess it's maybe a confusion on terminology. In
24 the normal run of events an expert will report, the
25 precognoscer will look at the experts' reports. There

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1 is of course -- and this is post petition. There is the
2 presumption that that expert will be consulted and the
3 notes or the precognition is taken. So if we're talking
4 about a homicide and we're talking about a pathologist
5 being spoken to, then the Crown Counsel would expect
6 there to be a precognition usually or a consultation and
7 a precognition of the pathologist by the time it comes
8 to us for reporting.

9 Q. Right. Thank you. And then in the next paragraph it
10 says:

11 "Case investigators should aim to consult with crown
12 expert witnesses prior to the case being reported to
13 Crown Office for Crown Counsel's instructions and
14 indicting."

15 Which I think is what you just said?

16 A. I think that's what I've just said, yes.

17 Q. "And where an allocated AD has been identified then the
18 consultation should ideally be conducted with that
19 allocated AD and the case investigator both present."

20 Do you see that?

21 A. I do. And in my experience that often happens once the
22 AD has the papers, the precognition, and the
23 consultation then takes place with the Advocate Depute
24 and the case preparer present.

25 Q. And who's the case preparer or case investigator as is

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- 1 stipulated there? Is that the precognoscer?
- 2 A. It is, so that's Alisdair McLeod and Erin Campbell.
- 3 Q. Or would it include Fiona Carnan?
- 4 A. Not in this case, because that's not part of what she
- 5 did as far as I'm aware. She didn't come in at that
- 6 phase where the evidence was being in gathered, analysed
- 7 and the further statements taken. I don't actually
- 8 recall whether there were any consultations with the
- 9 experts prior to the case being reported to me, prior to
- 10 the precognition being received by me.
- 11 Q. All right.
- 12 A. There may have been. I just don't recall.
- 13 Q. Is this an example of where there may be some
- 14 disadvantage if the narrative and the analysis are
- 15 prepared by different people where perhaps
- 16 Alisdair McLeod who prepared the narrative could be
- 17 involved in a consultation of an expert, but
- 18 Fiona Carnan who prepared the analysis would not be?
- 19 A. Yes.
- 20 Q. All right. And was there expectation that the person
- 21 who attended the consultation with the expert would
- 22 prepare detailed notes?
- 23 A. Yes, but not in the way that is anticipated in the
- 24 preparation of the precognition, because the purpose of
- 25 consultation with an Advocate Depute is different from

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1 the purpose of preparing the precognition for the
2 Advocate Depute. So the way that it's anticipated it
3 would be set out and reported in proforma form is for
4 preparation of the precognition and for presenting
5 that's part of the precognition to the -- to counsel.

6 Q. So for an allocated Advocate Depute who is attending a
7 consultation with an expert where you have the crown
8 precognition and you're attending an expert, what is the
9 role of that Advocate Depute?

10 A. If you're asking me specifically about the consultations
11 that took place in this case --

12 Q. I will in a minute.

13 A. Okay. So can you ask me the question again, sorry.

14 Q. Yes, I can find out the copy of it. Essentially I was
15 asking you a general question about the role of an
16 Advocate Depute who's received a crown precognition, a
17 bundle of papers and instruction effectively to attend a
18 consultation with an expert, what is the role of that
19 Advocate Depute? What are they doing? What are they
20 trying to achieve by meeting with that expert?

21 A. So if we're talking about post petition, Advocate Depute
22 already has all the papers, the precognition, everything
23 is prepared that the case preparer wants to give to the
24 Advocate Depute. The Advocate Depute has read that
25 precognition. If the consultation is pre-decision or

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1 pre-service of the indictment, then it is to inform the
2 Advocate Depute with regard to further information
3 that's not clear from the report or from the papers.

4 Q. And if it's after the indictment has been served before
5 the trial?

6 A. It's in preparation for the trial and at that stage it
7 may be even more focused because it will involve the
8 types of things that we were asking discussing this
9 morning, which is different hypotheses with regards to
10 the factual matrix. If that's put to you, what would
11 you say about that? What about X? What about Y?
12 That's the kind of thing by the time you are post
13 indictment and you're preparing for a trial an Advocate
14 Depute wants to really fully explore.

15 Q. Could you not be exploring that in advance of the
16 indictment if alternative factual scenarios have
17 presented themselves through the investigation?

18 A. You could be. It really depends on each individual
19 case. You could be looking pre making a decision post
20 indictment -- pre-- post petition but pre indictment.
21 You could be looking at things that are going to factor
22 in as to whether you're going to mark this case to
23 proceed, whether there's a sufficiency of evidence,
24 whether you have in fact got the correct forum, whether
25 it should be a High Court or whether it's something that

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1 perhaps should be marked to go to sheriff and jury. All
2 those things pre indictment are potentials, whereas by
3 the time you're post indictment you are really focusing
4 in with trial goals as to what is going to happen at the
5 trial.

6 Q. Right. Could we look at the bottom of page 8, please.
7 And it talks about:

8 "In solemn cases there is a presumption that a
9 consultation should be conducted with all crown expert
10 witnesses, including expert medical witnesses, unless
11 their evidence relates to routine forensic analysis of
12 drugs, confirmation has been provided by the defence
13 that the evidence will be the subject of agreement or a
14 satisfactory statement from a medical witness has been
15 submitted by the police in accordance with the Serious
16 Crime Protocol."

17 Would you agree with that assertion?

18 A. At the stage that this document, because we are talking
19 about post petition, because already we have defence
20 counsel or an identified accused.

21 Q. So post petition there is a presumption that a
22 consultation will be carried out with all the crown
23 expert witnesses, including expert medical witnesses.
24 Before the petition, before the decision has been made
25 to -- whether to prosecute or not, is there a

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- 1 presumption along those lines or is there any
2 expectation along those lines?
- 3 A. I'm not sure whether there is guidance or documentation
4 that deals specifically with pre-petition precognitions.
5 I'll be directed by you if there is.
- 6 Q. Is there a practice akin to what you have described a
7 moment ago that a decision will be taken as to whether
8 it's necessary to consult with an expert?
- 9 A. Absolutely.
- 10 Q. Medical or otherwise?
- 11 A. Absolutely, because what we're wanting to do pre
12 petition is really we're going through the same process,
13 we just have a slightly different focus, because we're
14 looking at all aspects of potential criminality. We
15 want an in-depth, but also quite a wide investigation in
16 and pre petition. On the other hand, there might be
17 some pre-petition investigations when we're looking at a
18 very, very specific thing and all that we need is the
19 precognition of one witness or the examination of two or
20 three witnesses.
- 21 Q. Right.
- 22 A. That might be a situation where Crown Counsel will say
23 "I'm not making a decision to put this person on
24 petition until you go and provide me with information
25 with regard to X, Y and Z."

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1 So it can be quite focused and quite short or it can
2 be very lengthy.

3 Q. Now, as Allocated AD in the particular investigation
4 we're talking about into Mr Bayoh's death, what input
5 did you have from the point you became Allocated AD into
6 which experts were to be consulted with?

7 A. I'm not sure that I had any particular input into which
8 experts would be consulted with pre submission of the
9 precognition.

10 Q. All right. Do you remember any discussions with you
11 about who should we consult with or do you wish to
12 consult with this expert or another expert?

13 A. By the time I had the precognition, read all the
14 materials, I knew which experts I needed to consult with
15 because I knew where the gaps in my knowledge or my
16 understanding were.

17 Q. So at that point, in 2018, was it your decision who was
18 selected to have a consultation with?

19 A. Post submission of the precognition to me, yes, in my
20 reading of the material that I had. What I don't
21 remember is as part of the preparation of the document,
22 the set of case papers, was whether the case preparation
23 team consulted and precognosed any of the expert
24 witnesses. That might --

25 Q. Right.

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- 1 A. That might have happened, but I don't recall.
- 2 Q. Right. And I think you said earlier this morning that
3 you received the precognition in early 2018; is that
4 right?
- 5 A. I did. I think certainly at the meeting in Hamilton in
6 the January, which was actually the period that I had
7 been allocated to do the reading, there was a discussion
8 which I have seen in the materials which suggested that
9 the precognition or at least parts of it would come to
10 me by the end of February, beginning of March.
- 11 Q. We have heard evidence about some of the experts who
12 were instructed in the period after the final PIRC
13 report was received by Crown Office so after August 2016
14 when you were Allocated AD and during that period
15 between in 2017 actually between the March and August
16 there were three experts instructed, a
17 Professor Anthony Freemont, who was an osteoarticular
18 pathologist; a Dr William Lawler, a forensic
19 pathologist, and a Professor Michael Eddleston, a
20 clinical toxicologist and pharmacologist. And the
21 evidence we have heard in relation to Professor Freemont
22 was that he was instructed to explore the issue of the
23 fractured rib. Now, that was not part of the cause of
24 death, but the crown, as I understand it, were
25 interested in the fractured rib because it may have had

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1 an impact on the level of force used and in terms of
2 timing of the fracture.

3 A. Levels of force and also the methods used, so it might
4 have helped us with regard to this idea that there was
5 potentially officers kneeling on Mr Bayoh's back. So
6 those were the kind of things that we wanted to look at
7 with regard to the fracture and my recollection was it
8 was in an unusual position for a fracture. If I
9 remember correctly, it was the first rib.

10 Q. Yes, that's correct.

11 Now, we've heard that Professor Freemont, being an
12 osteoarticular pathologist, that's a particular niche
13 area of pathology, that it's a rare expertise for an
14 expert to have, and he gave evidence that when he
15 retired and I summarise, the Home Office asked him to
16 return to train the next generation, because there was a
17 concern that there was no one in the UK that could take
18 his place. Were you aware of any of that?

19 A. I was. I was aware of all that, because it was me that
20 had suggested Professor Freemont and, in fact, in the
21 months before, I had been down consulting with him with
22 regard to a non-accidental death -- non-accidental head
23 injury and a previous death of a baby, so I had
24 consulted with him in detail. I had also been on a --
25 conducted a number of cases where I had been the

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1 allocated Advocate Depute where we had difficulty in
2 finding a replacement for Professor Freemont once he had
3 retired and if my recollection is correct, it was
4 Dr Mangham I think that took over from him.

5 Q. Thank you. You anticipated the question I was going to
6 ask. Les Brown had given evidence that
7 Professor Freemont was identified because of your prior
8 involvement with him as a witness in another trial that
9 you had conducted and that was how he was ultimately
10 instructed and identified by the team?

11 A. It was in fact a trial that I was conducting at the time
12 of Mr Bayoh's death, so it was an eight- or nine-week
13 trial in the Summer of 2015.

14 Q. Thank you. Can I ask you about Dr Lawler,
15 Dr William Lawler. He is a forensic pathologist. Now,
16 we've heard that is the same role as Dr Shearer and
17 Dr Bouhaidar who conducted the postmortem on Mr Bayoh
18 and also the same expertise as Dr Carey and Dr Crane and
19 I'm interested in the instruction of Dr Lawler.
20 Les Brown gave evidence about his instruction and he
21 said -- he described him as a "reviewing pathologist"
22 and as I have been listening to your evidence today,
23 I think you maybe used a phrase along those lines. You
24 said he had been suggested or that course of action had
25 been suggested by the Lord Advocate at an early stage

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1 and that is how Professor Lawler's name came up.

2 "At that time the Crown Counsel were wanting to
3 identify or reviewing pathologist and the full CV of
4 Professor Lawler was forwarded to Ashley Edwards and she
5 considered that and approved an approach being made to
6 Dr Lawler."

7 Now, I'm interested in how Dr Lawler came to be
8 identified and what the purpose of his instruction was?

9 A. I don't remember how he finally came to be identified,
10 but I think the precognition team did a lot of
11 investigations into the correct expert to carry out the
12 process of reviewing all the expert reports that we had,
13 because we had quite a range of expert reports from
14 recollection, a lot of them covering the same material,
15 maybe having the same qualifications, but stepping
16 outside their own area perhaps of expertise and that's
17 not a criticism.

18 I think it was they were asked the particular
19 questions and perhaps they weren't the ideal experts, so
20 in the question that you asked me earlier about the
21 instruction of the pharmacologist and the toxicologist,
22 I recall having a discussion and identifying that
23 actually the information that we had on pharmacology and
24 toxicology was not sufficient, because the expert didn't
25 have the qualifications and we really needed someone

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1 specifically with regard to toxicology and pharmacology.

2 I don't -- the second one was Professor Freemont.

3 I don't remember who the third one was that you

4 mentioned. I think he might have been emergency --

5 Q. Eddleston, clinical toxicology and pharmacology.

6 A. Okay. And there was another one that you mentioned, a

7 third one as well.

8 Q. Lawler.

9 A. Lawler, okay, so he was the reviewing -- we thought

10 would be the reviewing pathologist.

11 Q. I know you said earlier today you had looked at the

12 evidence or some of the evidence of Les Brown, so you

13 may be able to anticipate the questions I'm about to ask

14 you, but in relation to Dr Lawler, first of all, do you

15 remember if the suggestion came from a Lord Advocate

16 that there should be a reviewing pathologist or was it

17 from someone else?

18 A. I don't remember if it was the Lord Advocate or if it

19 was me that suggested a reviewing pathologist. If the

20 Lord Advocate said it was him, that's fine, I'm happy to

21 take that one.

22 Q. I think it's fair to say the Chair has differing

23 versions available to him.

24 A. It's certainly a process which I had employed in the

25 trials that I was talking about with regard to baby

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1 deaths and non-accidental head injury.

2 Q. Can you explain to the Chair what this different -- what
3 you envisaged a reviewing pathologist would do?

4 A. Okay. I was seeing a lot of expert evidence which
5 covered -- as I indicated not the fault of the experts,
6 but they were asked questions that perhaps were not
7 covered in their area of expertise which meant that we
8 had a lot -- we had the original pathology report and
9 then we had a lot of other expert reports from memory
10 that kind of skirted around the pathology.

11 So we had a great deal of reports, but not
12 particularly targeted and I needed to find my way
13 through all those reports and what they actually meant
14 at the end of the day. The idea of a reviewing expert
15 is certainly something that I've used in non -- cases
16 involving non-accidental injury to children, in
17 particular a reviewing pediatrician. The purpose of
18 reviewing all of the reports, everything that we had,
19 was to try and pull together what we had. It wasn't
20 necessarily someone that was going to give evidence in
21 court, but someone who could assist us with the
22 potentially plethora of reports that we had.

23 Q. So was the expectation that they would simply come in
24 and review every single report that you had available?

25 A. I think they were given -- I think Dr Lawler --

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- 1 Q. Dr Lawler, yes.
- 2 A. Dr Lawler was given all the reports that we had,
3 including supplementary reports, and that process that I
4 had anticipated he would go through is pretty much what
5 a pathologist does on preparation of the autopsy report,
6 which is go through their own investigation, produce a
7 draft report, wait for the information from subsequent
8 experts like neuropathologist, histopathology,
9 toxicology. The pathologist, as I understand their job
10 from consulting with them, will go -- will look towards
11 those supplementary reports and, if required, will
12 reflect them in their final autopsy report.
- 13 Q. And was the expectation that it would be all
14 pathologists' reports that Dr Lawler would look at or
15 all experts with some connection with pathology?
- 16 A. All experts with some connection with pathology, because
17 that's the understanding, my understanding of the
18 process that the original pathologist would do so
19 routinely at the end of their report you'll find
20 reference to neuropathology, toxicology, histopathology,
21 biochemistry, those kind of things, and so that's the
22 process that I had envisaged Dr Lawler would carry out.
- 23 Q. You mentioned toxicology, did you consider that to be
24 akin to pathology? You just said toxicology there.
- 25 A. No, no, sorry. The pathologist will look at the reports

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1 from all those different experts before they have their
2 final report, so the pathologist will look at the
3 neuropathology report, which will be a different --
4 usually in my experience a different doctor.

5 The pathologist, the original attending pathologist,
6 the doctors who carry out the autopsy will before
7 issuing their final report take into account all the
8 other expert reports which they have instructed on the
9 back of their examination before they produce their
10 final report.

11 Q. Let's look at the letter of instruction, please, which
12 is COPFS 04503A. My understanding this is a letter of
13 instruction from the crown to Dr Lawler dated 28 March
14 2017. So this is after the crown precognition has been
15 sent to you -- sorry -- this is before the crown
16 precognition has been sent to you. That didn't happen
17 until the following year, 2018, so it's a letter to
18 Dr Lawler and if we can just go down the page, there's
19 some explanation about what Crown Office are looking
20 into:

21 "Evidence suggests that during the restraint
22 Mr Bayoh lost consciousness, went into respiratory and
23 then cardiac arrest and was pronounced dead."

24 And it talks about at the interim postmortem.
25 Following the postmortem examination a skeletal survey

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1 was undertaken.

2 A. I'm not sure. I am following you now. I see it's in
3 the middle of the page now.

4 Q. I'm just having quickly scanning through. If I'm going
5 too quickly, we can stop.

6 "Further toxicological investigations revealed the
7 presence of alcohol, MDMA and a drug known as alpha-PVP
8 within want blood and the cause of death was then
9 amended to sudden death in a man intoxicated by MDMA
10 (ecstasy) and alpha-PVP whilst being restrained at that
11 stage."

12 A. And that is an example of what I was explaining earlier
13 as my understanding of what pathologist do before they
14 produce their final report and here there is an
15 acknowledgment that following the toxicology report
16 there was in fact an amendment to the cause of death in
17 the final report.

18 Q. We've heard evidence from Dr Shearer that after the
19 postmortem was carried out, there was an interim, if you
20 like, postmortem report prepared. The cause of death
21 was described as unascertained and at that stage it was
22 pending further results from toxicology, so Dr Shearer
23 explained in evidence that she had taken samples and
24 they had been sent to other experts to carry out the
25 process of analysis of that blood and the contents of

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1 that and she then incorporated those findings back into
2 her report.

3 A. And I think that's an example of what I was trying to
4 explain earlier about the process that pathologists go
5 through before issuing their final report.

6 Q. Right. Dr Shearer was not being asked to review the
7 methodology or the results or the findings of the
8 toxicologist. She was incorporating those findings into
9 her postmortem report. Is that the process that you
10 expected that other reports would be incorporated into a
11 final report by Dr Lawler? Do you see I'm trying to get
12 you to explain the different expectations.

13 A. I do. This -- Dr Lawler is not producing a postmortem
14 report.

15 Q. No.

16 A. That --

17 Q. He's a pathologist.

18 A. He is a pathologist and if he had conducted the
19 postmortem, then he would have produced the report in
20 the same way as you have just described Dr Shearer
21 described to you. So I think what I was trying to
22 explain was that that's a process taking into account
23 the different results or different reports, different
24 findings. That's a process that the pathologist goes
25 through before producing a final report so I think that

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1 was all I was trying to draw an association with.

2 Q. Right. Can you explain -- obviously we can see with
3 Dr Shearer and Dr Bouhaidar they're gathering in --
4 they're having analysis, independent tests carried out,
5 gathering in the results of those and incorporating them
6 into a final postmortem report which is then presented.

7 What was the role and the expectation of Dr Lawler
8 who wasn't carrying out an autopsy or a postmortem. He
9 was a pathologist, however, he is a forensic
10 pathologist, what were you expectations of him in
11 relation to his instruction, because it was -- clearly
12 not the same as the process being carried out by
13 Dr Shearer?

14 A. No, but it was -- from the process that we've gone
15 through that pathologists go through to produce their
16 final report, it was a similar process that the -- we
17 were asking the pathologist to do which was look at the
18 extra information that we've now got and give us an
19 opinion if you can about the extra information, is it
20 something that you would want -- you would take into
21 account if you were doing the postmortem? Does it
22 change anything? How do the expert reports interact
23 with each other? Just giving us a bit of assistance
24 into pulling everything together, because we did have
25 rather a lot of reports, some of them saying differing

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1 things about exactly the same circumstances.

2 Q. All right.

3 A. And it was really just a bit of assistance into how we
4 looked at that and how we judged them.

5 Q. Right. So at the bottom of this letter it says:

6 "As part of our... "

7 This is the letter of instruction to Dr Lawler:

8 "As part of our investigations, Crown Office are
9 attempting to clarify the role that restraint played in
10 the cause of Mr Bayoh's death."

11 And then we can move on:

12 "While it's apparent the fracture to the left first
13 rib will not have caused death, it may be of some
14 significance in establishing the force and mechanism of
15 restraint used by the police officers. A report has
16 been requested from an osteoarticular pathologist in
17 relation to the possible mechanism of the rib fracture
18 in light of the circumstances spoken to by the witness.
19 This will of course be shared by you in due course.
20 Following direction from the Lord Advocate, PIRC sought
21 opinion from a number of medical experts on the cause of
22 death, potential contributor factors and on the use of
23 force and restraint by police."

24 And so, again, if we move just to the bottom of the
25 previous page, we'll see that there seems to be a focus:

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1 "Crown officer attempting to clarify the role that
2 restraint played in the cause of Mr Bayoh's death."

3 And then moving down on to the next page:

4 "Following direction from the Lord Advocate, PIRC
5 sought opinion from a number of medical experts on the
6 cause of death and potential contributor factors."

7 And I'm interested -- in giving your evidence
8 earlier this morning, cause of death was a given. You
9 were satisfied in relation to cause of death.

10 A. I think I was satisfied with the causal link. I'm not
11 sure that I said that I was satisfied at that stage,
12 which is a year earlier, which is March 2017. We're
13 still in the throws of the investigation.

14 Q. Can you explain what the distinction is here in relation
15 to the in further investigations and the explorations of
16 the cause of death and the potential contributory
17 factors and what you were seeking to achieve in relation
18 to that aspect with Dr Lawler?

19 A. We were trying to tease out what had contributed to
20 Mr Bayoh's death. We were looking at that stage, and
21 that's a much earlier stage, that's some I think four or
22 five months after I first became involved, because it's
23 early 2017, and so at that stage we were still looking
24 to see if asphyxia was an issue --

25 Q. Sorry, can I stop you there, maybe I misheard. My

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1 understanding is you were the Allocated AD in
2 August 2016?
3 A. And this is March of --
4 Q. 2017.
5 A. -- 2017, yes.
6 Q. So you were involved at this time, weren't you?
7 A. It was just a matter of months after I had been
8 involved, so just an early --
9 Q. Thank you, sorry.
10 A. My arithmetic is not very good. I thought it was about
11 four months but maybe it's a bit longer than that.
12 Q. All right.
13 A. But certainly it's the early part of 2017.
14 Q. So it's 2017 and I'm really interested in trying to
15 understand what you were seeking to clarify in relation
16 to cause of death.
17 A. I wanted to know about the possibility of asphyxia,
18 mechanical asphyxia, positional asphyxia, and the reason
19 that Dr Lawler was asked those questions was I had
20 understood that he was a Home Office pathologist and he
21 had been involved in the Hillsborough disaster so he had
22 some expertise in the findings of mechanical asphyxia at
23 postmortem and that's the kind of things that we were
24 trying to tease out at that early stage because those
25 were important from a point of establishing a causal

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1 link.

2 Q. And if we could look up -- you say they were important
3 in establishing a causal link and with what, what was
4 the causal link --

5 A. The restraint --

6 Q. With the restraint --

7 A. -- the restraint and the death.

8 Q. With the restraint and the death. So you were trying to
9 clarify that there was a causal link between the
10 restraint and the death?

11 A. Absolutely, and initially it was thought the causal link
12 was asphyxia.

13 Q. Mm-hmm.

14 A. And it became clear that once the experts, the further
15 experts' reports had been obtained, and consultation
16 with Dr Lawler, that perhaps it was not causal -- it was
17 not asphyxia which was the mechanism of death but
18 perhaps some sort of cardiac arrhythmia.

19 Q. Can we go up to the previous page, please, and stop
20 there, please. This -- the cause of death is stipulated
21 here in the second-last paragraph that we see on the
22 screen, this was the amended cause of death after the
23 final postmortem report came out, "sudden death in a man
24 intoxicated by MDMA ecstasy and alpha-PVP whilst being
25 restrained". So "restrained" is specifically mentioned

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1 in the cause of death. Was that not sufficient for you
2 to recognise that there was a causal link between the
3 death and the restraint?

4 A. No, it was important for me from a criminal -- potential
5 criminal prosecution point of view to know what the
6 difference -- who the mechanism was as much as I could
7 understand so it would be important to know whether the
8 circumstances of the restraint led to the death as a
9 result of asphyxia or as a result I think -- now,
10 I think you, of course, have heard from the experts but
11 my understanding was that it was -- it finally came down
12 to a potential cardiac event as a result of the drugs
13 which Mr Bayoh had in his system and the fact that he
14 was struggling during the restraint or -- and there was
15 a greater requirement for oxygen, as I understand it,
16 and that could have contributed to the -- to the cardiac
17 issue.

18 Q. In your answer are you trying to diminish in some way
19 the impact of restraint and emphasise the impact of the
20 struggle against restraint?

21 A. Absolutely not. The two are the same. The restraint is
22 the restraint.

23 Q. Yes.

24 A. So but it was important from my point of view to
25 understand whether the death has resulted from the

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1 restraint because of asphyxia, which was the mechanism,
2 or because of something else.

3 Q. I think we'll have to come back to this tomorrow if
4 that's an appropriate time.

5 LORD BRACADALE: We'll continue with your evidence at 10
6 o'clock tomorrow morning, Ms Edwards.

7 (4.16 pm)

8 (The hearing was adjourned to 10.00 am on Wednesday, 5 June
9 2024)

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2ASHLEY EDWARDS KC (sworn)

Examination-in chief by MS A GRAHAME KC2

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