

Transcript of the Sheku Bayoh Inquiry

Thursday, 2 May 2024

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(10.10 am)

LORD BRACADALE: Good morning Lord Mulholland, will you take the oath.

A. Yes.

FORMER LORD ADVOCATE FRANK MULHOLLAND (sworn)

LORD BRACADALE: Ms Grahame.

MS GRAHAME: Thank you, good morning.

Examination-in-chief by MS GRAHAME

Q. You are Frank Mulholland?

A. I am.

Q. What age are you?

A. 65 last week.

Q. You are a senator of the College of Justice?

A. I am.

Q. And for the public listing, that means you're a judge who sits in the High Court in the Court of Session?

A. Yes.

Q. And you were Lord Advocate from May 2011 until around May 2016?

A. Yes.

Q. And in that capacity you were involved in the investigation into the death of Mr Bayoh?

A. Yes.

Q. At the point in time when you left the role of

Transcript of the Sheku Bayoh Inquiry

1 Lord Advocate, I think that was shortly prior to the
2 final PIRC report having been received by Crown Office?

3 A. Yes, although I wasn't there when it was received.

4 There was an interim report I think had been submitted
5 whilst I was in office.

6 Q. So you had received the interim or the first report from
7 PIRC, but you were not in office when the final
8 report --

9 A. No.

10 Q. -- was received? Thank you. And you were not involved
11 with the arrangements that were in place after the final
12 PIRC report was received?

13 A. No.

14 Q. Allocating the team or the advocate depute?

15 A. No, that was someone -- that was a successor in
16 Crown Office.

17 Q. That was James Wolffe?

18 A. Yes, yes.

19 Q. And James Wolffe was your successor?

20 A. He was.

21 Q. Have you had any chance to watch any evidence in
22 the Inquiry at all?

23 A. No, I decided not to read any other witnesses'
24 statements and I decided not to read -- not to see or
25 view any of the evidence.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. Well, in that case, let me tell you about the blue
2 folder that's sitting in front of you.
- 3 A. Yes.
- 4 Q. That provides you with hard copies of your Inquiry
5 statements and you can use them as you wish and if
6 there's anything you would like to refer us to within
7 your statement, please let me know and we can have it
8 brought up on the screen.
- 9 A. Okay. Thank you.
- 10 Q. When I ask you specific questions about your statement,
11 it will come up on the screen so that everyone in the
12 room can see, but it will only shown a paragraph or
13 perhaps two, but if there's other areas you would like
14 me to refer to, please feel free to tell us.
- 15 A. Okay.
- 16 Q. And equally, if there are any documents that you feel
17 you should see which I've not let you look at or not
18 provided you with, please let us know and we'll try and
19 get them at the next break.
- 20 A. I gave the witness support person a number of two
21 documents.
- 22 Q. Well, I will have a look at those in the break and we
23 can deal with them, unless I am already going to speak
24 to you about them.
- 25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. Could we start first of all with your first Inquiry
2 statement which was from March, which is SBPI 000476,
3 I believe. And as you'll see, that's come up on the
4 screen. You'll recognise that as your statement for
5 the Inquiry?
- 6 A. I do.
- 7 Q. And if we looked at the final page -- there's 22 pages.
8 If we looked at the final one, you'll see it's dated,
9 it's been signed although the copy we see on the screen
10 is redacted, but I'm correct in saying it's signed on
11 11 March 2024?
- 12 A. Yes.
- 13 Q. And the final paragraph we see on the screen, 126,
14 reads:
- 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 public published on the Inquiry's website."
- 19 A. I'm aware of that.
- 20 Q. Thank you. And you were doing your best to give a true
21 and accurate recollection of your involvement when you
22 gave your statement?
- 23 A. Yes.
- 24 Q. Then we have the second Inquiry statement, SBPI 00536,
25 and again this was taken by the inquiry team in April.

Transcript of the Sheku Bayoh Inquiry

1 5 April 2024. It's seven pages long and if we can look
2 at the final page, we should say that, as I understand
3 it, you signed this on 15 April 2024. There we are.

4 A. Yes.

5 Q. And again, if we look at the final paragraph, it's the
6 same wording, paragraph 34, that you believe the facts
7 stated in this statement are true and you understand
8 this statement may form part of the evidence before
9 the Inquiry and be published on the Inquiry's website?

10 A. Yes.

11 Q. Thank you. And again, you were doing your best to give
12 a true and accurate recollection of your involvement?

13 A. Yes.

14 Q. Could I begin by asking you about the topic of
15 disclosure?

16 A. Mm-hm.

17 Q. And there's two aspects to this I'm interested in. So
18 this is in relation to your involvement as Lord Advocate
19 and the disclosure that you gave to the family.

20 A. Yes.

21 Q. And we've heard that they were represented by their
22 solicitor, Mr Amar Anwar.

23 A. Yes.

24 Q. Perhaps we could look at -- there is a paragraph in your
25 own statement, paragraph 94 in the first statement,

Transcript of the Sheku Bayoh Inquiry

1 which touches on disclosure, but I have some additional
2 questions.

3 You talk about not being aware of any undertakings
4 and promises made by you beyond the general one, this is
5 to the family, that the Inquiry would be thorough, that
6 the issue of possible racial motivation would be
7 investigated and that:

8 "I would continue to meet with the family and the
9 crown would not make any public statement on the
10 investigation."

11 Looking behind that aspect of it, we understand from
12 other evidence that we've heard that you authorised
13 disclosure of material available to the crown to the
14 family through their solicitor?

15 A. To their solicitor, yes.

16 Q. Yes, and as I understand it a number of documents were
17 disclosed --

18 A. Mm-hm.

19 Q. -- on your authority and you also permitted them to
20 watch CCTV --

21 A. Yes.

22 Q. -- of the events at Hayfield Road. As part of that, did
23 you require Mr Anwar to sign any formal undertaking or
24 disclosure or confidentiality agreement in relation to
25 that disclosure that you authorised?

Transcript of the Sheku Bayoh Inquiry

1 A. No, but I mean there's a background to it. I worked or
2 been involved in cases which Mr Anwar has represented
3 families over the years. For example, I prosecuted the
4 murder of a Scottish Asian lad called Imran Khan who was
5 murdered in Pollokshaws in Glasgow and that was the
6 first time I came across Mr Anwar who represented the
7 family of the young lad, and there was issues about the
8 mother, didn't speak very good English and that's
9 whether I got to know Mr Anwar who assisted in liaison
10 with the family in that case.

11 I also did work on the Chhokar case after the
12 collapse of the first two trials, and Mr Anwar
13 represented the family and I again ensured that as Lord
14 Advocate that this was given top priority through the
15 cold case unit and there required to be liaison with the
16 family. I remember going out to speak to Mr Chhokar's
17 family with Mr Anwar, Aamar Anwar who assisted, and the
18 liaison with the family to ensure that they were told
19 and advised of what the process was leading to a
20 double-jeopardy application and a successful prosecution
21 in that case.

22 I also worked with Mr Anwar in the murder of
23 Emma Caldwell, which was sent to the cold case unit when
24 I was Lord Advocate and I liaised with Margaret Caldwell
25 with the assistance of Mr Aamar Anwar in that case. So

Transcript of the Sheku Bayoh Inquiry

1 there has been a lot of very high profile, very
2 important, very difficult cases for the families to
3 navigate through and I worked with Mr Anwar in these
4 three big inquiries -- big cases so I trust Mr Anwar.
5 He has never breached any confidentiality that -- any
6 information that I've given him and he of course has his
7 duties as a solicitor and it seemed to me that there's
8 an Article 2 right for effective participation by the
9 family. The source of that is paragraph 435 of Human
10 Rights in Scotland edited by Robert -- Lord Reed, the
11 Chair of the Supreme Court, and Jim Murdoch and that
12 explains the Article 2 rights that there requires to be
13 effective participation by the family, which I was well
14 aware of and tried -- did my best to ensure.

15 So it seemed to me that it's important to -- because
16 the family are going to do -- the solicitors for the
17 family are going to do their own investigations. It was
18 a mandatory fatal accident inquiry at the very least so
19 what I wanted to do was to ensure that he had the
20 material to instruct his experts and part of my
21 obligation in terms of Article 2, effective
22 participation, was to explain the process to the family,
23 listen to their concerns, listen to any points that they
24 want to make, answer them if I could and ensure that
25 they were participants in the process so that was part

Transcript of the Sheku Bayoh Inquiry

1 of that so.

2 And give you a wider aspect on disclosure, I led the
3 crown through two Supreme Court disclosure cases. I
4 argued them myself. I wrote the disclosure manual for
5 the crown with John -- the late John Dunne and John
6 Watt, who now heads the parole board, as I also have
7 done a number of appeals in the Appeal Court in
8 Edinburgh on disclosure matters. So applying all that
9 knowledge, experience, judgment, I determined that
10 I would disclose matters to Mr Anwar so that he can
11 conduct his own inquiries and that's participation for
12 the family. So that's a background to it.

13 Q. Thank you very much. Did you have any concerns against
14 this background that you've explained of risks to future
15 criminal proceedings in the event that you made this
16 disclosure?

17 A. Well, I thought about it. I mean I just didn't make it
18 in a vacuum, that decision, I thought about it.
19 Firstly, there's a statutory inquiry inevitable, right,
20 so there's preparation required by the family's legal
21 representatives. Secondly, in relation to the potential
22 criminal proceedings, I could not see how that would
23 prejudice any potential criminal proceedings. The
24 family -- a lot of the family lived in London, they were
25 not witnesses or wouldn't be witnesses. I couldn't see

Transcript of the Sheku Bayoh Inquiry

1 how they would be witnesses. Collette Bell lived in
2 Fife and there were some family and friends in Fife.

3 Collette Bell would be a witness to background as
4 far as I could see it. She wouldn't be a witness to
5 fact, in other words what went on that resulted in
6 Sheku Bayoh's death. So applying my judgment, I took
7 the view that I couldn't see or the risk to potential
8 criminal proceedings was very, very small.

9 Q. Thank you. We have heard evidence from James Wolffe who
10 was your successor and we've heard about the differences
11 in approach that were taken by you in relation to
12 disclosure and by Mr Wolffe.

13 A. Yes.

14 Q. And I would like to ask you about some of his evidence
15 so that you can comment on that.

16 A. Mm-hm.

17 Q. Perhaps if we could have his Inquiry statement on the
18 screen, SBPI 00529. There's three or four paragraphs of
19 relevance and what I'll do is I'll briefly look at those
20 on the screen and then we can discuss his evidence
21 together.

22 A. Yes.

23 Q. Paragraph 60, please. There we are and it's just after
24 the --:

25 "When the issue arose in the context of further

Transcript of the Sheku Bayoh Inquiry

1 detailed disclosure requested by Mr Anwar in February
2 and March 2017... "

3 So this is after you had left the role of
4 Lord Advocate and James Wolffe had taken office?

5 A. Yes.

6 Q. "I was presented with a dilemma. On the one hand, it
7 would have been contrary to my own experience of crown
8 practice for disclosure of the sort requested to be made
9 in the context of a live criminal investigation. That
10 general practice reflected a compelling public interest
11 in avoiding any risk of prejudice to future criminal
12 proceedings. On the other hand, in this case Mr Bayoh's
13 family had already been given certain disclosure and
14 were now seeking further disclosure. Mr McGowan's
15 advice in paragraphs referred to in a minute and an
16 email was consistent with my own experience. I also
17 recall having a brief discussion with the APCC,
18 assistant principal Crown Counsel, about the issue."

19 I'll briefly let you see the minute that he's
20 referring to. SBPI 00529. Sorry. That's a statement.
21 It must be COPFS 00529 I think.

22 A. So is this a Steve McGowan minute?

23 Q. Yes. We'll leave this. I've got the wrong reference
24 there. I don't want to cause difficulty.

25 Having read the minute and having discussed it with

Transcript of the Sheku Bayoh Inquiry

1 Mr Wolffe, we can see that advice was given to him in
2 relation to disclosure by Mr McGowan. Let's move on to
3 61 which is on the screen:

4 "I took the view that my overriding responsibility
5 at that stage was to avoid any risk to the integrity of
6 criminal proceedings should they eventuate. It would
7 neither be in the interest Mr Bayoh's family nor in the
8 public interest if disclosure of information by the
9 crown whilst the investigational was pending were to
10 prejudice a future prosecution. I also had to be
11 mindful that if information were to be disclosed to the
12 family in this case, issues would likely arise in other
13 death cases to which Article 2 applied about the
14 disclosure of similar information whilst an
15 investigation was ongoing."

16 And then moving on to 62:

17 "I considered whether the investigative obligation
18 under Article 2 of the European Convention on Human
19 Rights required a different approach to be taken and
20 took the view that it did not. It seemed to me that the
21 question of compliance with the UK with its obligation
22 under Article 2 fell to be addressed in light of the
23 whole process of the investigation and inquiry which
24 could be anticipated. I expected the position in
25 relation to disclosure to be different in the context of

Transcript of the Sheku Bayoh Inquiry

1 an FAI or indeed a public inquiry once any issue of
2 criminal proceedings had been resolved. Not only would
3 the family of the deceased see the evidence being led at
4 the Inquiry, but they would likely be represented and
5 would receive disclosure in that context. I accordingly
6 concluded that further material should not be disclosed
7 where that disclosure presented a risk of prejudice to
8 future criminal proceedings. As regards the specifics
9 of what information could safely be disclosed without a
10 risk of prejudice future criminal proceedings, I relied
11 on the judgment of the professional prosecutors directly
12 involved in the case."

13 So let's go back to 60 first of all, and, you'll see
14 that this was -- he describes it as dilemma and he talks
15 about his general practice, crown practice, for
16 disclosure at that time. This was in the context where
17 the final PIRC report had been received and the process
18 of crown precognition was underway and the issue was
19 whether to give the family further disclosure at that
20 stage.

21 A. What was asked? What was a request or what disclosure?

22 Q. We'll have to see if I can get -- I think the difficulty
23 will be I don't have the access to the minutes on the
24 screen at the moment.

25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. My understanding of the position is that further
2 disclosure of expert reports was specifically requested
3 and my reading of the minute, which we can't see at the
4 moment, is that that was specifically raised by
5 Mr McGowan, the request for expert reports?

6 A. Well, without knowing in detail what the actual request
7 was and what the reason for it is kind of difficult to
8 comment on the specifics. I would just make a general
9 observation. It's very easy to say, well, I can't give
10 you it because there's a risk of prejudice to future
11 criminal proceedings. I think you have got to drill
12 down and, well, what is the risk?

13 And what I'm saying to you is when I took the
14 decision, which I stand by, I think it was the right
15 decision with the benefit of hindsight, I drilled down
16 to look at what is the risk of prejudice and what was
17 the purpose that this disclosure -- when I dealt with
18 the matter, what was the purpose of this request? And
19 as I understood it, it was in relation to families
20 instructing their own experts and their own inquiry so
21 it seemed to me that it was consistent with my
22 obligations in Article 2. I couldn't see what the risk
23 was and James Wolffe's statement he's not articulated
24 what the risk was.

25 As I said, I couldn't see that information being

Transcript of the Sheku Bayoh Inquiry

1 prejudiced, prejudicial. For the family that lived in
2 London, they were not going to be witnesses, and in
3 relation to Collette Bell, she was not a witness to what
4 happened. So I took the view, and as I say I stand by
5 it, that the risk to future criminal proceedings was
6 very low.

7 Q. Thank you.

8 A. And also you have the duties of a solicitor as well.

9 Q. All right.

10 A. Obligations of a solicitor in ethics.

11 Q. The evidence we've heard from Mr Wolffe on 1 May
12 yesterday was that he had taken the view that Article 2
13 or he had been told that a view had been taken that
14 Article 2 required disclosure, but he was not convinced
15 that that was correct in the context of a criminal
16 investigation. Do you wish to comment on that?

17 A. I disagree with him.

18 Q. You disagree. And he gave evidence that the crown had a
19 responsibility and needed to be able to investigate, as
20 it, were in a private space and to reach its conclusions
21 and then take whatever course was the right course.

22 A. Well, I agree with that that the crown needed to do its
23 work in a private space. I mean I issued the one and
24 only time in my time as a law officer, I was nine years
25 a law officer, a media release saying that the crown

Transcript of the Sheku Bayoh Inquiry

1 wouldn't make any public statement, that all the stories
2 in the press were upsetting for the family and asking
3 the media to essentially stop at a report responsibly.
4 So obviously you need to conduct your inquiries, the
5 crown, in a space that you can do that, but I mean the
6 crown has got loads of experience in dealing with high
7 profile investigations and prosecution and not being
8 affected by outside noise, for want of a better phrase.

9 Q. Thank you. I have been provided with the minute I was
10 looking for earlier. COPFS 03943A. It's not on the
11 play list. If you don't mind I'll read out an
12 excerpt --

13 A. This is --

14 Q. -- just to complete this.

15 A. Steve McGowan's minute?

16 Q. This is the minute dated 7 February 2017 from
17 Stephen McGowan to the then Lord Advocate and others.
18 And I will read out from paragraph 11:

19 "Throughout the course of the PIRC investigation the
20 family and their solicitor received disclosure of
21 information reflecting their rights under Article 2 in
22 order to facilitate the instruction of their own expert
23 witness or witnesses.

24 "12. It is clear however that following receipt of
25 the report by PIRC that the focus and direction of this

Transcript of the Sheku Bayoh Inquiry

1 investigation, which remains a live criminal
2 investigation, has now passed to the crown. Given that
3 precognitions are confidential, our advice is that we
4 should not share the detail of what we have learned or
5 the precognitions themselves. Our investigation at this
6 stage should remain confidential and there is a real
7 likelihood that a number of family members are potential
8 witnesses in any future proceedings. In light of this,
9 it will be important that the expectations of the family
10 and their solicitor, particularly regarding disclosure
11 at this stage, should be carefully managed."

12 And then 13:

13 "Similarly, whilst we have thus far shared expert
14 reports with the family, we do not recommend sharing the
15 new reports that we are instructing at this stage."

16 And there's a reference to paragraph 5 above which
17 details a number of expert reports that were being
18 instructed at that stage, including an osteoarticular
19 pathology report and a further expert pathology report.
20 So I'm sorry I can't show you on the screen.

21 A. No, that's fine. I get the gist of that. What I would
22 comment is that Mr McGowan and James Wolffe were dealing
23 with a different situation. The final report is in and
24 the crown is now doing its precognition preparation.
25 When I made the decision, it was a different set of

Transcript of the Sheku Bayoh Inquiry

1 circumstances and I took the view and, as I have said, I
2 stand by, I think it was the right decision.

3 And I just like make a general observation and my
4 time as a law officer is that you are given advice on a
5 regular basis by permanent members of staff in COPFS.
6 I know Mr McGowan. I know him personally. I have a
7 high regard of his abilities. But the advice you get is
8 not always right and at the end of the day, it is the
9 Lord Advocate or whoever has taken the decision, could
10 be Crown Counsel senior Crown Counsel in those
11 circumstances, that is the decision-maker and regardless
12 of what the advice is, it is a person that's got to make
13 the decision so -- but it's a different set of
14 circumstances it seems to me from the excerpts you've
15 read from Mr McGowan.

16 Q. Thank you. And then another aspect of the evidence
17 we've heard from James Wolffe yesterday. It was he
18 said:

19 "One risk in the context of a possible criminal
20 prosecution of the police officers is the question of,
21 you know, the crown has to be independent and
22 demonstrably independent. One would not want to end up
23 with a position where it could be said or any issue
24 could be raised about, as it were, the independence of
25 the crown investigation, regardless of how that might

Transcript of the Sheku Bayoh Inquiry

1 have been affected."

2 And did you consider when you were dealing with the
3 matter the issue of crown independence?

4 A. Of course. I consider crown independence all the time
5 to ensure -- it was a frequent mantra from me on a whole
6 raft of cases about crown independence. In my time as
7 Lord Advocate, very unpopular decisions were taken in
8 certain cases commensurate with the crown's independence
9 and it might be helpful if at one stage bring up a
10 letter I wrote to Pamela Paton who was the wife of, is
11 it, Alan Paton, Constable Alan Paton?

12 Q. Yes, we've heard her evidence.

13 A. Well, she was upset at a lot of the media reports about
14 what had happened and who was saying what and she
15 emailed in -- I don't have access to the email, but I
16 responded to her letter with a letter of two pages which
17 I set out in great detail the crown's obligations and I
18 explained that liaising with the family, meeting with
19 the family, is not in any way an indication that the
20 crown was representing any one particular party in this
21 and I explained what the crown's obligation were in
22 relation to Sheku Bayoh's family.

23 Q. Thank you.

24 A. So what you have -- I mean you cannot shut the crown
25 down from speaking to people affected by investigation,

Transcript of the Sheku Bayoh Inquiry

1 case and decisions. That is not a breach of your
2 independence as a decision-maker. As a prosecutor, you
3 have to speak to people and listen to what they have got
4 to say. That doesn't affect your independence. As far
5 as I can see, no one ever suggested to me that the crown
6 weren't independent in its investigations into the death
7 of Sheku Bayoh so it was considered.

8 Q. Thank you.

9 A. Considered all the time in a whole raft of cases.

10 Q. I believe the letter has been added now, COPFS 04836A,
11 and this may be the letter that you're referring to.

12 A. It might be quite helpful if I could have that on screen
13 just to go through it, please.

14 Q. Yes, I have just asked for that to be. It will just
15 take a moment I think. So it's COPFS 04836A. This is a
16 letter from you, the Right Honourable Frank Mulholland
17 QC, and if we can move down it says PC Paton's wife,
18 14 October 2015?

19 A. That's the one. There was an email had come into the
20 private office and I think -- if you just scroll down,
21 I think she was upset, amongst other things, at
22 something that Les Brown had said to her in a phone call
23 so I wanted to set out what the crown's position in this
24 was.

25 And you'll see from the second paragraph I state

Transcript of the Sheku Bayoh Inquiry

1 that the investigation into the death of Sheku Bayoh is
2 at the instance of me who is statutorily responsible for
3 the investigation of all deaths in Scotland.

4 Investigation conducted by PIRC who acted -- sorry --
5 who act under my directions and superintendence. I set
6 out what the decisions at the end of the day required to
7 be taken. I set out, state emphatically that:

8 "The Lord Advocate is impartial and will take
9 decisions following a full and thorough investigation.
10 The crown has a long and proud history of conducting
11 impartial investigations and this one will be no
12 different. Please do not think that because the family
13 of Sheku Bayoh are involved in the process that
14 impartiality is compromised. They will not be involved
15 in the decisions, which is right, but have a legal right
16 to be kept advised of progress in an investigation of
17 this nature. It is important that the family have
18 confidence in the process so that they can have
19 confidence that the decisions taken are taken following
20 a full and thorough investigation and that the family
21 understand why the decisions were taken. The family are
22 not being treated any differently than other families in
23 similar circumstances."

24 If we can go on to the next page, please:

25 "I'm sure you will agree that all parties affected

Transcript of the Sheku Bayoh Inquiry

1 by this decision, including the police officers
2 involved, should have confidence that decisions were
3 taken following a full and thorough investigation with
4 expert opinion from the most eminent experts available.
5 I appreciate the amount of publicity this case has
6 generated and that this has been difficult for the
7 persons affected. I should note that the crown has not
8 been responsible for the publicity and I have said very
9 little about the case, other than to talk about the
10 process. I have not and will not talk publicly about
11 the evidence, as to do so would be tantamount to
12 prejudicing the investigation before it's completed. I
13 hope that at the end of the process you will have the
14 answers you and all parties affected seek."

15 I then go on to deal with what she was saying in
16 relation to Les Brown and she was also -- I think in her
17 email she was upset about a BBC documentary that was due
18 to be broadcast and I explain that I can't prevent the
19 broadcasting of that, but any matters which are raised
20 in the documentary which will be thoroughly
21 investigated --

22 Q. Thank you.

23 A. -- is what I said. So that sets out what the crown
24 position is in independence and, as I said, liaising and
25 speaking to families of deceased persons affected by

Transcript of the Sheku Bayoh Inquiry

1 this is not in any way compromising an independence.

2 Q. So when you considered the obligations under Article 2,
3 but also the importance of retaining crown independence,
4 you resolved it in this way and this letter reflects
5 your thought processes?

6 A. Yes, and I would just add to that that Article 2
7 requires an independent investigation.

8 Q. Mm-hmm.

9 A. So there are procedural requirements and one of them is
10 effective participation and I remember checking as -- I
11 dealt with a number of cases over the years, deaths,
12 call them at the hands of a state, as you know, a death
13 in custody is another way of phrasing it, so I -- when I
14 became aware of Sheku Bayoh's death, I checked the
15 books.

16 Q. Thank you.

17 A. And Article 2 obligations.

18 Q. Thank you. There was only one other aspect that we
19 heard in evidence from James Wolffe and that was his
20 evidence that let's say one went to a position of very
21 open disclosure to any party, and let's take it away
22 from this case, you know, taking views about how the
23 crown should proceed with its investigation and so on
24 and so forth, issues about how that would be perceived
25 down the line in the context, but he also talks about a

Transcript of the Sheku Bayoh Inquiry

1 concern, or he gave evidence about a concern, regarding
2 putting himself or the crown under pressure to make
3 similar disclosures in other cases also. Did you have
4 any concerns in that regard?

5 A. No, what I did was I looked at the circumstances of this
6 case and and I applied my mind to what is the prejudice.
7 It's very easy, it seems to me, to hide behind, well, it
8 could be prejudicial. I think you have a duty to drill
9 down and try and identify what the potential prejudice
10 is and when I did that and gave consideration to that,
11 as I've said, I think it was a very small risk so I took
12 the view that it was appropriate in those circumstances
13 for the reasons I was being asked to disclose, in other
14 words to instruct the experts, and duties and
15 obligations of the solicitor, my past experience of
16 Aamar Anwar, he never breached a confidentiality when me
17 speaking to him, him speaking to me, it seemed to me
18 that I should instruct the disclosure for that to
19 happen, which I did.

20 It's a different situation when the crown is doing
21 their investigations and it's being precognosed after
22 the full report has come in from PIRC, so it's a
23 different set of circumstances, but I'm the
24 Lord Advocate, it's up to me to make the decision. I
25 thought about it, I thought about it in depth and that's

Transcript of the Sheku Bayoh Inquiry

1 the decision I took and I stand by it.

2 Q. Thank you. We've heard that the different approaches
3 had an impact on the family and I'm interested in your
4 perspective about the benefits of your approach in
5 relation to building trust and confidence in the family?

6 A. Well, I've been a front line prosecutor in the
7 High Court as an advocate depute, as a senior advocate
8 depute for, what, ten years. In my work as a member of
9 COPFS and senior positions I had met families in very
10 difficult situations for them. To give you an example,
11 the day after the collapse of the World's End trial,
12 I was asked to go in and meet the families. As you can
13 imagine, that was a very, very difficult conversation.
14 So I have experience of those difficult conversations
15 and helping families through very traumatic troubled,
16 upsetting, distressing times.

17 Now, my approach is always -- I mean, for example,
18 I was involved in as Lord Advocate in the Lockerbie
19 case. I went out to Washington to speak to the families
20 at Arlington on the anniversary so I have got experience
21 in that. I dealt with the Chhokar families. I also
22 dealt with the murder of Elaine Doyle, a young girl that
23 was murdered in Greenock, and there was I think over
24 25 years before the perpetrator was brought to justice.
25 I dealt with very much under the radar confidential not

Transcript of the Sheku Bayoh Inquiry

1 speaking to Mrs Doyle and Mrs Doyle's family and her
2 husband who passed away before. So what I'm saying is
3 I've got lengthy experience, probably more experience at
4 the time I was Lord Advocate than anyone in the crown in
5 dealing with families in these types of situations.

6 What are the benefits of it? Well, firstly, the
7 benefit is it helps the families. They don't ask --
8 they didn't ask to be put in this position. They didn't
9 ask to have to or come up to Edinburgh and meet people.
10 They were happy getting on with their lives in London
11 and Fife and then something happened that's propelled
12 them into this alien situation that it seemed to me that
13 on a human level, on a professional level, it was
14 important to speak to the families to explain the
15 process, to listen to them, listen to their concerns,
16 answer any questions that they have. If I could answer
17 them at that time and involve them in the process,
18 effective participation, which is required in the law.
19 That's my approach, and through my lengthy -- now
20 lengthy legal career that's what I've done and, again, I
21 stand by that. I think that is the right approach.

22 Let me tell you in my experience with the family of
23 Sheku Bayoh they were a nice family put into this
24 position. They were not -- and I had a number of
25 meetings with them, they were not looking for revenge.

Transcript of the Sheku Bayoh Inquiry

1 They were not looking for someone to pay a price for
2 this regardless of their involvement. What they wanted
3 was they wanted answers. They wanted to know what
4 happened, why it happened, whether anyone is responsible
5 for what happened, whether anything could have prevented
6 the death of a partner, son, brother, and they wanted to
7 be listened to and it seemed to me that that was hugely
8 important in this case.

9 And the other thing you have got to remember is the
10 background to this. You -- we need to be deaf not to
11 know of the difficulties that the Stephen Lawrence
12 murder had and caused and the loss of public trust in
13 the judicial process, prosecutorial process, the
14 investigatory process. And in Chhokar it was quite
15 clear from the two inquiries, the Jandoo inquiry which
16 looked at how it was dealt with, the liaison with the
17 family, and the Sir Anthony Campbell inquiry about the
18 process that the crown had failed the Chhokar family.
19 And as Lord Advocate I wasn't -- I was going to do
20 everything I could to prevent that happening under my
21 watch, which is why I liaised, spoke to, listened to the
22 family of Sheku Bayoh and, again, I think that was the
23 right thing to do and I don't regret it and if it
24 happened tomorrow, I would do the same thing.

25 Q. Thank you. I would like to move on to the issue of race

Transcript of the Sheku Bayoh Inquiry

1 and you have discussed this in both statements. Perhaps
2 if we could look at paragraph 6 of your statement:

3 "The reason I involved myself from the beginning of
4 the investigation... "

5 Here we are:

6 "The reason I involved myself from the beginning of
7 the investigation into the death of Sheku Bayoh was in
8 light of my experience of 30 years as a prosecutor. I
9 have been involved in numerous high profile and complex
10 cases. I was not involved in the initial investigation
11 into the death of Surjit Singh Chhokar, but I dealt with
12 the fall-out from the case and the Jandoo report which
13 concluded that the COPFS was institutionally racist. I
14 prioritised this case for re-investigation and
15 superintended the subsequent murder case through the
16 double-jeopardy application and trial. I was not going
17 to let what happened in the Chhokar case happen again
18 with Sheku Bayoh; namely, poor liaison with the family,
19 not addressing issues of colour nor investigating racial
20 motivations"

21 And is that colour of his skin?

22 "... if any for what happened. That is why I became
23 involved at an early stage."

24 And was that something you were immediately -- you
25 say "at an early stage", was that something you were

Transcript of the Sheku Bayoh Inquiry

1 immediately conscious of?

2 A. As soon as I heard about it I knew from experience that
3 this was going to be high profile, that issues of race,
4 racial motivation, were going to be front, left and
5 centre in relation to the investigation and as
6 Lord Advocate you're the leader of the prosecution
7 service and it would be an abrogation of my
8 responsibility as Lord Advocate to leave that to someone
9 else. It seemed to me that this is what I required to
10 do was to step up to the plate and superintend.

11 I can't deal with -- I don't have the time to deal
12 with the day-to-day goings on, but I needed to know
13 about the case, about the circumstances. I also needed
14 to know where the investigations were going, because it
15 is very important in relation to resourcing the
16 investigation of the inquiry that I know where
17 investigation is at and what the issues are, because if
18 additional resources were required, it's my job to get
19 the money for it to fund those additional inquiries.
20 For example, in the Lockerbie case one of the things I
21 did was to get additional funding for investigation and
22 there are other cases where that's happened. So again,
23 that was something which I needed to know, you know,
24 whether they had sufficient resources and I mean it's
25 stating the obvious that with the constraints in the

Transcript of the Sheku Bayoh Inquiry

1 public purse, you know, it's can be a battle to get
2 additional resources if they're required and I need to
3 know what the position is in relation to that.

4 Q. At that stage, at that early stage, what were your
5 expectations of the crown and your staff and how the
6 investigation would be conducted?

7 A. Well, at the initial stage is that it hadn't been over
8 to the crown yet, because the PIRC final report was not
9 in so we at that stage. I think there was an interim
10 report which was submitted during my time. So the crown
11 was not at the stage of conducting its own
12 investigation. So obviously I would give thought to
13 that.

14 What my view would be that it would require very
15 experienced and senior Crown Counsel, maybe at principal
16 advocate depute level, that the Crown Counsel appointed
17 to the case would need to be supported with an assistant
18 Crown Counsel, that given the importance of this that
19 the people in COPFS that were dealing with it would
20 require to be experienced and have the ability and track
21 record to be able to deal with cases of this importance
22 and magnitude. There were complexities in this in
23 relation to the pathological evidence, so you required
24 an intellect to be able to navigate through that. There
25 were also issues -- other issues in the case about

Transcript of the Sheku Bayoh Inquiry

1 toxicology, about positional asphyxiation, a whole raft
2 of issues that were not day-to-day issues that you would
3 have to deal with. So my view was it would need to be
4 prosecutors, I'm not talking about Crown Counsel,
5 permanent prosecutors of COPFS who have the ability and
6 the experience to be able to undertake that.

7 Now, Les Brown, I know Les Brown, I know him very
8 well, I hold him in very high regard, I have no doubt
9 about his experience and ability to be able to deal with
10 that so I was reassured that he was directing the
11 investigation. I also knew that Lindsey Miller, who is
12 another person I hold in high regard, had a role, a
13 superintendent's role, an involvement in this so -- and
14 I can't remember at this stage there were others as
15 well. But prior to meeting the family, I would have a
16 briefing meeting so I would have the key personnel down,
17 I would discuss where we are, what the issues are, the
18 questions that were raised by the family have they been
19 answered, what are the answers, what's your fears,
20 what's your concerns, have we properly resourced this.
21 So all that information would be flowing to me from
22 them. And also there's a byproduct of that as well, in
23 the sense that the staff, permanent staff, dealing with
24 this case know that they have got the Lord Advocate's
25 support and that is very, very important, because these

Transcript of the Sheku Bayoh Inquiry

1 are difficult cases to deal with. And there are people
2 of that caliber and dedication to public service who
3 step up to the mark to be able to deal with these
4 challenging and difficult cases and they have to be
5 supported as well, and that's what I was doing as
6 Lord Advocate, so it's a two-way process.

7 Q. Thank you. We've heard from Stephen McGowan in evidence
8 and perhaps we could put his Inquiry statement on the
9 screen, SBPI 00431, and if we could look at paragraph
10 63:

11 "In my view everyone was aware that race was matter
12 at the heart of this investigation. From the first
13 telephone call I had from David Green, the question of
14 the deceased's race and whether it was a factor was
15 discussed. No one was in any doubt that it was an
16 issue. Whilst no specific instructions were given to
17 consider race as a motive, my recollection was that it
18 was clearly discussed at the time and everyone involved
19 was seized of the requirement to investigate the
20 potential for race to have been a motive."

21 Would you agree with that?

22 A. Entirely.

23 Q. Right. And --

24 A. I think I said something similar in my statement as
25 well.

Transcript of the Sheku Bayoh Inquiry

1 Q. I think in paragraph 78 you say:

2 "Race was front and centre from the outset of the
3 investigation. A black man has died in police custody.
4 It was obvious."

5 In relation to -- the comment here that we have on
6 the screen mentions that no specific instructions were
7 given to consider race as a motive. So we've looked in
8 detail at the instructions that were given by the crown
9 to PIRC when it came to the actual investigation into
10 the death of Mr Bayoh and there were no specific
11 references to race at that time. Was that something you
12 were aware of?

13 A. No, it would probably be unnecessary because race was an
14 issue, you know, left, front and centre. There's a
15 letter which was sent by Les Brown. I gave the number
16 to witness support. There's a Les Brown to John
17 somebody. Is it John Mitchell of PIRC? And there's a
18 reference to -- in that letter -- if we could have the
19 letter up it may assist you.

20 Q. All right. I'm advised that it is COPFS 6256 --
21 sorry -- 062562.

22 A. Yes, John Mitchell.

23 Q. Is this the -- this is dated 13 January. Well, it says
24 2015?

25 A. It's wrong.

Transcript of the Sheku Bayoh Inquiry

1 Q. It must be 2016.

2 A. It must be 2016. Yes. So if we could just scroll down.
3 We are talking about the paragraph when the final report
4 is --

5 "... read the comments in respect of the allegation
6 of racism in Fife Division and note that some
7 statistical analysis had been carried out, but would
8 question whether the figure is indicative that
9 institutional racism played no part in the approach of
10 the officers to Sheku Bayoh as stated by
11 John McSporran."

12 I mean the investigators went to the -- they looked
13 at the complaints against the police for the various
14 forces before it was amalgamated into Police Scotland.
15 They drilled down into whether complaints were being
16 made of racially prejudiced conduct by police officers,
17 and they then compared that with similar complaints
18 across the other police forces so it's a seam of work
19 which was important to be done, indicative of race
20 being, you know, a key issue in the case. And it says:

21 "The importance of ensuring the issues of race are
22 fully addressed as part of the PIRC investigations has
23 been highlighted in our previous meetings. From a crown
24 perspective, your investigation has to consider whether
25 race had any influence in the way that the incident was

Transcript of the Sheku Bayoh Inquiry

1 dealt with as part of a wider consideration, as well as
2 whether there was any evidence of overt racism, where
3 the latter will be explored as part of your
4 investigations relating to Constable Paton. However,
5 you will no doubt recollect the discussions at our last
6 meeting with the Lord Advocate where your attention was
7 drawn to the behaviour of a [I think it should be
8 'former' as opposed to 'formal'] Fife officer who
9 appears to have been responsible for distributing racist
10 communications and offensive images."

11 So what I'm saying is that any information that
12 would suggest or that could support racial motivation
13 was passed on to PIRC. It was front, left and centre at
14 meetings with PIRC and Les Brown is clearly dealing with
15 it and clearly knows it's a key issue and refers the
16 discussions with -- involving me in which these issues
17 were being discussed.

18 So to answer your question if there was -- there's a
19 form -- is it section 33 direction?

20 Q. 33A.

21 A. 33A if that was not included in that then it doesn't
22 mean that race wasn't an issue. It clearly was from the
23 very beginning.

24 Q. We've heard evidence that a number of letters of
25 instruction were sent first of all under section 33A by

Transcript of the Sheku Bayoh Inquiry

1 the crown to PIRC to formally instruct them to
2 investigate the death of Mr Bayoh and that during that
3 period up to the end August at least, there were no
4 references to race as part of that instruction in
5 correspondence from the crown to PIRC. And that during
6 that period PIRC were -- as we've heard evidence
7 described the situation as they were taking cognisance
8 of race if issues emerged, but they did not pursue any
9 active lines of investigation in relation to race. Were
10 you aware of that at the time?

11 A. I certainly was not aware of it at the time and it would
12 be inconsistent with, you know, the example of the work
13 being undertaken by PIRC to look at statistics in
14 complaints against the police and that type of stuff and
15 investigate -- there was specific instructions given to
16 PIRC to investigate allegations that were being made
17 against certain officers so that seems to me to be
18 inconsistent with what PIRC were doing.

19 Q. I shall perhaps explain that from 2 September 2015 we've
20 heard evidence that there was a letter from the crown to
21 PIRC asking for confirmation that race was a priority in
22 the investigation and that was the first reference --

23 A. Who was that from?

24 Q. That was a letter from Les Brown to PIRC on 2 September
25 2015 and that was the first reference in crown

Transcript of the Sheku Bayoh Inquiry

1 correspondence to inviting confirmation that race was a
2 priority in the investigation. From September onwards
3 that letter specifically instructed PIRC to investigate
4 issues that you've identified in this letter, the Fife
5 officers' issues, history of racism, prior misconduct.

6 So certainly from September 2015 there was reference
7 to race in crown correspondence and specific
8 instructions given, but in the period prior to that,
9 from 3 May up to that specific letter, the PIRC
10 investigation had simply taken cognisance of race, but
11 not -- we've heard evidence not actively pursued a line
12 of investigation regarding race.

13 A. Well, I'm surprised to hear that.

14 Q. Right. And were you aware of that at the time?

15 A. No. I find it surprising given -- I mean it's the
16 interaction with PIRC is not just letters.

17 Q. Mm-hmm.

18 A. There's conversations, and conversations with people
19 involved in the investigation in PIRC and Kate Frame,
20 who headed PIRC at the time, and it was quite clear in
21 the conversation that certainly I was party to that race
22 was front, left and centre.

23 Q. So -- and we've heard that you had a number of meetings.

24 A. Yes.

25 Q. You had a meeting with Kate Frame and John Mitchell from

Transcript of the Sheku Bayoh Inquiry

1 PIRC on 14 May 2015. As far as you're concerned, in
2 your communications with PIRC, did you effectively
3 communicate that race was a priority in this
4 investigation?

5 A. I mean it was weaved into the conversations. I would be
6 astonished if -- amazed if PIRC thought that you know
7 waited until September to the letter which you've
8 referenced to investigate racial motivations.

9 Q. Shortly prior to the letter from the Crown the PIRC also
10 received a letter from Mr Anwar specifically raising the
11 issue of race and after that letter was received they
12 did include race into the policy log that they retained
13 but we've heard evidence that that was really the first
14 point at which the matter became a more active line of
15 investigation.

16 A. Well, I mean you're telling me something that I wasn't
17 involved in, but I just -- race was front, left and
18 centre from the very beginning as far as I was concerned
19 and that occurred in conversations.

20 Now, Aamar Anwar is well entitled to formalise it
21 and put it in a letter, he's quite right to do so, but
22 that doesn't mean that this wasn't under consideration
23 from the very beginning. As Lord Advocate, I knew, I
24 dealt with Chhokar, I dealt with a number of what's
25 under the broad umbrella of hate crime. I was involved

Transcript of the Sheku Bayoh Inquiry

1 in -- at the Crown Office in the murder of Mark Scott,
2 who was a young lad that walked through Bridgeton and
3 was murdered just because he was wearing a green scarf.
4 So it's not just race for me. Right across the board it
5 seemed to me that it was something which I was -- that
6 was a priority to me.

7 Q. Can we look at paragraph 169 of your first Inquiry
8 statement and I think you emphasise here the
9 significance of race as far as you were concerned. 169
10 says the question of race. It doesn't seem to be the
11 correct reference. Let's leave that to one side. Can I
12 ask you given your -- the significance of race to you
13 and the experience you had in that, and you've commented
14 about race and racial motivation being important aspects
15 of this investigation, what were your expectations of
16 PIRC during this period from 3 May 2015 up to
17 2 September 2015 at least that initial period?

18 A. Well, they would be conducting an inquiry. They were
19 the investigators. They would report the results of
20 that inquiry to the crown when those investigations were
21 complete. I mean what my expectations would be it would
22 a thorough investigation. It would be an investigation
23 dealing with all of the issues in the case, including
24 race. It would deal with the issues about the cause of
25 death. It would instruct the -- or obtain expert

Transcript of the Sheku Bayoh Inquiry

1 evidence from a raft of experts, experts in their field,
2 and that they would report the results of their
3 inquiries, together with their analysis, recommendations
4 in a final report to the crown.

5 Q. In relation to race, did you expect PIRC to not simply
6 identify overt examples of racism if they existed, but
7 to look at underlying references that may be indicative
8 of racism or racial motivation?

9 A. Of course.

10 Q. To consider --

11 A. I mean that's part of the work that they did in the
12 statistical analysis. I mean PIRC was -- it was a
13 fairly new organisation. It used to be complaints or
14 Criminal Complaints Against the Police, so it was their
15 own forces that dealt with that so they had their
16 Criminal Complaints Against the Police Department in
17 each of the police forces, then of course you had
18 Police Scotland, and that resulted in having to set up
19 PIRC so that there's an independent investigators
20 independent from the police looking at Article 2
21 requirements as well. That was required.

22 It used to be stated that, well, the independence
23 comes from the involvement of the crown so albeit it's
24 investigated by the police officers of the same force,
25 at the end of the day it's going to be the crown that

Transcript of the Sheku Bayoh Inquiry

1 ultimately investigates and takes a decision. So that
2 was the prevailing view at the time, but of course
3 things move on and with the advent of Police Scotland it
4 was decided, and I think it was the right decision, to
5 set up an independent body and that's how PIRC came into
6 being, but Kate Frame used to head the Criminal
7 Complaints Against the Police Department at the
8 Crown Office before she left to be head of PIRC so she
9 had -- she had great experience in dealing with these
10 types of cases.

11 Q. Thank you. Did you -- in terms of your expectation of
12 Crown Office and to some extent PIRC, did you expect
13 them to consider whether Mr Bayoh had been treated
14 differently by the officers because he was black?

15 A. Of course. It's all part of it.

16 Q. We've talked about Article 2. Were you -- given your
17 experience in relation to race, were you also conscious
18 of the obligations on PIRC and the crown in relation to
19 Article 14 in conjunction with Article 2?

20 A. Well, Article 14 you require an Article 2 or some other
21 article obligation before Article 14 kicks in, but I was
22 well aware of that. I think it's in my statement as
23 well, because I set out what the case law Convention
24 jurisprudence is in this area and what the obligations
25 are on the investigatory agency, PIRC and the crown.

Transcript of the Sheku Bayoh Inquiry

1 Q. And we've heard that in terms of Article 14 in
2 conjunction with Article 2 that both the crown and PIRC
3 would have the duty to take all reasonable steps to
4 unmask any racist motive and to establish whether or not
5 ethnic hatred or prejudice might have played a role;
6 would you agree with that?

7 A. Absolutely, I think I refer to it in my first statement.

8 Q. I think paragraph 33 may contain that. There we are.

9 A. Well, there it is.

10 Q. And when you say "take all reasonable steps to unmask
11 any racist motive", how did that translate to your
12 expectations of PIRC's role? How would you have
13 expected them -- what steps would you have expected them
14 to take?

15 A. Well, the overarching is to carry out that obligation as
16 part of the investigation. What steps? Well, I mean
17 that's for the investigators to identify what steps to
18 discharge that obligation, but what they need to do is
19 they need to investigate it up hill and down dale to
20 identify or rule out any racist motive and that is overt
21 or covert in the sense of unconscious prejudice, racial
22 prejudice, that type of --

23 Q. So if we have heard evidence that there was language
24 used within the statements of officers referring to
25 Mr Bayoh as "coloured", making connections or possible

Transcript of the Sheku Bayoh Inquiry

1 links between the colour of his skin and terrorism,
2 matters of that sort, the use perhaps in the surrounding
3 circumstances of racial tropes or racially stereotypical
4 language, of detrimental derogatory comments regarding
5 black people or possibly to be interpreted in that way,
6 are these the types of adminicles of evidence that you
7 would have expected PIRC to be identifying and
8 considering?

9 A. Absolutely. You know, use of language is important and
10 that can -- that can identify an issue in relation to
11 the wrong use of language. It can display a mindset,
12 what the mindset is, and language is important and
13 that's one of the things that we looked at when I
14 chaired the diversity group at the Crown Office when I
15 was Lord Advocate to looked at the language used.

16 I mean I grew up in the 70s and some of the language
17 used that was part of everyday vocabulary people, if
18 you're looking back 2024, you would be horrified. Some
19 of the programs that were broadcast in the 70s under the
20 guise of comedy, you look back and you're horrified at
21 it. So it's important.

22 And I mean people always say, well, it's freedom of
23 speech. Well, it might be freedom of speech, but if
24 you're on the receiving end of it, it's not freedom of
25 speech to the person on the receiving end so language is

Transcript of the Sheku Bayoh Inquiry

1 important and the use of language and the wrong use of
2 language can give an insight into person's mindset and
3 motivation.

4 Q. And for those listening, can you explain why is evidence
5 as to -- that would relate to mindset or motivation be
6 of value to the crown in the job that the crown are
7 doing?

8 A. Well, it would be -- I mean I make the general point
9 that I was aware at the time that -- and I had stepped
10 down at the time that the final report and the work that
11 the crown did and what the evidence was when the crown
12 were preparing a case. So I'm really talking about this
13 at a sort of overarching level but, for example, I think
14 you referred to terrorist.

15 Q. Yes.

16 A. Well, I make a very obvious point, would the mindset be
17 if it was a white person, would that person be referred
18 to as a terrorist. So what I'm saying is language, use
19 of language a, wrong use of language can be -- can be
20 revealing sometimes and deserved of investigation.

21 Q. Thank you. And moving away from language at the moment,
22 would you also have expectations that PIRC initially
23 would consider perhaps patterns of behaviour, underlying
24 patterns, whether they had used sprays or batons at
25 other knife incidents, for example, or only in relation

Transcript of the Sheku Bayoh Inquiry

1 to this particular incident, would you have considered
2 it a relevant line of inquiry to look into whether they
3 treated all knife calls as potentially terrorist
4 related?

5 A. Of course. An example I gave but patterns of behaviour
6 are important. In my current job I deal with patterns
7 of behaviour on a daily basis in trials so of course
8 they're important.

9 Q. And what kind of pattern of behaviour, if identified, be
10 indicative of -- how would that assist the crown in the
11 job they have to do?

12 A. Well, I mean it depends what the patterns of behaviour
13 are, but patterns of behaviour, along with the use of
14 inappropriate language, can indicate -- can give an
15 indication into someone's mindset.

16 Q. Right.

17 A. And motivations.

18 Q. Thank you. And then I think --

19 A. But as I say, I don't know what the evidence was --

20 Q. No.

21 A. -- at the end of the day because I had stepped down by
22 then, but as a general point, as a general point of
23 principle, yes, I agree with that.

24 Q. And in your experience would you recognise that
25 comparator evidence could be of assistance in relation

Transcript of the Sheku Bayoh Inquiry

1 to an investigation, for example, comparing actions
2 taken with -- in this particular circumstance compared
3 to how actions would be normally taken against a white
4 man?

5 A. Of course. I mean PIRC looked at the patterns of
6 behaviour as an example in relation to complaints
7 against the police, whether there was a spike in racial
8 complaints against police officers for Fife when
9 compared with other forces so these things -- these
10 things matter and is a legitimate line of inquiry, but,
11 again, I didn't see the results of the investigation so
12 I'm commenting on a general level.

13 Q. Yes. And finally, would you also consider it to be a
14 relevant line of investigation to consider the speed at
15 which officers elected to use force, for example,
16 against Mr Bayoh and consider whether there were any
17 underlying indications or from which an inference could
18 be drawn?

19 A. Well, it's very difficult to answer that question
20 without the full panoply of circumstances that the
21 police officers were dealing with so I don't think you
22 could look at that in isolation. You would need to look
23 at that in the round, what are the circumstances
24 pertaining to that, you know, speed time in relation to
25 whatever actions the police are proved to have taken.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. And in the absence of overt examples, would it be
2 necessary for PIRC or for the crown to consider the
3 whole circumstances in detail?
- 4 A. Oh, the whole circumstances have to be looked at as part
5 of the investigation into all the circumstances.
- 6 Q. And was it any part of your expectation -- given what
7 you've told us about your experience and how you viewed
8 the significance of race, was it any part of your
9 expectation that the issue of race would not be fully
10 explored from the very beginning?
- 11 A. No, as I say front, left, centre, as soon as I heard
12 about it, I knew and I wasn't alone in that.
- 13 Q. We've heard evidence from Mr McGowan in relation to the
14 steps taken by the crown after the final PIRC report was
15 received and his evidence is that in light of the
16 circumstances that existed at that time and the work
17 that was done by the precognoscers and Crown Counsel
18 that, as he put it, there were further steps that could
19 have been taken. In relation to all reasonable steps to
20 unmask any racist motive, he said there were further
21 steps that could have been taken.
- 22 A. I wasn't there at the time so I don't know what the
23 further steps were, what he had in mind, but what the --
24 if there were further steps to be taken, these were
25 identified as part of the precognition process and those

Transcript of the Sheku Bayoh Inquiry

1 further steps required to be taken.

2 Q. Right. Perhaps we could look at your second statement
3 now, please. And I think you point out in paragraph 2
4 that you've actually been away from Crown Office now for
5 around eight years.

6 A. Yes.

7 Q. Could we look at paragraph 4:

8 "The Jandoo report following the death of
9 Surjit Singh Chhokar looked at inter alia liaison with
10 the family and questions of how the crown dealt with
11 racism and racially motivated crime. I was not involved
12 in the Jandoo or the Campbell reviews at the time, but
13 I was aware of the findings of the reviews. I was also
14 aware that crown accepted the findings and
15 recommendations of the reviews. I was not involved in
16 the implementation of the recommendations of the
17 reports."

18 But at paragraph 9 you do go on to say -- sorry --
19 paragraph 6 you say:

20 "From memory, after the Jandoo report all policies
21 were reviewed to make sure they were equitable and
22 fair."

23 And:

24 "The prosecution policy was reviewed to ensure that
25 racial motivation was identified and embedded in

Transcript of the Sheku Bayoh Inquiry

1 reporting and decision-making."

2 Then if we can move to paragraph 9, please, you say:

3 "I know from personal experience that precognition
4 templates were amended to ensure that precognoscers were
5 alive and required to address any issues or potential
6 issues of racial motivation. A section was added to the
7 precognition template narrative. I was involved in
8 designing the templates."

9 I'm interested in exploring this issue with you.

10 A. Yes.

11 Q. But I'm conscious it's now half past 11?

12 LORD BRACADALE: We'll take a 20-minute break.

13 (11.30 am)

14 (A short break)

15 (11.55 am)

16 LORD BRACADALE: Ms Grahame.

17 MS GRAHAME: Thank you very much. We were looking at

18 paragraph 9 of your Inquiry statement and if we could

19 have that back on the screen and you'll remember this

20 related to something known as precognition templates.

21 Tell us what precognition templates were.

22 A. Well, a bit of a history to get to explain. In the
23 nineties what we wanted to do at the Crown Office was to
24 try and improve the quality of precognitions and
25 precognitions are -- originally were a bundle of

Transcript of the Sheku Bayoh Inquiry

1 statements and that then through the 60s then developed
2 into assisting Crown Counsel with a narrative taken from
3 the statements as to what the evidence say happened,
4 together with an analysis of the evidence, sufficiency,
5 problems with witnesses, et cetera, and recommendations.

6 So that's how it developed 60s and 70s. And of
7 course what you had was you developed a mix of staff.
8 So you had legally qualified procurator fiscal deputes
9 who were doing precognition work and you also had
10 precognition officers or non-legally qualified and when
11 that was looked at we decided that you had to help and
12 focus the mind of precognoscers, in particular
13 precognition officers, as to the issues that required to
14 be identified in a narrative and analysis,
15 recommendations. So a group was set up of which I was
16 involved, precognition working group, I may be wrong in
17 that, but that's my recollection, and part of the work
18 that was done was to develop templates. So in other
19 words you have -- you're dealing with a robbery case so
20 you would set a template for a robbery case as to what
21 should be covered in the precognition. Of course it's
22 not prescriptive. It depends on the case and what the
23 evidence was, but it was designed to help the
24 precognoscer as to what the issues are and I remember,
25 although you know I have been away a long time from the

Transcript of the Sheku Bayoh Inquiry

1 crown, but I remember, because I was involved in
2 designing the templates that motivation, racial
3 motivation, homophobic motivation, et cetera was entered
4 into the templates to help precognoscers with
5 identifying what the issues that they required to
6 address were.

7 Q. So it was designed as a prompt perhaps to remind
8 precognoscers, whether legally qualified or not, that
9 racial motivation, issues to do with race or other types
10 of protected characteristics should be addressed in the
11 narrative and analysis?

12 A. Not all cases obviously.

13 Q. No.

14 A. But as you say it's a prompt and it's like a menu from
15 the template. If it's not an issue in the case, you
16 don't need to address it, but it's, as you say, a prompt
17 would be the best way to describe it.

18 Q. So something embedded automatically prompts the
19 precognoscer to at least consider whether it's relevant
20 to the case they have in hand?

21 A. Yes.

22 Q. And you have recalled here that those templates did have
23 some entry which required people to consider racial
24 motivation?

25 A. That's my recollection. It's a long time --

Transcript of the Sheku Bayoh Inquiry

1 Q. All right.

2 A. -- since these were produced. I have not kept a copy.

3 I am not with the crown. I have been away for a long

4 time, but that's my recollection.

5 Q. Because in light of this, we have explored the issue --

6 the Inquiry team have explored the issue of precognition

7 templates. Let me show you one which is in relation to

8 the CAAPD department, so COPFS 06461. It relates to a

9 standard CAAPD report and this --

10 If we can look at the top, it says "Criminal
11 Allegations Against the Police Division" and if we move
12 down, it invites the following entries to be included:
13 officer complained against, complainer, allegations,
14 linked criminal proceedings, chapter 24 disclosure,
15 category, and move down, circumstances. And that would
16 normally be contained within the narrative.

17 And then moving down, "Analysis of evidence.
18 Recommendation re criminal proceedings and malicious
19 complaint," and then "reported by". And as you will
20 see, if can move right down to the bottom, there's no
21 reference in this template of race, none whatsoever.

22 We've gone back to the crown who have continued to
23 look for other templates that may have existed. I have
24 been advised this morning that they're not able to find
25 any that include the issue of race.

Transcript of the Sheku Bayoh Inquiry

1 A. Well, it's my recollection. I drafted them. I drafted
2 some of them. I didn't draft the CAAPD ones.

3 Q. Right.

4 A. But it's my recollection.

5 Q. So if you -- if at some point you drafted those with --
6 to include race, given you experience, it would now
7 appear that at least some of these templates do not
8 include race. Do you have any comment to make about
9 that?

10 A. Well, what I'm talking about from recollection is in the
11 nineties. It's a long time ago and it's moved on, they
12 may have moved on, I'm just speculating, I don't know.
13 All I know is my recollection was that in drawing up
14 templates there was a reference to racial motivation.

15 Q. At one time, perhaps in the nineties when you were
16 drafting these templates, you obviously took the view
17 that to have race added into them was something to be
18 done and of benefit. Can you think of any reason why it
19 would not be of benefit now to have race?

20 A. Of course, it would be of benefit now.

21 Q. Yes, all right. Thank you.

22 A. Not only race, but all the protected characteristics
23 should be, if it's an issue in the case then of course.

24 Q. Would that -- in the same way you thought it would be of
25 assistance to precognoscers, legally qualified or not,

Transcript of the Sheku Bayoh Inquiry

1 would it continue to be of benefit perhaps to
2 precognoscers?

3 A. Of course.

4 Q. Yes. Can we turn now, please, to paragraph 24 of your
5 statement in relation to Simon San -- sorry -- this must
6 be the first -- sorry -- it will be the second Inquiry
7 statement.

8 You're giving examples and you mention the murder of
9 Simon San, a Chinese delivery driver, and you talk about
10 the accused, John Reid, punched Mr San who fell and
11 struck his head on the roadway and died from a cerebral
12 bleed 30 to 40 minutes after the punch. Reid had flown
13 the locus and went to a flat and confessed to another
14 person and used racist language. The question was
15 whether the crime was racially motivated. The answer on
16 the evidence was that it was not racial aggravated. We
17 made sure that the information was placed before the
18 court. We also ensured this was fully explained to the
19 family of Mr San.

20 So again, you've raised a number of issues here.
21 This was a case which you yourself prosecuted, was it,
22 or were involved in?

23 A. I was involved in it. I don't think I presented the
24 narrative to the court on the plea, but I was involved
25 in it, yes.

Transcript of the Sheku Bayoh Inquiry

1 Q. Right. And you've talked there about the use of racial
2 language, although you mention that it was after the
3 actual --

4 A. I think it was about 30 minutes had lapsed and it was
5 from memory the place he went to after punching Mr San.

6 Q. Right. You've talked there about placing the
7 information before the court and explain the purpose of
8 that.

9 A. Well, I mean there's a number of purposes. Firstly,
10 it's to allow the court to give the court the
11 information so they can take it into account in
12 sentence. Secondly, it places the information in a
13 public domain so that the public, the media, the family
14 are all aware of it, that it's not suppressed, not
15 hidden. And it also gives accountability, public
16 accountability, in the sense that this is your
17 assessment of the evidence and it allows anyone who
18 disagrees with that assessment to challenge it, make it
19 known, challenge it in writing, for example, or
20 whatever.

21 Q. Thank you. Can we look now at paragraph 31. And we'll
22 have that on the screen. It's a short paragraph. This
23 is where you're asked about training, and you talk here
24 about unconscious bias and racial language and you give
25 an example in this paragraph and talk about:

Transcript of the Sheku Bayoh Inquiry

1 "Whether it's a direct quote from a witness or an
2 accused, this type of racial language was not to be
3 used."

4 And you talk about the significance of that and I
5 noticed in paragraph 24 when you're talking about San,
6 that you also say racist language was used.

7 Two points about this paragraph in particular.
8 First of all, the example you give you've spelled out
9 specifically and I wondered why in one paragraph you've
10 described it as racist language without spelling it out
11 in terms, but in this paragraph you have spelled it out
12 in terms. Was there any reason for that distinction
13 being drawn?

14 A. Not really. I can't think of any reason. I've just
15 wanted to make the point that I was seeking to make
16 about the use of such language and ensuring that that
17 language is not used in a pre-cognition unless it's a
18 direct quote, a piece of evidence.

19 Q. Right. Was this a direct quote from --

20 A. I think it was from --

21 Q. -- the case that you're referring to?

22 A. I think that was an example I gave, but in the
23 Simon San case I recollect that 30 minutes after the
24 incident that type of language was used in a
25 conversation to someone else in a house about referring

Transcript of the Sheku Bayoh Inquiry

- 1 to someone in such pejorative language.
- 2 Q. Right. You've referred to that and give that as an
3 example of unconscious bias. In this day and age, do
4 you think that is unconscious bias?
- 5 A. It would be both I think.
- 6 Q. Both conscious and unconscious. In any event, it's of
7 relevance to any matters of criminality?
- 8 A. Of course.
- 9 Q. Yes, and you would expect in a narrative or analysis for
10 that type of language to be addressed?
- 11 A. Of course. But, you know, when you're looking at what
12 is the evidence that the actual crime was racially
13 motivated, so you need to look at whether that could be
14 a link to the actual crime or is it just -- is it racist
15 attitudes and views. So I mean there's issues to be
16 addressed which prosecutors should be experienced enough
17 and able enough to be able to work their way through
18 that.
- 19 Q. And I think the key is for those issues to be raised and
20 addressed and considered?
- 21 A. Of course.
- 22 Q. Regardless of the ultimate decision taken, that's a
23 matter for the crown, but it would be important for
24 these types of matters, the use of language such as this
25 to be addressed specifically within the body of the

Transcript of the Sheku Bayoh Inquiry

1 precognition?

2 A. Of course.

3 Q. Thank you. Can I move on to another section of your
4 statement, paragraph 49, which I think is your first
5 statement. And I think in at this section, it's called
6 section 4, and you start to talk about or maybe earlier
7 above that there's a section 4 is mentioned and there
8 you start to talk about the postmortem. There we are.
9 Section 4:

10 "Postmortem examination and release of Sheku Bayoh's
11 body."

12 And you have given the Chair a detailed explanation
13 of the final postmortem report.

14 A. Yes.

15 Q. Could we look at paragraph 49, please:

16 "Overall it was not possible for the pathologist to
17 be sure what had been the most significant factor in
18 death and as such the cause of death was best regarded
19 by them as being sudden death in a man intoxicated by
20 MDMA (ecstasy) and alpha-PVP whilst being restrained."

21 And you say:

22 "The results of the postmortem examination would
23 have informed the further investigations instructed by
24 the crown and undertaken by PIRC."

25 We've heard evidence that the final postmortem

Transcript of the Sheku Bayoh Inquiry

1 report was received on 18 June after the toxicology
2 results were in.

3 A. Yes.

4 Q. And various other investigations of that sort, although
5 the postmortem itself had been carried out on 4 May.

6 Regardless of whether the ultimate proceedings were
7 a criminal trial or an FAI, the crown would wish to lead
8 evidence, regardless of which forum it was, from a
9 pathologist to establish what caused or materially
10 contributed to the death; do you accept that?

11 A. Yes.

12 Q. And there were three factors named in the cause of death
13 from the final postmortem report and they were MDMA
14 (ecstasy), alpha-PVP, and restraint.

15 Now, I think in paragraph 49 you say:

16 "It wasn't possible for the pathologist to be sure
17 what had been the most significant factor in the death."

18 But would you agree that all three of those factors,
19 the MDMA, the alpha-PVP, and the restraint, were a
20 material contribution to death?

21 A. According to the pathological evidence.

22 Q. Yes.

23 A. Just make an obvious -- well, I think it's an obvious
24 point that part of the crown investigations dealing with
25 the pathology, one of the things, and you've got what

Transcript of the Sheku Bayoh Inquiry

1 the pathologist considered contributed to the death of
2 Sheku Bayoh, one of the things you've got to deal with
3 is to rule out matters. So at an inquiry or a criminal
4 prosecution you may be met with, well, is it
5 such-and-such, has that been considered, and it's
6 really, really a duty of the investigator to look at the
7 pathology, identify any possible other explanations and
8 rule that out if possible and get expert evidence on
9 that and even that would include speculations,
10 speculative cause of deaths, that type of thing.

11 And the reason is that you may be faced at say a
12 criminal prosecution with a defence pathologist who's
13 putting forward a theory and if you haven't dealt with
14 it, ruled it out or whatever, then your investigation is
15 deficient and what you're doing is you're -- there's a
16 hole in it which someone else could fill.

17 Q. Obviously if the defence pathologist comes up with a new
18 theory, you would anticipate the crown would be given an
19 opportunity to explore that themselves?

20 A. You would.

21 Q. So in relation to cause of death you would want to rule
22 out things such as natural disease of some description?

23 A. Yes.

24 Q. Such as perhaps an infection or an underlying medical
25 condition?

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes.
- 2 Q. You would want to rule out a prior assault --
- 3 A. Yes.
- 4 Q. -- such as a stabbing or a head injury or something
5 along those lines?
- 6 A. Yes.
- 7 Q. You would want to look at removing the possibility of
8 any underlying, as I've said, preexisting condition of
9 some description. And the final postmortem report
10 actually addressed all of those issues, did it not?
- 11 A. Mm-hm.
- 12 Q. And Dr Shearer and Dr Bouhaidar took the view that all
13 of those could be excluded as causes of death and the
14 cause of death for Mr Bayoh was these three factors,
15 MDMA, alpha-PVP and restraint. So if it's sufficient
16 for the crown's purposes to lead evidence at trial or an
17 FAI as to what caused or materially contributed to
18 Mr Bayoh's death, can I ask you in relation to this
19 paragraph, was it not sufficient for the crown to simply
20 proceed on the basis of the cause of death given by
21 Dr Shearer and Dr Bouhaidar? Why was it necessary in
22 your view to consider what was the most significant of
23 those three factors?
- 24 A. Well, I mean the case law is such that that is something
25 which will be an issue at the case, to what extent did

Transcript of the Sheku Bayoh Inquiry

1 all three or taken individually -- for example, if it's
2 put to the pathologist, well, actually it was alpha-PVP
3 which could have caused death without any contribution
4 from MDMA or restraint, then that's something which you
5 would have to address and that's what precognition
6 consultation with the pathological witnesses would do
7 and it may be that you need to get a further opinion
8 when someone with -- a specialist in a particular area.

9 Q. And my understanding of the position, and it will
10 obviously be a matter for the Chair, that alpha-PVP, for
11 example, could of itself cause death?

12 A. Well, that's the issue I'm saying. You would need to
13 look at what is the contribution, could each of these
14 individually on their own without -- and that would be
15 highly relevant I would have thought. Restraint for
16 example on its own, highly relevant in relation to the
17 investigation.

18 Q. We've heard evidence that restraint on its own can cause
19 death.

20 A. Well, that's the type of thing that you need to
21 investigate and get -- identify the definitive position
22 so that you know where you are in relation to the
23 decision-making.

24 Q. But if it's sufficient for the crown to simply lead
25 evidence to prove that restraint, for example, was a

Transcript of the Sheku Bayoh Inquiry

1 material cause of death, why did the crown need to
2 investigate further what proportion or whether it was
3 significant or otherwise? You already have a report
4 saying it is a material cause of death, that restraint
5 was significant, it could not be excluded as de minimis.

6 A. Well, you would want to speak to the pathologist to find
7 out what they meant by that.

8 Q. Yes, so in terms of your expectations after that report
9 came in, would you have expected either PIRC or your own
10 staff to speak to Dr Shearer or Dr Bouhaidar to explore
11 these issues and discuss the postmortem?

12 A. I would.

13 Q. We've heard evidence from the lead investigator at PIRC
14 that that wasn't done?

15 A. Well, it's a matter for PIRC to answer, but I would
16 certainly expect the crown to do that.

17 Q. And we've heard evidence from Les Brown that in fact as
18 matters progressed with the investigation Crown Counsel
19 specifically accepted that cause of death was a given.
20 They refer to the case of Johnstone against HMA, which
21 I'm sure you're aware of, it's in the Bench Book as I
22 understand it, that what was provided in the final
23 postmortem report where restraint was specifically named
24 as one of the factors which contributed to death, and
25 that was sufficient. So was there -- was there a need

Transcript of the Sheku Bayoh Inquiry

1 for the crown to explore this proportion issue further?

2 A. I can only speak personally. If it was me as
3 Crown Counsel that was dealing with the case, I would
4 want the pathologist conducting the postmortem to be
5 spoken to and consulted with as to what is the
6 contribution, primary, major, what minor, and that in my
7 experience in dealing with pathology, very important
8 I would have thought.

9 Q. Would it matter if it was a minor cause of death if it
10 has provided a material contribution to death?

11 A. Well, legally it wouldn't matter, but in relation to the
12 evidence, it does matter. For example -- if for example
13 you prosecuted police officers on the back of following
14 this and restraint played a minor part, then that would
15 if they were convicted affect sentence, for example,
16 I would have thought so it is relevant.

17 Q. Right. Les Brown also gave evidence on 17 April that:

18 "From what I do recollect was that the
19 Lord Advocate, and I was in agreement with this, he was
20 keen to try to separate out, so far as possible, whether
21 it was possible -- sorry, I'll rephrase that. He was
22 keen to see whether it was possible to separate out the
23 extent to which each of those factors had played a
24 part."

25 A. Well, for the reason I've explained.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. We've heard that there were a number of reports
2 ultimately obtained by the crown from a number of
3 forensic pathologists.
- 4 A. Mm-hm.
- 5 Q. We've heard that not only was there this report from
6 Dr Shearer and Dr Bouhaidar, who I should say were not
7 being criticised by anyone else, that there was also
8 forensic pathology reports from Professor Crane, a
9 Dr Nat Carey, a Dr Lawler. There were a number of
10 pathologists and ultimately all said the same cause of
11 death, subject to one element. They also added in the
12 struggle against restraint as well as the restraint.
13 Can you now envisage why so many pathologists would be
14 required?
- 15 A. Well, in a case like this, which is complex
16 pathologically, it gives confidence. It can flag up
17 issues that haven't been considered by the pathologists
18 and, as you said, I think you said that the additional
19 pathologists had mentioned struggle so that was flagged
20 up. I mean I haven't seen those reports, but in my
21 experience of complex cause of death then it seems to me
22 that it's sensible to get third opinions on other
23 matters on that.
- 24 Q. We've heard evidence that the final forensic pathologist
25 who looked at this from the first instruction until the

Transcript of the Sheku Bayoh Inquiry

1 final report was received, there were a number of
2 communications and reports during that period, but that
3 period took 14 months.

4 A. Sorry. Give me that again.

5 Q. So from the first instruction -- there were a number of
6 letters of instruction, but from the first date of the
7 first one to the final report that was received was a
8 period of 14 months.

9 A. For the pathology report?

10 Q. For the final report from the final pathologist. And I
11 wonder if you were concerned in any way about the
12 impact -- often experts can cause -- can take a
13 considerable period of time. I'm wondering for your
14 thoughts about the impact of delay, the period of time
15 that that took and the impact on the overall
16 investigation.

17 A. Well, it's difficult to say, and the time taken I think
18 is demonstrative of the fact that it was complex, and
19 there's other -- I mean there's issues to consider
20 around this. And for me what I want is I want a
21 thorough report, thorough investigation, there weren't
22 matters that have been raised to be considered, and if
23 the report took 14 months, then if that's what it took,
24 you know, for the report to be completed and all these
25 matters to be considered and, as you say, it's not

Transcript of the Sheku Bayoh Inquiry

1 disputed the original postmortem and cause of death
2 issued in the report 14 months later, that just
3 demonstrates it was well thought out, I would say, and
4 carefully considered by the pathologist.

5 And you have got to remember as well is that the
6 pathologist would be well aware of the profile of this
7 case and the pathologist would know that it was
8 important to be thorough, to be careful, to get it
9 right.

10 Q. At the time you were Lord Advocate, was it the normal
11 course of events that when a final postmortem became
12 available to the crown and a two doctor postmortem that
13 that would -- the thoroughness and the way that was
14 written, the way that was conducted, would that
15 generally be reviewed by a subsequent pathologist to
16 check it was thorough and considered?

17 A. Just depends. I mean the importance of this case and
18 the profile that this case had and the issues in
19 relation to restraint, postural asphyxia, intoxication,
20 all this, it's important I would have thought that the
21 crown has confidence in the original pathologist's view
22 and to get a third opinion on specific issues. I can't
23 see anything wrong with that.

24 Q. All right. From your recollection, when this final
25 postmortem report came in, was there anyone in your --

Transcript of the Sheku Bayoh Inquiry

1 in Crown Office or yourself to have any concerns about
2 the pathologists, that's Dr Shearer and Dr Bouhaidar?

3 A. No, I don't think -- you mean the ability of and
4 experience of the pathologist? Certainly I didn't.

5 Q. All right, thank you. I would like to move on to a
6 comment that is in a document which is Lindsey Miller's
7 Inquiry statement, SBPI 00428, and this relates to a
8 period after the first PIRC report has been received so
9 it's after the 7 August. It relates to a meeting
10 which -- paragraph 59, please, a -- meeting which you
11 had with the family on 12 August.

12 Now, this is Lindsey Miller's Inquiry statement to
13 the Inquiry:

14 "The first part of my note from 12 August 2015 is
15 not a note of a meeting with Mr Bayoh's family, but the
16 note of a premeet before the anticipated meeting with
17 the family."

18 So there was a meeting with you I think prior to
19 meeting with the family.

20 "I was present at that meeting along with the
21 Lord Advocate, John Logue and Stephen McGowan. I have
22 not attributed the comment about the PIRC report being a
23 'piece of rubbish' to anyone, simply noted that it was
24 said, and I cannot now recall whether that was said by
25 someone at the meeting directly, or them quoting someone

Transcript of the Sheku Bayoh Inquiry

1 else. I say that because of the use of quotation marks,
2 which suggests one of the attendees at the meeting was
3 quoting someone else."

4 Do you remember who said the first PIRC report was a
5 piece of rubbish?

6 A. News to me. I didn't certainly say it and I didn't have
7 a knowledge and I wouldn't describe it is that. So I
8 have no knowledge of that.

9 Q. Right. Do you remember from that meeting anyone in your
10 hearing saying that?

11 A. No, I don't.

12 Q. Right. What was your view of the first PIRC report?

13 A. You mean the interim report?

14 Q. Yes, we've heard that -- I think Les Brown when he gave
15 evidence corrected me when I called it an interim report
16 and he said it wasn't actually designed initially as an
17 interim report, he thought that would be the PIRC
18 report, but subsequently, because further investigations
19 were required by the crown, that it then became referred
20 to as an interim report by others.

21 A. I understood it to be an interim report.

22 Q. Did you?

23 A. I didn't really have a view on it to be honest, because
24 it was an interim -- whatever terminology used -- it was
25 an interim report, a final report to come in. You would

Transcript of the Sheku Bayoh Inquiry

1 work through the final report once it came in and you
2 would conduct your own investigation. I didn't have a
3 view on whether it was a good, bad, indifferent report
4 at all.

5 Q. Right. In your role, did you actually read that first
6 PIRC report or did you rely on information from staff?

7 A. A bit of both actually, but I remember I did read it
8 when it came in.

9 Q. What parts of it did you read?

10 A. I read -- I don't think I read the appendices and I
11 particularly --

12 Q. We've heard that was statements and the like.

13 A. Yes, I didn't read that. I read the actual body of
14 report itself with a particular focus on the
15 circumstances which were set out in it and I think I
16 looked at the pathology as well.

17 Q. Right. In relation to your expectations after that
18 first interim PIRC report was obtained, what -- how did
19 you envisage matters progressing from that point?

20 A. What do you mean from the interim report to call it
21 that?

22 Q. From the interim report.

23 A. Right.

24 Q. We've heard that after that -- we've heard evidence from
25 Les Brown that he looked through a number of matters, he

Transcript of the Sheku Bayoh Inquiry

- 1 then did a letter on 2 September.
- 2 A. Yes.
- 3 Q. Detailed letter giving further more detailed directions
4 to PIRC.
- 5 A. Sorry. What year was that?
- 6 Q. That was 2015.
- 7 A. Yes, okay.
- 8 Q. So the first or the interim report is received,
9 Les Brown head of CAAPD works on that and does a
10 detailed letter of the 2 September --
- 11 A. Yes.
- 12 Q. -- instructing a number of lines of investigation for
13 PIRC to pursue. They then took a period of around one
14 year --
- 15 A. Mm-hm.
- 16 Q. -- between August 2015 and August 2016 for the final
17 PIRC report to be received.
- 18 A. Well, exactly that. That's what I would expect.
19 Les Brown, experienced, able, been in charge of
20 investigation, preparation, from the crown's point of
21 view to go through it, identify the issues which need to
22 be addressed, let PIRC know about them and these will be
23 addressed in the final report.
- 24 Q. And what sort of engagement did you have with Les Brown
25 in relation to the work that was being done during that

Transcript of the Sheku Bayoh Inquiry

1 period, that year?

2 A. Not in detail, a kind of overview. It would tell me
3 what the issues are, but it's the official's job to
4 interact with PIRC at the end of the day, to move it
5 forward and the final report comes in, to conduct the
6 crown investigations, to prepare case papers, document,
7 precognition, call it what you want, and identify
8 Crown Counsel to report it to them.

9 Q. Right. I would like to move on to an issue regarding
10 instruction of experts.

11 A. Mm-hm.

12 Q. We've heard that PIRC were asked to identify experts --

13 A. Mm-hm.

14 Q. -- as part of their investigation. Prior to the final
15 report being received by the crown, PIRC were to gather
16 in CVs and they were to make recommendations to the
17 crown as to who should be instructed and then once the
18 crown had approved an expert, the PIRC prepared a draft
19 letter of instruction which would be checked by
20 Crown Office and then sent off to the expert. And that
21 was happening at the period of time shortly prior to the
22 final PIRC report being prepared and submitted.

23 Can I ask you, did you have any concerns at that
24 time about PIRC being asked to do this work in relation
25 to experts, particularly medical experts? We've heard

Transcript of the Sheku Bayoh Inquiry

1 evidence that maybe their experience of doing that was
2 limited.

3 A. No, because it would be superintended by the crown and
4 it's the crown's decision in what experts are instructed
5 and the investigators would have an input in that. They
6 made recommend -- I think it was a letter, a detailed
7 letter setting out suggested experts, but ultimately
8 it's a decision for the crown.

9 Q. So were you happy that your staff would ultimately take
10 the final view about which experts were to be
11 instructed?

12 A. Yes, I think is there not -- there's a memorandum of
13 agreement between PIRC and the crown.

14 Q. Yes, we've heard evidence about that.

15 A. Right, I think it may be covered in that.

16 Q. But were you comfortable that your staff would deal with
17 the issues of who was to be instructed and how they were
18 to be instructed?

19 A. That was my understanding. I was comfortable with that.

20 Q. We've heard that the first couple of experts that were
21 instructed were a Dr Payne-James and a Dr Steven Karch?

22 A. Mm-hm.

23 Q. And they were instructed -- actually the work had been
24 progressed prior to the final PIRC report, but they were
25 instructed shortly after that was received.

Transcript of the Sheku Bayoh Inquiry

1 Can we look at paragraph 117 of your Inquiry
2 statement. I think this is Lindsey Miller's on the
3 screen. There we are. 117. "Issues regarding
4 Dr Steven Karch", you have addressed this in your
5 statement:

6 "The recommendation of this expert was initially
7 proposed by PIRC. It would have been done through an
8 assessment of his experience and qualifications.
9 Dr Karch is a forensic pathologist who is expert in
10 cardiac pathology. He is a fellow of the Faculty of
11 Forensic and Legal Medicine of the Royal College of
12 Physicians in London. He served as a cardiac
13 pathologist in the office of San Francisco Medical
14 Examiner and is the author of a number of books and has
15 given evidence in a number of trials"

16 Do you remember now was his name first mentioned by
17 PIRC or from someone in Crown Office?

18 A. I can't answer that, because I can't remember who the
19 genesis of Dr Karch was.

20 Q. Right. You have said that:

21 "It would have been done through an assessment of
22 his experience and qualifications."

23 Who did you expect to carry out that assessment of
24 his experience and qualifications?

25 A. Well, the people that were involved in the process was

Transcript of the Sheku Bayoh Inquiry

- 1 PIRC and Les Brown.
- 2 Q. Would you have expected PIRC to carry out that
3 assessment or Les Brown?
- 4 A. To have an input. To have an input.
- 5 Q. Would you have expected them to work together on that?
- 6 A. Yes.
- 7 Q. Right. And was it your expectation that either PIRC or
8 Les Brown would assess independence, impartiality of
9 Dr Karch and confirm he had no conflicts?
- 10 A. Well, yes, I would expect that, if that information was
11 identifiable. I think there was an issue with him.
12 I think part of it was that he went to the press.
- 13 Q. Yes, you deal with that in your statement. I'm
14 interested in his experience and qualifications, first
15 of all.
- 16 A. Yes.
- 17 Q. So who would you have expected to address those issues
18 regarding his qualifications and his experience?
- 19 A. Both, Les Brown and PIRC.
- 20 Q. To work together on that?
- 21 A. Work together, yes.
- 22 Q. And in terms of assessing his independence and
23 impartiality?
- 24 A. It's part of it.
- 25 Q. And any conflicts that he may have had?

Transcript of the Sheku Bayoh Inquiry

- 1 A. Part of it, yes.
- 2 Q. Part of it.
- 3 Now, we've heard evidence, and there is evidence
4 available to the Chair, that Dr Karch was not in fact a
5 forensic pathologist, he had never conducted any
6 autopsies, and we have other evidence available to
7 the Chair that he was being instructed for the purposes
8 of expertise in toxicology. Do you have any
9 recollection of that?
- 10 A. No.
- 11 Q. No. So what was your understanding of why Dr Karch was
12 being instructed?
- 13 A. As it says in paragraph 117, the cardiac pathology.
- 14 Q. Right. And why were you interested in cardiac
15 pathology?
- 16 A. I think -- I need to go back to the original postmortem
17 report, but from memory it was cardiac arrhythmia was
18 referred to so that would be an issue. You would need
19 an expert for that just to look at that as an issue.
- 20 Q. That was your recollection of the reasons --
- 21 A. That's my recollection.
- 22 Q. -- the reasons why.
- 23 A. But as I say, I didn't have a detailed involvement in
24 that, in the selection of Dr Karch or looking at his
25 qualifications, independence, objectivity, that type of

Transcript of the Sheku Bayoh Inquiry

- 1 thing.
- 2 Q. Do you remember any part of the instruction being in
3 relation to toxicology or the drugs that were mentioned
4 in the final postmortem?
- 5 A. I can't recall that. That doesn't mean that wasn't the
6 case but --
- 7 Q. Right.
- 8 A. -- I don't recall that.
- 9 Q. And then if we look at paragraph 120:
- 10 "It's my recollection that there was a
11 misunderstanding that Dr Karch was instructed on excited
12 delirium. This was not the case. He was instructed on
13 his expertise on cardiology."
- 14 A. That's my recollection.
- 15 Q. And so if there's been any suggestion or concern
16 expressed by other witnesses that he was instructed on
17 the basis of his views on excited delirium, does that
18 accord with your recollection?
- 19 A. No, because I was specifically -- I remember asking
20 about this, because I think it was raised at one of the
21 meetings with the family and I remember specifically
22 asking is he being instructed on excited delirium.
23 I was reassured that he wasn't. It was in relation to
24 that area. That's my recollection.
- 25 Q. So certainly in terms of your understanding and

Transcript of the Sheku Bayoh Inquiry

1 awareness at that time --

2 A. Mm-hm.

3 Q. -- you were not seeking an opinion from Dr Karch --

4 A. No.

5 Q. -- on excited delirium?

6 A. Yes. Earlier in my evidence I talked about ruling out

7 things, because it's as important as ruling in things,

8 and excited delirium was something that would have to be

9 dealt with, ruled out or whatever so I remember that,

10 but I wasn't heavily involved in that area, but I do

11 remember saying, look, if this is an issue, you need to

12 look at this and you need to either rule it out or rule

13 it in and if you need expert evidence on it, you would

14 need to get expert evidence on it and the expert

15 evidence may be that, look, this is bogus or whatever,

16 this is not a factor. So that is something that you

17 would want to address.

18 Q. And if the final postmortem report from Dr Shearer and

19 Dr Bouhaidar ruled out excited delirium and said it's

20 not a pathological condition and spoke of perhaps being

21 more a psychiatric condition at best, but not one for

22 pathologists, would you have considered it needed to be

23 ruled out further based on that?

24 A. I think I would. I would want to have the confidence,

25 reassurance, that that was ruled out.

Transcript of the Sheku Bayoh Inquiry

1 Q. And if it was possibly considered at that stage to be a
2 psychiatric condition, what sort of expert would you
3 consider the crown would have to go to do that ruling
4 out exercise?

5 A. It's kind of difficult to say in the abstract. I would
6 need to look at what the information is about
7 psychiatric condition. I would, if I was dealing with
8 it, that particular issue, I think I would take
9 soundings, I would speak to people that I respected,
10 I would take soundings on it and try and identify an
11 appropriate perhaps psychiatric witness that would speak
12 about it and explain what it is and why that's not a
13 factor in this particular case so that evidence is
14 available to present to the court. But it depends. It
15 may be it's a combination of both say a third opinion in
16 relation to the two pathologists that said it's not a
17 pathological condition, it's a psychiatric condition, I
18 might get a third opinion in that -- on that and I would
19 also consider whether or not to get expert psychiatric
20 evidence.

21 Q. And so would the crown be looking to instruct a
22 consultant psychiatrist or someone along those lines to
23 express a view?

24 A. It's a possibility. I don't know. I need to look at,
25 you know, what the circumstances are. It may be it's

Transcript of the Sheku Bayoh Inquiry

1 a -- you know, it's a step-by-step approach. You know
2 you've got further information and you look at that and,
3 you know, your mind is focusing in on the issue and what
4 particular experts, if any, that may be required to deal
5 with that, but, as I say, part of the preparation of a
6 case is to prove what it's not.

7 Q. Right. And do you remember why Dr Payne-James was
8 instructed? You've talked to us about Dr Karch. Do you
9 remember why --

10 A. No.

11 Q. -- Dr Payne-James was instructed?

12 A. I don't.

13 Q. Do you remember anything about him?

14 A. No.

15 Q. Do you remember what specialism --

16 A. I remember the name.

17 Q. The name.

18 Can we look at the letters of instruction that were
19 sent by PIRC to those experts. Let's look at Dr Karch's
20 first, PIRC 03434B. See this is a letter from Dr --
21 from PIRC to Dr Karch in August 2015. This letter
22 actually was sent out just shortly after the interim
23 PIRC report was sent. And if we could look at the
24 actual instructions, you see there letters (a) to (d):

25 "Please accept this letter as formal instruction to

Transcript of the Sheku Bayoh Inquiry

1 produce an expert witness report and documents are
2 attached."

3 There's an expert witness package attached. You'll
4 see that it refers to:

5 "The physiological effect of the drugs detected in
6 the toxicology sample, individually or in combination,
7 on the deceased in the circumstances of his arrest.

8 "(b) The physiological effect of the CS PAVA spray,
9 individually or in combination, on the deceased in the
10 circumstances of his arrest.

11 "(c) The physiological effect of the physical
12 restraint of the deceased in the circumstances of his
13 arrest.

14 (d) And the physiological effect of all three in
15 combination."

16 There's no reference there to cardiology or cardiac
17 pathology or, in fact, any reference to the heart at
18 all?

19 A. Well, that's contrary to my understanding.

20 Q. All right. And then can we look at the other letter of
21 instruction, PIRC 03435A. This is the letter of
22 instruction dated 10 August 2015 to Dr Payne-James, and
23 can we look at his instruction also further down the
24 page, please, looking for (a) to (d) also. There we
25 are:

Transcript of the Sheku Bayoh Inquiry

1 "Please accept this letter as formal instruction."

2 And you'll see that (a) to (d) are in exactly the
3 same terms and we've heard that Dr Payne-James and
4 Dr Karch are different -- work in different fields, but
5 the letter of instruction appears to simply cover the
6 same wording and the same questions to each doctor.

7 Do you have any concern looking at that?

8 A. Well, I mean I wasn't involved in it, no knowledge of
9 it, certainly contrary to my understanding. I don't
10 know why and I don't have a recollection of why this
11 expert was instructed.

12 Q. Right. But in terms of your expectations regarding
13 instructing further experts, would you have expected
14 their letters to be tailored to each particular
15 specialism that they have and seeking an opinion from
16 each expert within the realms of their areas of skills,
17 qualifications, expertise?

18 A. I would and, further, I would expect -- in addition to a
19 letter of instruction, I would expect conversations to
20 take place with the expert in advance of the letter of
21 instruction.

22 In my experience if you're instructing an expert you
23 would have had detailed conversation with the expert.

24 You would want to see the expert's CV. You would
25 want -- do some research yourself to check expertise of

Transcript of the Sheku Bayoh Inquiry

1 the expert. You would also, again, do some research on
2 whether there's issues with a particular expert. You
3 would speak to the expert having done that homework.
4 You would identify from speaking to them what their area
5 of expertise is, what they could add if anything, what
6 they would need if an expert was appropriate, what
7 information they would need, what is the limit of their
8 expertise, and whether or not they would accept the
9 work, timescales in reporting, all these things you
10 would -- I mean there's a process. It's just not --
11 I wouldn't suggest it's formulaic. Instruction of an
12 expert is an important thing.

13 Q. Thank you.

14 A. And takes time.

15 Q. I would like to move on to an issue regarding what was
16 known and described in evidence as a reviewing
17 pathologist. Can I just explain a little of the context
18 of the evidence that we've heard so far.

19 We've heard that there was a forensic pathologist
20 instructed called Dr Lawler and there were a number of
21 letters of instruction and reports sent to him and we've
22 heard evidence from Les Brown that -- about the genesis
23 of that idea that there would be this reviewing
24 pathologist and I would like to -- he thought you were
25 the Lord Advocate at the time that this issue arose and

Transcript of the Sheku Bayoh Inquiry

1 I would like to ask if you remember this.

2 A. So when was Dr Lawler?

3 Q. He wasn't instructed when you were still Lord Advocate,
4 but I'll tell you what the evidence of Les Brown is, and
5 see if it prompts any memories. So he talked about a
6 reviewing pathologist:

7 "This was a course of action that had been I think
8 suggested by the Lord Advocate at an early stage in the
9 investigation."

10 And he later clarified that he meant it was
11 Frank Mulholland, as he recollected, that raised the
12 question of the benefit of having a reviewing
13 pathologist. And he talked about identifying a
14 reviewing pathologist and identifying Dr Lawler and, as
15 I understood his evidence, it was to have a pathologist
16 come in and review all the reports that had been
17 obtained by the crown.

18 And I'm wondering if in light of Les Brown's
19 suggestion that you were the Lord Advocate that came up
20 with the idea and suggested the idea and discussed it
21 with him, do you remember that?

22 A. I don't. He wasn't instructed during my time.

23 Q. No, not at that time.

24 A. If I'd suggested it, he would have been instructed at an
25 early stage I would imagine, but I don't -- I don't --

Transcript of the Sheku Bayoh Inquiry

1 when you put it to me, I don't think it's necessarily a
2 bad idea in a complex case such as this. Someone can --
3 an experienced pathologist who's reviewing matters can
4 identify issues that you haven't thought of or give
5 information to you and expertise on areas that perhaps
6 you've not considered.

7 So if a sort of overview, third person pathologist
8 overview, was to happen you would want that person in
9 pretty close to the start so he's not been instructed so
10 and I mean I have got a decent memory, I don't recollect
11 that, and the fact that he wasn't instructed during my
12 time would maybe -- would support the fact that maybe it
13 wasn't me, but I'm not sort of departing from that could
14 be a good idea. It would depend on the circumstances.

15 Q. Have you in your experience used a review -- a
16 pathologist in this way as a reviewing pathologist --

17 A. Yes.

18 Q. -- prior to the involvement with --

19 A. Yes.

20 Q. You have. Can you explain to us how that works.

21 A. Well, cold cases, for example. In cases where the
22 pathology -- at the time you have a postmortem report
23 and, you know, 20 years down the line you're looking at
24 a case, there may be issues with the pathology, the
25 general pathologist at the time. You might want someone

Transcript of the Sheku Bayoh Inquiry

1 to look at that, not to become an expert witness, but to
2 look at it to give you an understanding of what the
3 issues are, could be, what the defects are.

4 I mean you've got to remember, we all deal with
5 medical evidence, pathological evidence, but we're not
6 pathologists so it can assist in those types of cases.
7 I have seen it done in complex -- in cases of complex
8 pathology to give you a reassurance, but I mean I'm just
9 going kind of setting out in general terms when it can
10 be of use.

11 Q. Is that a pathologist who would -- other evidence we've
12 heard is a pathologist could become part of the team to
13 help the prosecutors understand evidence and work
14 through that evidence?

15 A. I'm not sure part of a team in the sense of the
16 prosecution investigators but without instructing that
17 pathologist as an expert witness, it can help to
18 identify to give a commentary on what's went on before
19 and identify any issues, any flaws, any defects,
20 anything that you need to address.

21 Q. Right.

22 A. So there is benefit to it but it depends on the
23 circumstances.

24 Q. Well, given your own experience of having a pathologist
25 assist, would you expect that pathologist, that forensic

Transcript of the Sheku Bayoh Inquiry

1 pathologist, to then be asked to comment on the opinions
2 of a consultant psychiatrist, a consultant in emergency
3 medicine or a consultant clinical toxicologist so
4 separate areas of specialism.

5 A. It's out with their expertise.

6 Q. Sorry?

7 A. It's out with their areas of expertise.

8 Q. And would you agree if it's out with their areas of
9 expertise it would not be admissible?

10 A. What's the point.

11 Q. What's the point.

12 A. But I mean I wouldn't even do it, ask an expert witness
13 who's a for example a reviewer, to comment on areas out
14 with their expertise, what's the point.

15 Q. Thank you.

16 A. If I wanted someone to comment on toxicological
17 evidence, it would be a review toxicologist.

18 Q. Right. Presumably if you wanted someone to comment on
19 toxicology evidence, you would want them to have formal
20 qualifications in toxicology.

21 A. Of course, and experience.

22 Q. And experience. The combination would be required?

23 A. Yes.

24 Q. Can I move on, please, to another matter. If we look at
25 SBPI 00476, there we are, back to your statement and

Transcript of the Sheku Bayoh Inquiry

1 paragraph 80, please.

2 "PIRC and the Scottish Police Federation media
3 releases are of course a matter for PIRC and SPF. I was
4 aware that the family were concerned and upset at such
5 releases and anonymous briefings and as a result I wrote
6 to the Chief Constable on 21 May 2015 expressing concern
7 about SPF press briefings. The following is an extract
8 from this letter."

9 And then you quote:

10 "I share your concern in relation to the briefing of
11 the press and agree that it is very unfortunate that the
12 Police Federation saw fit to put information into the
13 public domain at such a sensitive time and when the
14 facts had still to be established. This was in my view
15 unhelpful and caused the family of the deceased
16 considerable distress on the day that I met with them at
17 Crown Office together with their solicitor ..."

18 Can I ask you, obviously you have expressed concern
19 there about comments made by the SPF, why did you elect
20 to write to the Chief Constable rather than SPF?

21 A. I think from recollection the Chief Constable had raised
22 it with me as well, so -- I mean the action I took was
23 to put something out in the media, I think you have got
24 the media release.

25 Q. We'll come on to that.

Transcript of the Sheku Bayoh Inquiry

- 1 A. Yes, so I didn't see -- I thought the Chief Constable
2 was an appropriate person to write to to express that.
- 3 Q. Did you copy that to SPF?
- 4 A. No, I don't think I did.
- 5 Q. Why not?
- 6 A. Not sure.
- 7 Q. Was there any reluctance to address matters direct with
8 the SPF?
- 9 A. Not on my part. I wouldn't hesitate in addressing
10 issues but I can't remember the circumstances at the
11 time but what was agreed.
- 12 Q. At that time was there any reason not to write to the
13 SPF?
- 14 A. No, I mean you have made the point to me and I think
15 it's a good point.
- 16 Q. All right. Let's look at some other paragraphs, 99, 100
17 and 102 and I think you also make comments about media
18 issues. 99:
- 19 "I wrote to the Chief Constable on May 2015
20 expressing my concern at the SPF briefing."
- 21 Is that the same matter that you addressed in the
22 earlier paragraph at 80, if we look back at 80?
- 23 A. Yes, I think it is.
- 24 Q. I think it seems to be the same date, it seems to be --
- 25 A. Yes.

Transcript of the Sheku Bayoh Inquiry

- 1 Q. Is that the same?
- 2 A. I think it is.
- 3 Q. That's the same, all right, thank you. Then if we can
4 look at 100, 102. I think 100 is just the same
5 quotation.
- 6 A. Yes.
- 7 Q. And you say at 102:
- 8 "I was so concerned about the press briefings and
9 the effect that that was having on the family that I
10 unusually issued a press release on 22 October 2015 ..."
- 11 A. Yes.
- 12 Q. "... calling for restraint and to allow the crown and
13 PIRC to get on with their jobs."
- 14 And I think is it fair to say you did have concerns
15 about what was happening in the press during?
- 16 A. Yes, I mean out of the blue you're reading stuff in the
17 press that about the case and, you know, the case was
18 under investigation, it seemed to me it was not helpful
19 and at one of the meetings the family expressed their
20 concern, their upset at it. And I have never done that
21 before or since.
- 22 Q. Right.
- 23 A. So it indicates the importance I regarded to it and it
24 did quiet -- I think from memory it quietened it down.
- 25 Q. So what in particular was it that prompted you actually

Transcript of the Sheku Bayoh Inquiry

1 issuing your own press release?

2 A. Well, to do something about it, to try and, you know,
3 kill it. It wasn't just the Scottish Police Federation;
4 there was others that were in the press as well.

5 I don't know the source of it but there seemed to be a
6 steady stream of information that seemed to me the best
7 way to deal with it to lance the boil would be to issue
8 the press release that I did.

9 Q. Did you ever find out who the others were?

10 A. No, and I wouldn't be -- how would you find out that
11 with confidentiality of journalists, that type of thing.
12 I wouldn't even attempt to go down that road; it's not
13 my business. My business is to deal with a drip in the
14 media and that's why I did what I did.

15 Q. We'll remain on this topic but I'm conscious of the
16 time.

17 LORD BRACADALE: Stop for lunch, sit at 2 o'clock.

18 (1.01 pm)

19 (Luncheon adjournment)

20 (2.03 pm)

21 LORD BRACADALE: Ms Grahame.

22 MS GRAHAME: Thank you. We were dealing with the press
23 release that you issued just before lunch. Could we
24 have that on the screen, COPFS 00975. So this is from
25 October 2015 and it's listed here, Lord Advocate,

Transcript of the Sheku Bayoh Inquiry

1 Frank Mulholland QC said:

2 "The investigation into that death of Sheku Bayoh is
3 being conducted by PIRC under the direction of the crown
4 and both are well aware of all the evidence, the lines
5 of inquiry and the issues surrounding this case. The
6 crown and PIRC are not influenced by comments made in
7 the media and that is how it should be. However,
8 speculation and a running commentary on the
9 investigation can be upsetting to the family of
10 Sheku Bayoh as well as the families of the officers
11 involved.

12 "A decision will be taken at the end of this
13 extremely complex investigation as to whether or not
14 criminal proceedings should be raised. An inquiry will
15 also be held at which all the relevant evidence will be
16 heard, open to the public and the media, and it is right
17 that it this forum where the evidence will be rigorously
18 tested and judicially assessed.

19 "PIRC and the crown should be allowed to get on with
20 their job."

21 Do you see that and that's where it ends?

22 And if I can to go back to your first Inquiry
23 statement. And if we look at paragraphs 84 and 85, and
24 you have been asked to comment on a statement from
25 Mr Ade Johnson:

Transcript of the Sheku Bayoh Inquiry

1 "He states that me calling publicly for calm and
2 commentary to stop made the family feel that they were
3 put in the same bracket as the SPF."

4 85:

5 "I was not intending to put the family in the same
6 bracket as the SPF. In the media release I stated,
7 however, speculation and the running commentary on the
8 investigation can be upsetting to the family of
9 Sheku Bayoh, as well as the families of the officers
10 involved. I was not suggesting the family were leaking
11 information and briefing the press. The terms of this
12 media release is pored over by officials and that head
13 of communications to get it right. I am sorry if
14 Mr Johnson is upset by this, but in my opinion it could
15 not have been phrased better. It was not directed at
16 the family."

17 And I think probably I missed the first couple of
18 lines of the press release actually when I read it out.
19 I wonder if we could go back just for a moment to
20 COPFS 00975. I didn't read out the top line:

21 "The Lord Advocate has today called for restraint
22 from all parties in the provision and publication of
23 information in respect of the death of Sheku Bayoh."

24 So you call for restraint from all parties in regard
25 to that.

Transcript of the Sheku Bayoh Inquiry

1 A. It wasn't the family. It was not my intention -- I
2 never thought that the family were leaking information
3 to the press, it never crossed my mind, it still
4 doesn't. I don't think they were and I was concerned
5 about the family of Sheku Bayoh and the effect it was
6 having on them and I was also concerned about the
7 families of the officers involved and it was with the
8 best of motivation to try and put -- put a stop to it.

9 Q. And was that your aim in speaking out in this way which
10 you said before lunch you had never taken this step
11 before?

12 A. Yes, that was essentially it. And if you just scroll
13 down a bit:

14 "The crown and PIRC are not influenced by comments
15 made any media and that's how it should be."

16 I mean there was one view that the information in
17 the media was with a view to putting pressure on PIRC
18 and the crown, so I just wanted to make that point
19 absolutely clear, but there's reference to the family;
20 "it can be upsetting to the family of Sheku Bayoh as
21 well as the families of the officers involved".

22 I never -- it never crossed my mind that the family
23 were leaking information to the press. I still don't
24 believe it.

25 Q. Looking at this press release with the benefit of

Transcript of the Sheku Bayoh Inquiry

1 hindsight, do you think it could have been phrased
2 differently?

3 A. Well, the press release is -- you know, the point I was
4 making is it's not just me, this is communications input
5 and officials input. Maybe a call for restraint from
6 all parties in the provision, "all parties" where
7 there's a -- you know, could that be taken as implied
8 criticism of families in some way? All I can say it was
9 never intended that way, and it never crossed my mind.

10 Q. So who was this directed to, this call for restraint?

11 A. It was directed at the information that was appearing in
12 the media and I was hoping that the people that were
13 leaking that information to the press would read this.

14 Q. And were you aware of any particular source of
15 information?

16 A. Well, I wouldn't like to say. I mean I didn't know who
17 was leaking to the press. It wasn't my business to find
18 out and if I tried to find out, then I wouldn't find out
19 because of journalistic confidentiality protection of
20 sources and all that type of stuff so it was pretty
21 pointless to even to attempt to find out.

22 Did I know who? No, I didn't know. All I know was
23 that there was information in the media, and it looked
24 as if some of that information had been leaked by
25 persons who knew so that is -- I mean I could have

Transcript of the Sheku Bayoh Inquiry

1 written -- you are right, I could have written to the
2 SPF and others, I don't know, but I thought that the
3 best way to deal with this would be to deal with it head
4 on and put this and I did give consideration to this.

5 And it had been raised by the family and, as I said
6 to you earlier, it's very important that you listen to
7 what the family has said and I listened and tried to do
8 something about it. It did from memory quieten it down
9 somewhat so I think it was the right thing to do.

10 Q. Thank you. Can I ask you about some comments that have
11 been made in another statement the Inquiry has, a
12 statement from Aamar Anwar, SBPI 00549. And I'm
13 interested in paragraphs 224 and 226. 224 and this is
14 Mr Anwar:

15 "I have been asked what my or the family's
16 expectations were of the Lord Advocate when we requested
17 that he take action in relation to the media releases
18 that the SPF were issuing. I think the family's
19 expectation was that they would be robust with the
20 Scottish Police Federation whether it was material that
21 they were putting in a public domain or whether it was
22 letters they were writing to people threatening them or
23 whether it was the media statements that they were
24 making was interfering with the integrity of the
25 investigation, that it was inflammatory, that it was

Transcript of the Sheku Bayoh Inquiry

1 prejudicing an ongoing live criminal investigation,
2 whereas the Federation were just simply propagating the
3 idea this was a fatal accident inquiry. That was a
4 constant mantra, 'there will be a fatal accident inquiry
5 at which all these issues will be discussed', almost
6 excluding completely and utterly that there's supposed
7 to be a live criminal investigation."

8 Was it your recollection that that family's
9 expectations of you was that you would be robust with
10 the Scottish Police Federation in relation to their
11 engagement with the media?

12 A. No, that's not my recollection.

13 Q. Can you remind us, please, what was your recollection?
14 Were the SPF included within that or not?

15 A. Well, they were included with all parties, so it was all
16 the people that were leaking, all the bodies,
17 organisations, leaking information to the press, it was
18 directed at them.

19 Q. But not exclusively to the Scottish Police Federation?

20 A. Not exclusively, no.

21 Q. Right. And can we look at paragraph 226, please:

22 "The family feel that the media has been used by the
23 SPF to smear Sheku and attempt to bully the family into
24 silence, to call them or their representatives liars and
25 complicit in this process has been the Crown Office and

Transcript of the Sheku Bayoh Inquiry

1 PIRC."

2 Do you wish to make any comment about that
3 suggestion?

4 A. It's not the case for my time when I was at the crown.

5 Q. Right. And just to go back briefly to 224 --

6 A. But I mean the family are entitled to express their
7 views. If they thought that they can express their
8 views, but you asked me, is that correct? No, it's not.

9 Q. Right. And given the family's concern, as is expressed
10 in 226, do you consider there was anything more you
11 could have done to address that concern?

12 A. Other -- I mean I was absolutely committed to liaising,
13 speaking, keeping up a regular dialogue with the family
14 and the family solicitors. I was hoping that in that
15 process it would give them confidence in the
16 independence, objectivity of the crown.

17 Smearing, it's not my style. I have no -- certainly
18 my time with the crown, I know of no one that would
19 engage in that type of behaviour and I certainly --
20 there was no attempt to bully the family into silence.
21 They had -- they had Amar Anwar acting for them. They
22 had me. They could speak to me at anytime. It would be
23 arranged the meeting of course, but there was a regular
24 dialogue with the family and I would never even -- never
25 thought, never called, their representatives or them

Transcript of the Sheku Bayoh Inquiry

1 liars in any way, they were certainly not liars and all
2 I wanted to do was to help them navigate through a very
3 difficult distressing process for them that's not been
4 of their making, they were thrust into this and on a
5 human level I wanted to help them.

6 Q. It will of course be a matter for the Chair, but it may
7 be one interpretation of this paragraph that the
8 concerns of the family are that SPF were attempting to
9 smear Mr Bayoh, bully the family and calling the
10 representative liars, rather than asserting that it was
11 the crown doing those things. Was that something that
12 was drawn to your attention in relation to the SPF?

13 A. I can't say it wasn't, but I don't have a recollection
14 of it. The SPF will need to answer for that themselves,
15 I can't answer on their behalf, but the press release
16 was designed that the people that were leaking this
17 information into the press should be aware of it and I
18 honestly hoped that the press release would result in an
19 end to this.

20 Q. And then specifically in relation to the concern that
21 the Crown Office were complicit in this process, this
22 smearing by SPF?

23 A. It's not the case.

24 Q. And is there anything that you reflecting on the events
25 at this time, anything you can think of that could have

Transcript of the Sheku Bayoh Inquiry

1 been done by Crown Office to make it absolutely clear
2 that the crown were not complicit in these matters?

3 A. Well, you can make it clear directly to the family if
4 you needed to. I didn't think that I needed to do that
5 and the crown weren't complicit, weren't in any way
6 smearing or complicit in smearing the family. I had
7 great respect for the family and I felt for the position
8 that they had -- that they had -- were in that had been
9 thrust upon them.

10 What else could the crown -- I mean it's a matter of
11 trust. Even a statement that we'll not doing it, if
12 they don't believe it then it's a matter for them, but
13 it won't deal with it. What you have got to do is build
14 up trust in how you're dealing with the case, with the
15 investigation.

16 Q. And if we can go back briefly to 224, the paragraph we
17 looked at a moment ago, where the family's expectation
18 was you would be robust with the
19 Scottish Police Federation. I'm interested in the
20 comment at the end of that paragraph:

21 "The Federation were just simply propagating this
22 idea this was a fatal accident inquiry. That was a
23 constant mantra, 'there would be a fatal accident
24 inquiry at which all these issues will be discussed',
25 almost excluding completely and utterly that there's

Transcript of the Sheku Bayoh Inquiry

1 supposed to be a live criminal investigation."

2 I'm interested in this aspect of the family's
3 impression that there was perhaps an overemphasis, if I
4 can put it that way, on the FAI rather than the live
5 criminal investigation?

6 A. Well, I mean I can't speak for the family and what their
7 perception is, but I can reassure you it was a live
8 criminal investigation and in support of that I think in
9 the documentation that certainly I was shown there
10 was -- I instructed Les Brown or the investigator team
11 to speak to the Health and Safety Division of the
12 Crown Office and also the Health and Safety Executive to
13 place them on notice that in addition to individual
14 criminality we were looking at systemic criminality
15 under the Health and Safety at Work Clause and I think
16 there's documentation I have seen to confirm that that
17 was carried out.

18 The Health and Safety Executive said that thank you
19 very much, we'll keep a watching brief. So what I was
20 doing was ensuring that the relevant health and safety
21 unit, the Crown Office and the investigators, health and
22 safety investigators, were placed on notice that they
23 had an interest.

24 I had years ago prosecuted Transco, I knew health
25 and safety law in great detail, I had set up the Health

Transcript of the Sheku Bayoh Inquiry

1 and Safety Executive -- a Health and Safety Division in
2 the Crown Office to bring expertise in health and safety
3 matters. There's also reference -- I mean I can't put
4 my finger on it just now, but from what I've read PIRC
5 had obtained standard operating procedures, training,
6 the extent of training for police officers in restraint
7 arrest techniques, deployment of sprays, and all that
8 was of a view to be in a position to assess that aspect
9 of the criminality.

10 And what I do is I use that as an example to point
11 out that this was a live criminal investigation. It was
12 mandatory to hold an FAI, that's parked, that will
13 happen, but this is about a live criminal investigation
14 and that's all about reassuring the family, reassuring
15 the public that this is being extensively properly
16 investigated, but, you know, if it was just to
17 facilitate a fatal accident inquiry it could have been
18 done in months, quite frankly.

19 Q. I think there may be an issue about whether an FAI was
20 mandatory in terms of the legislation, but I think from
21 your perspective, as I understand your statement, it was
22 anticipated that there would be a public interest in
23 holding an FAI?

24 A. Well, I saw it as mandatory. It's a death in custody.

25 Q. And as I say, it may be the position that there is a

Transcript of the Sheku Bayoh Inquiry

1 disagreement about whether this was truly a death in
2 custody.

3 A. Well, whoever disagrees, I was Lord Advocate, I saw it
4 as a mandatory fatal accident inquiry at the very least.

5 Q. And at the very least, it is a death following police
6 contact and --

7 A. Well, it was in custody, was it not? That's the point.

8 Q. That will be a matter for submission.

9 A. Well, a matter for submission, I can tell you how I saw
10 it. I saw it as a death in police custody.

11 Q. All right. Talking about the Health and Safety
12 Executive, we have heard evidence and there's other
13 evidence available to the Chair that the crown and PIRC
14 would have welcomed the involvement of the HSE in
15 relation to this matter. The HSE declined to engage in
16 the investigation.

17 And I'm interested in evidence we've heard that it's
18 not open to the crown to direct the HSE to investigate.
19 If they decline, that is the end of the matter. I'm
20 interested in any perspective you have about whether
21 that is something that the crown would have wished to
22 pursue if they had had the power to do so?

23 A. Well, I'll go back to Transco and the debrief coming out
24 of the Transco trial. I made the point that it would be
25 helpful to have the power to direct the Health and

Transcript of the Sheku Bayoh Inquiry

1 Safety Executive and that was fed in and, I can't swear
2 to this, I think there was some correspondence with
3 either the Health and Safety Executive or the UK
4 Government with someone who was a looker who had
5 responsibility for this area and it was decided to leave
6 things as they are.

7 Q. Was this at the time of Transco?

8 A. Post -- the debrief coming out of Transco.

9 Q. All right. Thank you. Can I ask you to look at another
10 paragraph in your statement, 476, if we can go back to
11 that, and look at paragraph 124. You were asked about a
12 handover of the investigation between you and your
13 successor, Mr Wolffe, and you say:

14 "I spoke to James Wolffe by telephone and reiterated
15 the importance of this inquiry including the need to
16 maintain good and regular liaison with the family."

17 I'm interested in your recollection of that
18 telephone conversation.

19 A. Well, I have a very good recollection of the telephone
20 conversation. I can tell you how it came about.

21 Q. Please do.

22 A. Having been appointed the Solicitor General and then
23 Lord Advocate, I know from personal experience that on
24 taking up office there is a lot of detailed briefing
25 which is provided to the new law officer by senior

Transcript of the Sheku Bayoh Inquiry

1 officials at the Crown Office. I remember when I first
2 took up post as a Law officer that briefing took the
3 best part of a week. It's not only the Crown Office in
4 relation to criminal matters. It's also SGLD, Scottish
5 Government Legal Directorate, in relation to the array
6 of civil cases so and you also get briefing from the
7 crown agent about -- I've forgotten the phrase now --
8 it's about treasure and various other matters, Cramond
9 Lion -- finds that the public make. So there's a vast
10 array of briefings, quite onerous actually to go through
11 it, it's very detailed and officials are there to
12 present it, explain it, you can ask questions.

13 So when I demitted office the first thing I did was
14 hand the BlackBerry in without deleting anything and
15 handed that over to the crown agent. What I then did
16 was my personal mobile I gave the number of that to the
17 private office and said to the private office that if
18 James wishes to telephone me about anything, just pick
19 up the phone. If I'm not available at that time, I
20 promise I'll get back to you.

21 Three weeks -- three weeks into James' post as
22 Lord Advocate he phoned me, I was at home, it was in the
23 evening and the call took about an hour. We went
24 over -- I gave James advice, a lot of advice, as to what
25 to look out for, how to deal with certain situations,

Transcript of the Sheku Bayoh Inquiry

1 about Cabinet, his attendance at Cabinet, about dealing
2 with the crown officials. I mean James didn't have the
3 background that I had, I had worked for the crown for
4 30, 40 years, so I wanted to be as helpful as possible
5 to him. Including in the telephone call went through a
6 number of high profile cases, the Sheku Bayoh
7 investigation was one of them, and I said, look, James
8 you really need to ensure that you maintain good regular
9 liaison with the family. I described the family, where
10 they were from and how to deal with it and I suggested
11 that he dealt with it personally to ensure that the
12 family have -- know that it's being dealt with at the
13 highest level. There were other matters which are
14 irrelevant to here, but it was a lengthy conversation
15 and what I wanted to do was to help James in his new job
16 as Lord Advocate and that was an important case which --
17 I didn't go into the evidence in detail, but I did
18 mention the liaison with the family.

19 Q. And when you described good and regular liaison with the
20 family, did you give any indication of what that had
21 been -- how that looked under you?

22 A. Well, in a general conversation I would be talking about
23 the meetings that I had with the family and Amar Anwar
24 and I think, although I can't swear to it, but I think
25 I would have said I met with them around about every two

Transcript of the Sheku Bayoh Inquiry

1 months or so, I may have mentioned that, so -- but
2 I didn't go into detail in here. That's not my business
3 to go into the evidence: one, because we didn't even
4 have the final report at the time and, two, the crown
5 really hadn't embarked on its own investigations, but I
6 wanted him to know that it was important because I knew
7 it was important and James being a new Lord Advocate it
8 was important to him as well and I didn't want him to,
9 you know, be on the receiving end of criticism for not
10 doing that job. And I wanted to ensure that the family
11 were -- continued to be helped.

12 Q. Thank you. Can I ask you about the use of the word
13 where the "reiterated"? You "reiterated" the importance
14 of this inquiry. Can I ask why you selected that word
15 or did it mean anything beyond --

16 A. It didn't really.

17 Q. No.

18 A. It's just I suppose my words.

19 Q. Is it essentially you emphasised the importance?

20 A. Yes, that's essentially what --

21 Q. Thank you.

22 A. -- what it meant. I think from recollection James was
23 very receptive to that, fully understood that, so I
24 tried to help James as much as I could.

25 Q. Thank you. Now, can I go back to one thing that you

Transcript of the Sheku Bayoh Inquiry

1 mentioned earlier before lunch regarding the interim or
2 PIRC report, the first PIRC report --

3 A. Yes.

4 Q. -- that you received. You had that in August 2015?

5 A. Yes.

6 Q. And you talked earlier in your evidence about you hadn't
7 read the appendices?

8 A. No.

9 Q. But you had read -- did you read the whole report or --

10 A. Well, I can't swear to -- I certainly read the narrative
11 of what happened, I certainly read the pathology, and
12 there will be other the introduction and that type of
13 stuff.

14 Q. We've heard that this was a substantial document, over
15 350 pages in length. There was no reference in that
16 document however to race, racism, discrimination, racial
17 discrimination, anything of that sort, not even to raise
18 it and exclude it, although it was recognised that
19 Mr Bayoh was a black man. Did you notice when you
20 reviewed that report that that was missing?

21 A. Well, no, I didn't stick out. As I have said before,
22 race was front, left, centre. PIRC were alive to it.
23 This was an interim report, the final report still to
24 come in, so it wasn't particularly -- it didn't stick
25 out. I wasn't concerned about it, nobody drew that to

Transcript of the Sheku Bayoh Inquiry

1 my attention. I just was under the impression that in
2 the final report, which would be more comprehensive than
3 the interim report it would be dealt with.

4 Q. Was it not something that you noticed? Given your views
5 on the importance of race and race being front and
6 centre or race being at the heart of this that it was --
7 was it not noticeable by its absence?

8 A. Well, I knew from Les Brown conversations,
9 correspondence, that race was under investigation given
10 examples of that, so I just assumed that as an interim
11 report that race will be dealt with in the final report
12 so, no, I didn't have a concern about that.

13 Q. Are you saying there was correspondence you had from
14 Les Brown that said race was under investigation?

15 A. Well, there was -- I think I referred this morning to
16 the letter from Les Brown --

17 Q. Yes.

18 A. -- to Jim Fleming.

19 Q. I am interested in the period up to the first PIRC
20 report which was August 2015, so in that period from the
21 death of Mr Bayoh on 3 May 2015 up to August 2015,
22 7 August, when the PIRC report, first one, was sent to
23 the crown, during that period, as the evidence we've
24 heard indicates that the first time race was mentioned
25 by the crown in correspondence with PIRC was dated

Transcript of the Sheku Bayoh Inquiry

1 2 September 2015, so that's at a later date, that's
2 after the first report?

3 A. Well, I mean I can only tell you about conversations and
4 my perception and the perception of senior lawyers at
5 the Crown Office, including Les Brown, and in
6 conversations with PIRC that race was front, left,
7 centre.

8 Q. Certainly we have evidence that there were meetings
9 between you and, as we said earlier, Kate Frame and
10 John Mitchell, and you've talked about conversations
11 with PIRC regarding race and the importance of race, did
12 it not strike you as odd that race wasn't mentioned in
13 the first PIRC report?

14 A. It didn't strike me, because it was an interim report,
15 or whatever terminology. You know, I've dealt with a
16 number of interim reports on various matters. It's the
17 final report that matters. And if there's any
18 deficiencies in the final report, then it will be
19 highlighted because then the crown has got a duty to
20 investigate it as well and if there's any deficiencies in
21 the PIRC investigation, then that should be remedied by
22 the crown and instructions to PIRC to do X, Y and Z in
23 relation to the investigation of race if they've not
24 dealt with it. So at that stage in reading that report,
25 no, I didn't, it didn't strike me as particularly

Transcript of the Sheku Bayoh Inquiry

1 unusual or noteworthy.

2 Q. Did you have any hand at that stage in instructing
3 Les Brown to address the issue of race with PIRC to make
4 sure that this wasn't being left out of account?

5 A. Well, it was my understanding that it was being
6 addressed through Les and the crown team and I'd made
7 absolutely clear -- I didn't need to make it clear that
8 race was an issue, you know, right at the heart of this.
9 So I mean the journey through this, from Day 1 the
10 people in the crown, including myself, knew this was a
11 key issue in this, absolutely critical, along with a lot
12 other issues. I don't want to say it was this and
13 only -- along with other, but it was absolutely the key
14 issue as far as I was concerned and as far as Les Brown,
15 Lindsey Miller and others working on it and the
16 conversations with PIRC, discussions with PIRC through
17 Les and my discussions, I was under no misapprehension
18 that PIRC were ignoring race. It was my impression that
19 they knew it was an important issue in the case. So
20 when I read the interim report, it didn't strike me
21 because I knew that my understanding that it was being
22 investigated by PIRC.

23 Q. Right. Could you give me a moment, please. Thank you
24 very much. I have no further questions.

25 LORD BRACADALE: Lord Mulholland, can you help me with one

Transcript of the Sheku Bayoh Inquiry

1 thing, taking you back to the first issue that you
2 discussed this morning, which was the issue of
3 disclosure of expert reports and the like to the family,
4 and the difference of approach between you and your
5 successor Mr Wolffe, and one point that you made in the
6 context of Mr McGowan's minute was that Mr McGowan and
7 James Wolffe were dealing with a different situation:

8 "The final report was in and the crown was now doing
9 its precognition preparation. When I made the decision,
10 it was a different set of circumstances."

11 Can you explain to me what the significance of the
12 different stages is?

13 A. Well, the different set of circumstances is the fact the
14 final report is in so it's now under the crown for
15 investigation, so that's a different set of
16 circumstances and at that stage the crown will review
17 what the evidence is, review the expert evidence, review
18 whether further experts should be instructed, and at
19 that stage -- so that is different from the stage that I
20 dealt with was before the final PIRC report had been
21 received and indeed before the interim report was
22 received so that's what I meant by a different set of
23 circumstances.

24 I don't know their thinking at the time that
25 Steve McGowan's minute and the Lord Advocate --

Transcript of the Sheku Bayoh Inquiry

1 James Wolffe Lord Advocate made that decision. I can
2 only tell you how I saw it. I didn't see -- I saw there
3 was little prejudice to potential criminal proceedings
4 and I took the view that to facilitate the family --
5 family's solicitor instructing their own experts that I
6 should do that.

7 LORD BRACADALE: And if you had still been the Lord Advocate
8 by the time the crown were preparing the precognition,
9 would you have changed your position as a result of the
10 changed circumstances?

11 A. I would only have changed my position if there was a
12 particular reason to do it. I would have kept the
13 undertaking I gave unless I could rationalise a change
14 in approach, a change -- a set of circumstances or
15 something of that nature.

16 LORD BRACADALE: Thank you.

17 A. So it's difficult to project yourself because I had
18 stepped down at the time.

19 LORD BRACADALE: I appreciate that.

20 Now, are there any Rule 9 applications?

21 Ms Mitchell. Nobody else.

22 Lord Mulholland, would you mind withdrawing to the
23 witness room while I hear a submission.

24 A. Okay.

25

Transcript of the Sheku Bayoh Inquiry

1 Submissions by MS MITCHELL

2 MS MITCHELL: I just have one issue that I would like to
3 raise and it relates to some evidence the Inquiry has
4 heard into the murder of Simon San.

5 As the Inquiry will have heard, Lord Mulholland in
6 writing gave evidence about this matter and he also gave
7 evidence today at the hearing. He was -- he spoke on
8 whether or not the crown considered the matter racially
9 motivated and he explained about placing information
10 before the court about the family identifying it as a
11 racist matter even though the crown did not do so. And
12 just for the purposes of the Inquiry, it's at page 53 of
13 evidence and following.

14 In writing at paragraph 24 of his statement, which
15 is recorded by my learned friend again this morning
16 reading it out, the question was whether the crown was
17 racially motivated. The answer in the evidence was
18 that:

19 "It was not racially aggravated. We made sure that
20 the information was placed before the court. We also
21 ensured this was fully explained to the family of
22 Mr San.

23 "So again you raised a number of issues here. This
24 was a case that you yourself prosecuted, was it, or
25 involved in?"

Transcript of the Sheku Bayoh Inquiry

1 And he said it wasn't. He didn't think he was the
2 person who had presented it. And my learned friend goes
3 on:

4 "Right. You've talked about placing the information
5 before the court and explained the purpose of that."

6 And what he said is:

7 "Well, there's a number of purposes. Firstly, it's
8 to allow the court -- to give the court the information
9 so they can take it into account in the sentence.
10 Secondly, it places the information in a public [I'm not
11 sure how that's been translated] Domain [thank you] so
12 the public, the media and the family are well aware of
13 it so it's not expressed, not hidden. It gives
14 accountability, public accountability, in the sense that
15 this is your assessment of the evidence and it allows
16 anyone who disagrees with that assessment to challenge
17 it, to make it known, challenge it in writing, for
18 example, or whatever."

19 Now, unfortunately the report -- so what happened
20 after this hearing is that Lothian and Borders, who were
21 the police service dealing with the case, did a
22 year-long review of their involvement in this matter and
23 I'm now reading from a newspaper article saying what the
24 outcome of that was and I have given -- passed these on
25 to my learned friend. The newspaper article on

Transcript of the Sheku Bayoh Inquiry

1 23 August 2011 indicated that:

2 "After a year-long internal inquiry overseen by
3 Deputy Chief Constable Steve Allen, Allen confirmed that
4 the force should have treated Mr San's death as a racist
5 murder."

6 And then he goes on to make various different
7 further apologies.

8 After that time it appears but on the same day, the
9 Crown Office issued a statement indicating that it was
10 alert to the question of racial motivation from the
11 beginning of the investigation and after careful
12 consideration of all the available evidence provided to
13 the crown by the police Crown Counsel concluded that
14 there was no evidence to show that the attack on
15 Mr San was racially motivated.

16 Thereafter, it appears at some point Mr Anwar called
17 upon the Lord Advocate to -- at some point in that day
18 called upon the Lord Advocates to itself carry out a
19 crown inquiry in relation to the handling of the case
20 and there seems to be an additional press release by the
21 crown that said:

22 "In addition to CO's statement 23 August, we can
23 confirm the Lord Advocate will not be instructing an
24 inquiry and is satisfied with the crown's prosecution of
25 the case. Mr John Logue, the area procurator fiscal for

Transcript of the Sheku Bayoh Inquiry

1 Lothian and Borders has offered to meet with Mr San's
2 family to discuss any questions which they might now
3 have."

4 After that very long explanation -- hopefully I
5 won't have to go into that detail with the Former
6 Lord Advocate, but after that very long explanation,
7 what I would like to ask is whether or not -- why he
8 didn't call for inquiry into the way the Crown Office
9 had dealt with the issue of race in the present case of
10 Mr San.

11 And I say that's important because this inquiry has
12 evidence before it that Crown Office were trained in
13 respect of issues of race, this was an incident that
14 happened relatively soon before the incident in this
15 case and that might have been an opportunity for -- for
16 the crown to engage with the matter and consider it. In
17 particular, as it is quoted in one of the newspaper
18 articles, it might have saved another family in the
19 future from having to fight for answers from the
20 authorities and I just would like to ask be there was a
21 reason there wasn't an inquiry, given the very clear
22 distinction between the year-long investigation and what
23 Lothian and Borders had identified and what the
24 Crown Office's position was.

25 LORD BRACADALE: Yes, very well, I shall allow you to ask

Transcript of the Sheku Bayoh Inquiry

1 these questions.

2 Can we have the witness back, please.

3 Lord Mulholland, Ms Mitchell, who's senior counsel
4 for the families of Sheku Bayoh, has some questions for
5 you.

6 Questions by MS MITCHELL

7 MS MITCHELL: It just relates to one issue that I want to
8 ask you about and, in fact, it's about the case of
9 Simon San, which you referred to earlier in your
10 evidence and you gave evidence this morning the question
11 was whether or not the crown was racially motivated and
12 you said the answer on the evidence was that it was not
13 racially aggravated and then you went on to explain
14 about the crown having put evidence about what the
15 family thought in front of the court and that allowed
16 that to be made public, as it were.

17 Do you recall that after Mr San's case was in court
18 there was an investigation done by Lothian and Borders
19 police into their handling of the case?

20 A. Very vaguely. When I say there was -- the crime wasn't
21 racially motivated, what I mean was that there was no
22 evidence that the crime was racially motivated. There's
23 a fine distinction there. But to answer your question
24 directly, I've got a vague recollection of it so -- but
25 I couldn't give you chapter and verse as to what it

Transcript of the Sheku Bayoh Inquiry

1 involved.

2 Q. Do you remember the outcome of that --

3 A. No.

4 Q. -- inquiry? The outcome of that matter was that after a
5 year-long inquiry by Lothian and Borders Police, Deputy
6 Chief Constable Steve Allen confirmed that the force
7 should have treated Mr San's death as a racist murder
8 and he apologised to the family and explained the
9 various different things that were going to be done by
10 Lothian and Borders Police in respect of that, one of
11 which include the force's procedures being significantly
12 overhauled.

13 At that time, there was a call by Mr Anwar asking
14 the Crown Office for it to review its handling of the
15 matter. Do you recall that?

16 A. No, I don't.

17 Q. No.

18 A. I'm not saying that that didn't happen, but I don't
19 recall that.

20 Q. There appears to be a Crown Office release about it so?

21 A. Well, I don't recall it is the answer.

22 Q. Okay.

23 A. But in relation to the prosecution, we were dealing with
24 what the evidence was at the time.

25 Q. Yes, indeed.

Transcript of the Sheku Bayoh Inquiry

1 A. Evidence available at that time. Lothian and Borders
2 Police had an investigation, am I right in thinking that
3 that was post the criminal prosecution?

4 Q. It appears to be so.

5 A. Yes, so that -- the findings of that wouldn't have been
6 available at the time that the case was dealt with,
7 disposed of.

8 Q. Yes, indeed, it was a year later.

9 A. Yes.

10 Q. I don't suggest in any way that the crown could have
11 gone back and revisited the prosecution issue. What I'm
12 wondering is whether or not in light of that finding
13 that after a year's investigation Lothian and Borders
14 Police took the view that they ought to have dealt with
15 that in that way and the crown was asked by Mr Anwar to
16 review its practices and procedures --

17 A. I don't remember that. I'm not saying it didn't happen,
18 but I don't remember that.

19 Q. Indeed. What appears to be said in a document online
20 and, again, in fairness to you, you don't have it before
21 you, but perhaps in a future hearing that might become
22 available, but this document purports to say:

23 "We can confirm the Lord Advocate will not be
24 instructing an inquiry and is satisfied with the crown's
25 prosecution of the case. Mr John Logue, the area

Transcript of the Sheku Bayoh Inquiry

1 procurator fiscal for Lothian and Borders, has offered
2 to meet with Mr San's family to discuss any questions
3 which they might now have."

4 A. What was the date of that?

5 Q. That appears to be 23 August 2011.

6 A. Right. Okay well, John Logue is now the Crown Agent, so
7 that means, from what you tell me, that that was looked
8 at in some detail to generate that response. I can't
9 speak to that, because I have no recollection of it, I
10 need to see the paperwork and that may jog my memory,
11 but I genuinely have no recollection. I remember there
12 was a bit of a furore at the time that Deputy
13 Chief Constable made certain statements. I think he
14 gave a Newsnight interview, if I remember rightly.

15 Q. You know more than me in respect of that matter.

16 A. Well, there was a bit of -- let me put it this way,
17 without knowing the intimate detail, there was a bit of
18 a controversy about what was said.

19 Q. But in any event, the crown didn't conduct an inquiry?

20 A. Well, I think it's confirmation of that in this
21 statement, but I can't -- I can't explain why, because I
22 can't remember. I need to see the paperwork.

23 Q. That may be something that could be done. I'm obliged.

24 A. Okay.

25 LORD BRACADALE: Thank you. Lord Mulholland, thank you very

Transcript of the Sheku Bayoh Inquiry

1 much for coming to give evidence to the Inquiry. I'm
2 very grateful for your time. When the Inquiry adjourns,
3 you'll be free to go.

4 A. Thank you.

5 LORD BRACADALE: That brings this hearing to a close, though
6 it is likely that some further evidence in relation to
7 the subject matter of this hearing will be introduced at
8 a later stage.

9 The next hearing will begin on 4 June 2024 when
10 the Inquiry will hear evidence, including evidence in
11 relation to the issue of race.

12 My assessors and I and the Inquiry team are very
13 conscious that tomorrow is the ninth anniversary of the
14 death of Sheku Bayoh and we know and understand that
15 each anniversary is a difficult and distressing time for
16 members of the families and friends of Sheku Bayoh.

17 I want to take this opportunity to recognise the
18 continuing commitment of the families to the Inquiry and
19 I renew the commitment of the Inquiry to a thorough and
20 independent examination of the evidence.

21 The Inquiry will now adjourn.

22 (2.53 am):)

23 (The hearing was adjourned to 10.00 am on 4 June 2024)

24

25

Transcript of the Sheku Bayoh Inquiry

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

1 FORMER LORD ADVOCATE FRANK MULHOLLAND

(sworn)

1Examination-in-chief by MS GRAHAME

114Submissions by MS MITCHELL

118Questions by MS MITCHELL

Transcript of the Sheku Bayoh Inquiry

1

2