

THE BAHA MOUSA PUBLIC INQUIRY

SUBMISSIONS ON BEHALF OF DR DEREK KEILLOH IN REPLY TO CLOSING SUBMISSIONS (MODULES 1-3)

Submissions by PIL (SUB002149)

1. The opening statement¹ by PIL made, in advance of any evidence having been heard, a wide range of serious allegations and criticisms based, asserting as established fact matters which it was the very function of the Inquiry to investigate.² The closing submissions bear out concerns that the matter was not being approached with any other than a fixed and unalterable view of the facts and issues. They again repeatedly assert as established fact matters which are at best controversial and at worst unarguable on the balance of the evidence.
2. The accusations made are both sweeping and serious. Everyone is implicated: “*from the chain of command to the medical staff and even the padre*”³. There is no acknowledgment of the inconsistencies and flaws in the evidence of their clients, and equally a refusal to contemplate the possibility that any evidence unhelpful to their case might be true.
3. It is of course the purpose of closing submissions to make clear what findings the Inquiry is invited to make, but the refusal even to acknowledge disputes where they exist has two obvious practical consequences: (1) beyond expressing disagreement, there is little to which a meaningful response can be made, and (2) it is difficult to see how the Inquiry will derive much assistance from them.

¹ PIL000677.

² See the opening submissions of Mr Garnham QC at BMI 9/24/18 onwards.

³ Part VII, paragraph 2 (SUB002670).

4. This is all of particular concern given the seriousness of the allegations it has been felt can properly be made against “the medics” (as if they were a single homogenous entity). Either as one of “the medics” or individually, Dr Keilloh is accused of:
- a. “*facilitating*” the events that took place⁴;
 - b. contributing to the impunity of those who inflicted the abuse⁵;
 - c. forging documents⁶;
 - d. staying away from the TDF because he knew that a crowd of soldiers were around the building attacking the prisoners⁷;
 - e. knowing involvement in assessing the fitness of prisoners to undergo inhumane treatment⁸;
 - f. deliberately destroying notes he made⁹;
 - g. having grounds for suspecting that all of the detainees had been abused and deliberately failing to disclose these to the SIB¹⁰;
 - h. being intimately involved in certifying the detainees as fit for conditioning¹¹.
5. There is an important procedural objection to (c) and (f) as these were not criticisms notified to Dr Keilloh or put to him during the course of his evidence, but in any event these are all scandalous allegations. The startling combination of dishonesty and inhumanity is presented as something that may have occurred because “*in times of perceived emergency standards can be altered and significant de-professionalization can ensue*”¹². We submit that this is a self-serving theory which is not a sufficient basis for the allegations.

⁴ Part II, paragraph 353 (SUB002355).

⁵ Ibid.

⁶ Ibid. See also Part II, paragraph 364 (SUB002362). The use of the word “if” in paragraph 381 in reference to this makes clear that the allegation is indeed made against Dr Keilloh.

⁷ Part II, paragraphs 361 (SUB002360) and 366 (SUB002363).

⁸ Part II, paragraph 381 (SUB002369).

⁹ Ibid.

¹⁰ Part II, paragraph 452 (SUB002399).

¹¹ Part V, paragraph 70 (SUB002550).

¹² Ibid.

6. The opening assertion in paragraph 332 is a good example of the points made above: “*the body of the deceased that was worked upon by the medics in the Regimental Aid Post would have been covered in injuries*”.¹³ This fails to engage with the range of evidence on the point that the Inquiry has heard. The references to the expert evidence in this paragraph and in paragraph 372 are as brief as they are unbalanced.

7. Another example is the assertion in paragraph 381 that “*senior witnesses in the medical chain of command*” acknowledged that Dr Keilloh and his staff fell below expected standards. The only specific cross-reference given in support is to the evidence of a single witness (Lt Gen Lillywhite), and it appears from Part III that the only other witness that this could refer to was Brig Carmichael. Such an assertion is at best misleading and at worst unfounded, as the analysis of the evidence in Dr Keilloh’s closing submissions makes clear. In any event, such criticisms as were made were of an entirely different (and far less serious) order than those advanced in these closing submissions.

8. Although as noted above, a meaningful response to submissions of this nature is difficult, some discrete points which are capable of brief correction are set out below. Except where indicated, all references are to Part II:
 - a. Paragraph 356¹⁴ asserts that Dr Keilloh “*stood by*” his assertion that he did not know stress positions were being used “*even though Private Armstrong recalled speaking to him about stress positions being used on the Operation Salerno detainees*” with the supporting cross reference being “*BMI 35/84/3ff*”. This is a misleading allegation because the cross-referenced passage is not sufficient to support its basic proposition. The transcript shows only that Mr Armstrong was asked if he had told Dr Keilloh he had seen a person in the TDF with their hands up at shoulder level and answered

¹³ SUB002343.

¹⁴ SUB002357.

“I did”. When he is supposed to have said that, what exactly he said and what reply he received will never be known because neither he nor Dr Keilloh was asked about this. Further, the Inquiry is reminded of the submissions made in Dr Keilloh’s closing submissions about the reliability of Mr Armstrong’s evidence.

- b. Later in paragraph 356 the impression is given that Dr Keilloh considered there to be *“nothing inhumane or potentially problematic from a medical point of view in exposing a person to many hours of hooding in the heat of Iraq”*. No cross-reference to any part of Dr Keilloh’s evidence is given, and this is an inaccurate and misleading summary because Dr Keilloh in fact gave his opinion by reference to hooding being used for periods of 10-15 minutes¹⁵. The document that is referred to in the cross-reference was not put to Dr Keilloh.
- c. Paragraph 357 asserts that *“the most damning evidence against Keilloh’s claimed lack of knowledge”* of conditioning is that of Mr Goulding which is set out, but there is no explanation of why this conclusion follows. The submission seems to be based on the unsustainable proposition that what was Mr Goulding’s knowledge must also have been Dr Keilloh’s knowledge. It also entirely ignores the evidence about the way the RAP operated in practice, Dr Keilloh’s work patterns, and the very minor role played in both by detainees.
- d. Paragraph 373 suggests that proper care was not taken to preserve documentation. This ignores the evidence that records of Dr Keilloh’s examination of the two detainees were passed on to the SIB.¹⁶ This evidence was not challenged, and it is not known what efforts have been made by the Inquiry to locate this documentation. The alternative

¹⁵ Witness Keilloh BMI 36/104/21.

¹⁶ See the (first) paragraph 167 of Dr Keilloh’s first witness statement to the Inquiry (BMI00484). The same is the case for the documentation relating to Baha Mousa: see paragraph 142 of the same statement.

implication appears to be that Dr Keilloh is lying and in fact failed to make proper notes, although it is noted paragraph 381 ensures all bases are covered by including the further alternative allegation of having deliberately destroyed any notes made.

- e. Paragraph 381 asserts that “*the emotional response of Brigadier Carmichael on being confronted during his oral evidence with the humanitarian consequences of this doctor’s actions says it all*”. It is entirely unclear what “*it all*” is thought to be. In fact, Brig Carmichael’s breakdown occurred when he was being pressed (by Counsel for Dr Keilloh) as to whether, and if so in what way, Dr Keilloh failed in humanitarian matters. His answer was that Dr Keilloh, “*failed to maintain contemporaneous records of his initial contact with Baha Mousa*”¹⁷, notwithstanding, as it emerged a minute or so later, that the witness did not know when this initial contact took place and was basing his comment upon hearsay “*within the battlegroup*”¹⁸. This is not on any view a humanitarian failing. In fact it appears that Brig Carmichael was emotional about the fact that he, and not Dr Keilloh, had “*let the side down*”¹⁹.
- f. Paragraph 378 – The first sentence implies a criticism of Dr Keilloh for not signing a death certificate. This was never raised with Dr Keilloh, either before or during his evidence.
- g. Paragraph 379 – in relation to the death certificate, there is simply no evidence to support the assertion that “*between Keilloh and Le Feuvre a document was created that removed all acknowledgment of the risk of foul play until further investigation*”. The allegation that Dr Le Feuvre was somehow immediately willing to become an active participant in the medical conspiracy says a great deal about the case being advanced.

¹⁷ Witness Carmichael BMI 86/193/21.

¹⁸ Witness Carmichael BMI 86/195/18.

¹⁹ BMI 86/194/13.

- h. Part V – para 188 – The reference in the first sentence is to “*both doctors*” (i.e Bartels and Keilloh) but only Dr Bartels is referred to in the evidence that follows. There is no evidence to support the allegation against Dr Keilloh.

The HD witnesses (SUB000255)

9. In paragraph 156 it is suggested that Cpl Winstanley gave evidence of a system or practice whereby an FMED5 should have been filled out in relation to each detainee on initial inspection. What Cpl Winstanley in fact said at the reference given (BMI 34/64/18) was that the initial assessment “*should*” be recorded, but he was not aware of what happened in practice because he did not deal with “*the paperwork side of life*”. See also the last sentence of paragraph 266 of the KN closing submissions²⁰. Similarly, at the reference given for Mr Armstrong in paragraph 158 (BMI 35/107/15) he was not describing his recollection of what actually happened in practice.
10. The point is that the only person who has ever claimed that documentation was completed in practice each time a detainee was examined is Dr Bartels. As such, regardless of what should have happened, there is no dispute that (with the exception of Dr Bartels) there was a clear and consistent practice by which documentation was not routinely completed.
11. Paragraph 159²¹ summarises Dr Keilloh’s evidence about a discussion he had with Sgt Smith and Sgt Goulding. Paragraph 161²² then says, “*Sgt Smith disputes the content of this conversation*”. However, although Dr Keilloh was asked in oral evidence about the conversation²³, a specific dispute as to the content was not put to him and even now it has not been identified.

²⁰ SUB000384.

²¹ SUB000322.

²² SUB000323.

²³ BMI 36/163/23.

12. Further and in any event, it is both wrong and unfair to suggest that Dr Keilloh relies on the conversation to “*abdicate*” (paragraph 163) or “*distance himself from*” (paragraphs 164-165) responsibility. It is simply part of his explanation for why he acted as he did. As set out in paragraph 30 of Dr Keilloh’s closing submissions²⁴, he has recognised and accepted the inadequacy of the procedures but there are powerful reasons (given in paragraphs 31-37 of his closing submissions²⁵) why this is not something for which he can fairly be criticised.
13. In relation to paragraph 604²⁶, insofar as the Inquiry is considering the evidence given on 17 September 2003, it is not accepted that the Inquiry need prefer one or more accounts over others. As previously submitted²⁷, in the circumstances (in particular those identified in paragraph 43 of Dr Keilloh’s closing submissions) these descriptions can fairly be described as consistent.
14. The submissions in paragraphs 605-610²⁸ about the debrief are very brief and do not engage with any of the problems with Cpl Steven Winstanley’s evidence identified in paragraphs 59-63 of Dr Keilloh’s closing submissions.
15. The first sentence of paragraph 611²⁹ is another instance where the evidence at the cross-reference falls short of the submission made. What Mr Baxter said was that it occurred to him that the detainees should be seen, but he could not recall if that was discussed at the debrief and as the following paragraphs 612-615 helpfully remind the Inquiry, nor could any one else.

²⁴ SUB000553.

²⁵ SUB000554-SUB000556.

²⁶ SUB000427.

²⁷ SUB000562, paragraph 51 of Dr Keilloh’s closing submissions.

²⁸ SUB000427.

²⁹ SUB000428.

16. The repeated reference to Dr Keilloh abdicating responsibility at paragraph 615³⁰ is not understood. At the cross-referenced points in the evidence Dr Keilloh does not attempt to do any such thing.

Submissions by TSol (SUB001240)

17. Reference is made to Cpl Winstanley's evidence about completion of forms FMed5 at footnote 93 to paragraph 345³¹. Dr Keilloh's response is as at paragraphs 9 and 10 above. The cross-reference in the footnote should be to BMI 34/71/25 and that evidence in any event does not state that such a form was always completed.
18. In relation to the visibility or otherwise of injuries to Baha Mousa and others, Dr Keilloh agrees with and adopts the submissions at paragraphs 410-426.
19. Finally, brief submissions about two individuals whose submissions appear in Appendix 3:
- a. Dr Bartels at page 43³² – If it assists the Inquiry, it is correct that Dr Keilloh does not contend (because he cannot) that Dr Bartels did not leave such a file. He says simply that he never saw it or heard mention of it, which evidence is plausible for the reasons given at paragraph 17 of his own closing submissions³³.
- b. Le Feuvre at page 347³⁴ – We do not understand Maj Le Feuvre to be suggesting in paragraph 3 that Dr Keilloh knew that what he said in the telephone call he made to the hospital would be recorded on the death certificate. To the extent that any issue arises, we point out that there is no

³⁰ SUB000429.

³¹ SUB001397.

³² SUB001510.

³³ SUB000548.

³⁴ SUB001814.

evidence to support any such suggestion: see paragraphs 71-73 of Dr Keilloh's closing submissions³⁵.

CHARLES BOURNE

PAUL GREATOREX

9 July 2010

³⁵ SUB000570.