

Wednesday, 21 July 2010

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(10.00 am)

THE CHAIRMAN: Good morning, ladies and gentlemen.

Mr Elias.

MR ELIAS: Mr Charles Bourne.

THE CHAIRMAN: Yes. Yes, Mr Bourne.

Submissions by MR BOURNE

MR BOURNE: Good morning, Sir. As you know, I represent five clients. However, subject to any questions that the Inquiry may have, I propose to make only momentary mention of three of them and instead to concentrate first on Mr Cooper and then on Dr Keilloh.

THE CHAIRMAN: Yes.

MR BOURNE: In relation to S056 there is nothing I wish to add orally at all. In relation to Captain Parry, again the same. In relation to Captain Ellis-Davies, all I wish to add is simply that we align ourselves with the written submissions that you have had from the Treasury Solicitors relating to the position of the lawyers generally.

THE CHAIRMAN: Yes.

MR BOURNE: With that, can I move please to Mr Cooper, for whom I just wish to make a small number of points.

THE CHAIRMAN: Yes, by all means.

MR BOURNE: The first one is this: Mr Cooper has accepted

1 and accepts that he participated in beating the
2 detainees and nothing he says should be taken as an
3 attempt by him to excuse beating the detainees.

4 Second, Mr Cooper does, however, deny participating
5 in continuous violence over a more extended period.
6 There is, of course, an important issue in this Inquiry
7 as to how much violence took place in the TDF and
8 whether all the soldiers, including Mr Cooper,
9 participated in continuous serious violence throughout
10 the period of detention.

11 You have heard Mr Cooper's evidence of involvement
12 in what I would call "group violence", involving
13 punching and kicking when the multiple arrived on the
14 Sunday evening, but not anything from him thereafter.

15 Sir, I don't believe I can add anything of value to
16 what's already been said about the detainees' evidence
17 of the violence they suffered.

18 THE CHAIRMAN: I doubt you could say anything that, as you
19 say, has not been said once or twice, if not three or
20 four times.

21 MR BOURNE: Absolutely. Mr Cooper, of course, can only
22 comment on what he did, what he saw and heard, and that,
23 in the end, will, of course, be for your assessment of
24 the witnesses.

25 THE CHAIRMAN: He seems to have had somewhat of, on his own

1 account, a conversion after the events at about 7.30 on
2 the Sunday evening, when he accepts that he took part in
3 fairly violent assaults on the detainees. At some stage
4 he then seems, following that, to have decided that that
5 was not the way to behave and that he would not do it
6 again, but he did not discuss that with anybody, as
7 I understand it, until they got back to Camp Stephen.

8 MR BOURNE: That's right, Sir. He gave evidence of two
9 conversations, one back at Camp Stephen and then one in
10 transit from Camp Stephen back to BG Main.

11 THE CHAIRMAN: Yes.

12 MR BOURNE: It is at that point that he describes what you
13 might think are twinges of conscience on the part of
14 some of them surfacing in agreement, Mr Cooper says,
15 among some of them, that they would not continue
16 behaving as they behaved the night before.

17 THE CHAIRMAN: One of the problems that one faces with his
18 evidence is that he cannot have told the truth -- indeed
19 he says he didn't tell the truth -- under oath at the
20 court martial.

21 MR BOURNE: Sir, absolutely. I was going to come on to
22 credibility last, but I will go to it now if that will
23 be helpful.

24 THE CHAIRMAN: I am sorry I interrupted you. I will stop.
25 You take your own course.

1 MR BOURNE: Thank you. My third point is this: I submit
2 that Mr Cooper should not be criticised purely because
3 it was he who helped Corporal Payne to restrain
4 Baha Mousa in the final fatal struggle. I will come on
5 in a moment to what actually was done in the course of
6 that struggle and there are, of course, issues about
7 what exactly happened in the last moments of
8 Baha Mousa's life.

9 Mr Cooper agrees -- must agree and has always
10 agreed -- that he was involved with Corporal Payne in
11 some sort of a struggle to restrain Baha Mousa. My
12 submission is what matters is exactly what was done and
13 by whom in the course of the struggle because it could,
14 I submit, have been any one of the soldiers -- any one
15 or more of the soldiers -- who was called to assist
16 Payne at that moment.

17 From the evidence I will urge you to conclude that
18 whichever of the multiple Payne had asked to come and
19 help him, they would have obeyed him and done so.
20 Mr Cooper's participation per se in that incident merely
21 reflects the fact that he was the first individual who
22 was available to respond.

23 I then come on to what was done. Sir, in that
24 struggle Mr Cooper denies that he committed any
25 particularly untoward act. We have heard that there is

1 an issue of fact as to whether Baha Mousa had got
2 himself out of his plasticuffs at the time. You have
3 the evidence of all of the eye witnesses on that and, of
4 course, it will be a difficult question for you as to
5 what weight is put on that evidence. Cooper himself was
6 quite clear that Baha Mousa, when he saw him at that
7 moment, was out of his plasticuffs and not hooded and
8 was standing up.

9 Now, whatever the reason was for Baha Mousa being
10 restrained at that moment, in my submission there is no
11 evidence that Payne and Cooper, at least initially, were
12 doing anything other than trying to restrain Baha Mousa.
13 I say "at least initially" because, of course, on
14 Mr Cooper's evidence, that struggle consisted of two
15 very distinct phases. There is the first phase in which
16 they wrestle Mr Mousa to the floor and then there is
17 a second phase in which, according to Mr Cooper,
18 Corporal Payne lost control and set about Mr Mousa.

19 Just concentrating on the restraint, concentrating
20 on the way in which this final episode started, I submit
21 that there's no evidence to support the suggestion that
22 this episode was simply another beating, simply the
23 latest in a series of unprovoked vindictive assaults.
24 I submit that on the evidence you've heard, the only
25 theory for which there is any support is that Mr Mousa

1 was wrestled to the floor because, rightly or wrongly,
2 Corporal Payne believed that's what he needed to do.

3 Now if you accept that Cooper was under Payne's
4 orders to help in putting plasticuffs back on Baha Mousa
5 or to help in restraining Baha Mousa, I submit that it
6 was inevitable that Mr Cooper would obey the order.
7 A private in Mr Cooper's position could not be expected
8 to question whether Payne was lawfully entitled to give
9 that order in the first place. My submission is that on
10 the evidence of what Mr Cooper saw and of the situation
11 that he walked in on, there was nothing to tell
12 Mr Cooper that this restraint itself was unjustified or
13 wrongful in any way, if indeed it was.

14 THE CHAIRMAN: Yes.

15 MR BOURNE: Mr Cooper, in short, denies doing anything on
16 that occasion other than helping to restrain Baha Mousa
17 and absolutely denies having any intention other than
18 the simple one of assisting Corporal Payne in that
19 restraint.

20 THE CHAIRMAN: Yes.

21 MR BOURNE: The only direct evidence of any specific
22 wrongful action by Cooper at that time came from
23 Private Reader. He said that Cooper and Payne dragged
24 Baha Mousa from the right-hand room into the middle
25 room, kicking and hitting him.

1 Sir, again, I don't think I can add anything to the
2 written submissions, in which we have given a number of
3 reasons why we say reliance shouldn't be placed on that
4 evidence.

5 THE CHAIRMAN: Yes.

6 MR BOURNE: The only other witness I will mention there is
7 Douglas, because, of course, Douglas gave that odd
8 evidence of seeing somebody who he thought was Redfearn
9 jumping on Baha Mousa's legs.

10 THE CHAIRMAN: Yes.

11 MR BOURNE: If this issue is judged to be one of importance,
12 all I will say is it is well worth revisiting the
13 passages of the evidence, in particular Day 31, page 93,
14 just for your note. I don't plan to go there now, but
15 you will find a passage saying that Douglas says he is
16 positive it was Redfearn, albeit that he rather blew hot
17 and cold when questioned by different parties as to
18 whether he could --

19 THE CHAIRMAN: Well, he seemed to slide off that assertion
20 subsequently in his evidence.

21 MR BOURNE: Sir, he did. On the other hand he did also
22 agree that they look nothing like each other and it
23 would be a surprising mistake for him to have made.

24 That is why I say the only direct evidence of
25 misconduct by Cooper on that occasion came from Reader

1 because I say the Douglas evidence simply isn't coherent
2 enough to reach that threshold.

3 Therefore, Sir, my overall submission is simply
4 this: there is no sufficiently clear evidence on which
5 to accord to Mr Cooper an increased share or a special
6 share in the blame for what happened on account of his
7 being the man next to Payne in the final struggle.

8 THE CHAIRMAN: Yes.

9 MR BOURNE: I then finally come to credibility, as I said
10 I would a moment ago.

11 THE CHAIRMAN: Yes, you did.

12 MR BOURNE: It is, I submit, an important issue, whether
13 Mr Cooper is what he told you he was; that's to say
14 a helpful witness whose evidence was more revealing and
15 more forthcoming than those of most, if not all, of the
16 other soldier witnesses dealing with the TDF. Mr Cooper
17 openly acknowledges and must acknowledge that he has
18 given untruthful evidence in the past, including
19 evidence on oath. Sir, of course that damages his
20 credibility.

21 In our written closing submissions we noted that it
22 may be helpful to identify the limited respects in which
23 his previous evidence was actually wrong, at least wrong
24 in relation to what he now says, because it is by no
25 means the case that his previous evidence was

1 comprehensively unreliable.

2 Mr Cooper himself, in his witness statement to this
3 Inquiry, put in really a sort of mea culpa on this point
4 and accused himself of having gone up hill and down
5 dale, but in my submission he was perhaps a little hard
6 on himself when you come to identify the fairly limited
7 respects in which his account has fluctuated. Sir, we
8 hope those written submissions will aid you in your
9 unenviable task of disentangling the different accounts
10 of what happened.

11 Mr Cooper, in short, asks you to accept his evidence
12 that he has sought to take this opportunity -- perhaps
13 this final opportunity -- to say truthfully everything
14 that he can remember. That is absolutely not a claim by
15 him that he can remember everything in detail. I must
16 accept that he was vague on some of the detail of what
17 he said.

18 THE CHAIRMAN: Well, where he is really a little on the
19 vague side is the events when they arrived at the TDF on
20 the Sunday evening. I say "vague". He is perfectly
21 clear at one stage and not quite so clear at the next
22 stage.

23 MR BOURNE: Sir, yes. I am sure you will have in mind the
24 passage of cross-examination in which he struggles with
25 the question, "Can you name anyone who threw a punch?"

1 THE CHAIRMAN: Yes, I certainly do have that in mind.

2 MR BOURNE: Sir, yes. I am afraid I can't make that
3 evidence any more clear and more coherent than it was on
4 the day. I know you will have regard to the nature of
5 the incidents and the time that has passed since those
6 events took place. What Mr Cooper said -- and it is
7 a matter for your judgment of him -- is that he has done
8 his best for you, and my submission relating to that is
9 that he was not simply trying to deflect attention away
10 from himself and, perhaps most importantly of all, that
11 he was genuine in expressing his regret and his shame
12 for what took place and his part in it.

13 THE CHAIRMAN: Yes.

14 MR BOURNE: Unless I can assist further on him, I propose to
15 go to Dr Keilloh.

16 THE CHAIRMAN: No, thank you. That is very helpful and I am
17 grateful.

18 MR BOURNE: Now, in the oral submissions on Monday Mr Singh
19 said that some of the most serious criticisms this
20 Inquiry might make relate to Dr Keilloh.

21 THE CHAIRMAN: Yes.

22 MR BOURNE: My primary and my overall submission is that
23 whatever conclusion you reach on judgments made by
24 Dr Keilloh at the time, you should find that PIL's grave
25 suspicions about Dr Keilloh are misplaced and I will

1 urge you to reject the suggestion that Dr Keilloh was
2 guilty of any deliberate neglect or any deliberate
3 misconduct. I will, of course, develop that in
4 a minute.

5 THE CHAIRMAN: I think I asked -- I can't remember who I did
6 ask, but I had better ask you as well. I am not
7 inhibited in any way by the fact that he has to appear
8 before the GMC at some stage?

9 MR BOURNE: Well, what I say about that is this: I do not
10 submit that the GMC can possibly be a reason for you to
11 refrain from making any criticism which you would
12 otherwise make, at least where the criticism falls
13 squarely within your terms of reference.

14 THE CHAIRMAN: Yes.

15 MR BOURNE: What I do say is that Dr Keilloh's situation
16 calls for perhaps even more than the usual care in
17 guarding against any possible misunderstandings of your
18 findings, whatever those findings may be.

19 In my submission, this is perhaps an aspect of
20 something that you said in your standard of proof
21 ruling -- and the reference is paragraph 20 -- namely
22 that you must, as a matter of fairness, bear in mind the
23 consequences of an adverse finding to any individual
24 against whom serious allegations are made.

25 Now during the submissions relating to standard of

1 proof, there was debate about what you should do in the
2 event of your forming views at levels ranging from
3 certainty down to mere suspicion.

4 THE CHAIRMAN: Yes.

5 MR BOURNE: At the risk of stating the obvious, I submit
6 that in the case of Dr Keilloh, even more than for other
7 individuals, it is essential that readers of your report
8 clearly understand the extent to which you are satisfied
9 or not satisfied about each allegation on which you
10 decide to comment. When it comes to matters of mere
11 suspicion, I refer again to your ruling on the standard
12 of proof, paragraph 25:

13 "I further accept that the power to make such
14 a comment ..."

15 That is a comment on suspicions.

16 THE CHAIRMAN: "Sparingly" I think I said.

17 MR BOURNE: "... should be exercised sparingly."

18 I submit, in Dr Keilloh's case, when you decide
19 whether any such comment is appropriate, the fact of the
20 GMC proceedings is a factor weighing against making that
21 sort of comment -- I don't say "prohibiting", but I say
22 weighing against it -- because the public interest in
23 knowing about suspicions formed by you may well be
24 outweighed by the risk that readers of the report,
25 including the GMC, may attach more weight to a mere

1 suspicion than a mere suspicion actually deserves.

2 Whilst in the case of other witnesses to the Inquiry,
3 well, such potential discredit may simply bounce off
4 them, it is clear that in Dr Keilloh's case it may go
5 a great deal further.

6 THE CHAIRMAN: Yes. I think there is another point that
7 maybe you could make and that is this: that the GMC is
8 a specialist body in relation to medical matters and
9 doctors. I am not.

10 MR BOURNE: Indeed. Very astutely you took the next words
11 out of my mouth. What I have written in my note to
12 myself was, "It may be right to be cautious about
13 commenting on matters of medical practice".

14 We have heard some evidence in this Inquiry about
15 things to do with prescribing and we have heard quite
16 a lot about record-keeping. Those issues in the end may
17 or may not be of importance to your report and I say
18 that where they are assessed by you not to be of central
19 importance, you may take the view that it's fairer not
20 to comment and, as you rightly suggest to me, that is
21 a possible significance of the GMC --

22 THE CHAIRMAN: On the other hand, I have got
23 General Lillywhite -- if I have not over-inflated his
24 rank -- but I do have his evidence which is of
25 assistance to some extent.

1 MR BOURNE: Sir, undoubtedly it's of assistance. As regards
2 Dr Keilloh, that evidence bears in different ways on
3 different issues.

4 THE CHAIRMAN: Yes, it does.

5 MR BOURNE: He was perhaps favourable about some things,
6 adverse about others.

7 The most important warning light which might come on
8 in the case of General Lillywhite is that, when asked,
9 he himself said that he was not and should not be
10 regarded as an expert witness. Plainly he is
11 a knowledgeable witness.

12 THE CHAIRMAN: Yes.

13 MR BOURNE: What I say is this: I don't urge you to ignore
14 matters of medical practice. What is critical here,
15 when one looks at the significance, if any, of the GMC,
16 is how you frame the conclusions in the report.

17 THE CHAIRMAN: Yes.

18 MR BOURNE: So there are no areas you can't go into, but as
19 you have already picked up, there are areas in which
20 care obviously is needed.

21 Coming back then to Dr Keilloh and his overall
22 conduct and what has been said about it, in particular
23 by the PIL team. Like others before me this week, I pay
24 tribute to the achievement of the PIL team in covering
25 such an immense breadth of evidence in such

1 comprehensive detail. It seems almost churlish to
2 accuse them in the same breath of an excess of zeal, but
3 that, nevertheless, is a comment which I do make on
4 their submissions regarding Dr Keilloh.

5 To put it in a nutshell, I say that the gravity of
6 their relentless suspicions about Dr Keilloh is in the
7 end unfounded. In their and our written submissions you
8 will find exchanges on all the key subjects. I am not
9 going to revisit those now. What I say is that not all
10 of PIL's propositions have a sufficient foundation in
11 the evidence. We have developed that in writing.

12 On behalf of Dr Keilloh in particular and again at
13 risk of stating the obvious, I submit that if you are
14 minded or tempted to adopt any of the particular
15 propositions put forward by PIL, it will be valuable to
16 revisit the references cited in support of them to
17 ensure that they really do support them. But that is
18 a battlefield explored in more detail in writing.

19 Returning to Dr Keilloh himself, the single most
20 important finding I invite you to make was that he was
21 an honest witness. Whatever mistakes he may be accused
22 of making, he says he has told the Inquiry everything he
23 can and he also told you that he was not and never would
24 have been party to a cover-up or conspiracy.

25 Now, with what has now been a quite lengthy

1 introduction, I come to perhaps the central question of
2 whether Baha Mousa's injuries were or should have been
3 apparent to Dr Keilloh during or after the resuscitation
4 attempts.

5 THE CHAIRMAN: Yes.

6 MR BOURNE: At one extreme is the possibility that he must
7 have seen injuries of a kind which must have made it
8 obvious that Baha Mousa had been severely beaten and
9 that he then decided to look the other way and, perhaps
10 worst of all, has pretended to this Inquiry that he
11 didn't see the injuries.

12 Well, as Mr Singh quite rightly accepted, that would
13 indeed be serious criticism. If Dr Keilloh is and was
14 what he claims to be, that's to say an honest and
15 conscientious professional, that cannot have happened.
16 The allegation goes right to the core of Dr Keilloh's
17 character as an individual and as a doctor.

18 The question then must be: does the evidence compel
19 the conclusion that Dr Keilloh is not or was not that
20 honest and conscientious professional? By way of
21 starting point, I then go back once more to the standard
22 of proof ruling, in particular that the more serious the
23 allegation, the more cogent must be the evidence needed
24 to support a finding of wrongdoing.

25 We know that a concerted and intensive effort was

1 made to save Baha Mousa's life. No one suggests
2 otherwise. During this time Baha Mousa was in a shirt
3 and trousers, although the shirt was ripped open at the
4 chest. He was intubated and the team of medics
5 performed their various tasks under Dr Keilloh's
6 direction. Eventually it was agreed that Mr Mousa was
7 dead and Dr Keilloh immediately left the room, he said,
8 to report the matter to the RMP.

9 When he came back, the body had gone into a body
10 bag. I submit there are two questions at this point.
11 First, what state was the body actually in at the moment
12 when it went into the body bag? Second, how did it
13 appear to those present at that time? More simply, what
14 did they actually notice?

15 Now the expert pathology evidence, I submit, goes
16 mainly to the first question, the question of what was
17 or what must have been the state of the body.

18 THE CHAIRMAN: Yes.

19 MR BOURNE: The starting point, I submit, however, logically
20 is not the pathologist's expectation of what the body
21 probably looked like; the starting point is given by the
22 accounts of those who were present, followed obviously
23 by your judgment, in the light of expert evidence, as to
24 whether they were reliable.

25 Now there are two possibilities about the accounts

1 given by those present: either they were a true and
2 honest account of what was seen, what was noticed, or
3 the medics were lying. If it is the latter, the fact
4 that those medics all gave pretty similar accounts would
5 seem to point quite strongly to an agreement or
6 conspiracy to lie about this. But in my submission the
7 evidence falls far short of justifying the startling
8 conclusion that the medics, for some unfathomable
9 reason, entered into a conspiracy to lie.

10 THE CHAIRMAN: Yes.

11 MR BOURNE: Now, at this point it is important to note that
12 there is, in fact, no irreconcilable difference between
13 the medics' accounts and the expert pathological
14 evidence. None of the medics examined the body. What
15 they described was how Mr Mousa appeared to them when
16 lying on his back partially clothed.

17 The pathologist's view of when bruises can be
18 expected to become visible does not by itself answer the
19 question of what the medics actually saw. The fact,
20 I submit, is that we do not know exactly what state the
21 body was in at the time of the attempt to resuscitate.

22 THE CHAIRMAN: Well, I can't ignore the evidence that you
23 would be able to see the majority of the injuries and
24 particularly the injuries on the face and head.

25 MR BOURNE: Sir, I don't ignore that evidence. What I do is

1 remind you that it was described by the experts in their
2 evidence as their expectation and, as that was explored
3 further in questioning, an expectation based on certain
4 assumptions, in particular as to the timing of the
5 injuries.

6 My submission overall is -- I don't cast any doubt
7 on the expert opinions that have been expressed, but
8 what I say is that those inevitably involved and are
9 admitted to involve a degree of speculation, so they can
10 help us to a view of what we expect the body to have
11 looked like, but in my submission we do not have
12 a statement of what the body looked like that cuts
13 across what the medics say they saw.

14 That, Sir, I think is the highest I can put it --
15 THE CHAIRMAN: I think it is the highest you can put it,
16 I agree.

17 MR BOURNE: I quite accept that you have heard pathologists
18 say that the majority of the bruises would have been
19 visible in their opinion, but I urge you to go --

20 THE CHAIRMAN: It is not just based on expectation. It is
21 based on the fact that, sadly, the man ends up dead and
22 you take it from that point, so that they can see what
23 in their view would have been shown at that point.

24 MR BOURNE: Sir, I accept that as well. But what I say is
25 that when one goes back and reads their evidence,

1 especially in cross-examination, one finds the important
2 qualifications in the degree of certainty or confidence
3 which they are expressing.

4 THE CHAIRMAN: Yes.

5 MR BOURNE: What we don't have from them is some sort of
6 virtual photograph of what it must have looked like.

7 THE CHAIRMAN: No. Well, I will certainly go back and
8 re-read -- I read it over the weekend, but I will
9 re-read it again.

10 MR BOURNE: I am very grateful.

11 You have heard evidence that, after the unsuccessful
12 resuscitation attempt, Dr Keilloh and the medics had
13 a discussion. It has been called a "debrief". The mood
14 was somber as you would expect. It is quite possible
15 that some of the medics on that occasion mentioned the
16 bruises which they then went on to tell the RMP about.
17 But as we know from the RMP statements, those identified
18 bruises were very minor. On that evidence, I submit,
19 the state of the body was absolutely not a focus of the
20 debrief and there is no evidence on which you could
21 conclude that any suspicion of foul play was discussed
22 at the debrief.

23 What Dr Keilloh said about this was that he could
24 not remember any mention of matters such as bruising and
25 went on to say that, if any such thing had been said, he

1 would certainly have told them to report it to the RMP.
2 That, I submit, is consistent with the evidence of the
3 medics themselves, who agreed that Dr Keilloh encouraged
4 them to cooperate fully with the RMP and tell them
5 everything that they could.

6 The witness whose evidence is significantly
7 different is Corporal Winstanley. Now once again we've
8 listed in the written submissions -- our closing
9 submissions -- the numerous reasons why that evidence
10 should not be relied upon. Again I don't propose to
11 rehearse those.

12 THE CHAIRMAN: No.

13 MR BOURNE: One thing you may have noticed is that the
14 points made on Dr Keilloh's behalf about
15 Corporal Winstanley do not appear to have been addressed
16 on his behalf, neither in the Hill Dickinson closing
17 submissions nor in their reply submissions nor in their
18 oral submissions.

19 Now, there is another important point to make about
20 the suggestion that Dr Keilloh chose to ignore the
21 injuries and that the medics all lied about the
22 injuries.

23 THE CHAIRMAN: Yes.

24 MR BOURNE: It is this: the theory actually is strikingly
25 inconsistent with what Dr Keilloh actually did, albeit

1 that PII say that what he did was not good enough.
2 Dr Keilloh ensured that the body was properly secured;
3 he immediately put the matter in the hands of the RMP;
4 he reminded his team to tell the RMP the truth; he
5 raised the matter at O Group. Sir, if he was
6 participating in some sort of cover-up, how can he
7 possibly have hoped that his cover-up would go anywhere
8 in the light of his having to do those things?

9 Sir, I submit that the evidence does not approach
10 being sufficient to support the very serious conclusions
11 suggested. One must bear in mind first the uncertainty
12 as to what actually was visible on the body; secondly
13 the fact that the body was mostly clothed; thirdly, that
14 Dr Keilloh was busy orchestrating the resuscitation
15 efforts of a team; fourth, that the team was focused on
16 the resuscitation efforts, not on the body; fifth, the
17 generally stressful difficult conditions in which they
18 were working; sixth, the evidence of all of the medics,
19 with the possible exception of Corporal Winstanley, none
20 of whom claim to have seen anything like what you see in
21 the post mortem photographs; seventh, the inconsistency
22 of what I call the "conspiracy theory" with what
23 Dr Keilloh actually did.

24 We are far short of evidence so cogent as to justify
25 the inherently improbable conclusion that this doctor,

1 coming into the Baha Mousa incident cold, having no
2 prior association with the soldiers who have been
3 involved, went on to be guilty of deliberate and
4 blameworthy disregard or even concealment of suspicious
5 injuries that he saw on the body of his patient.

6 Now that brings me to the wider question of
7 Dr Keilloh's response to everything he saw on 15 and
8 16 September and the reasons why he did not do more than
9 he did in response to what he saw.

10 Dr Keilloh told you that he did not believe -- that
11 is to say did not come to the view -- that soldiers had
12 assaulted the detainees. The accusation as framed by
13 PIL is: he did nothing to disclose the fact that
14 criminal acts may have been committed.

15 It is true that he did nothing other than ensure
16 that the RMP were involved and then raise the matter at
17 O Group because he did not appreciate the fact that
18 criminal acts may have been committed. Perhaps the main
19 practical step which he might have taken, but didn't,
20 was to go and visit the other detainees to see if they
21 were all right.

22 THE CHAIRMAN: Well, that is the one that seems to stand
23 out, yes.

24 MR BOURNE: Sir, yes. First, just to clear up one point of
25 detail: it does now seem to be common ground that

1 Dr Keilloh did not see the detainees on the Tuesday.
2 I raise that because Armstrong's statement to the
3 Inquiry claimed that he and Dr Keilloh saw the detainees
4 on the Tuesday morning. However, that did not withstand
5 cross-examination and Mr Armstrong's representatives,
6 T-Sol, in their reply submissions -- for your reference
7 it is paragraph 64 -- positively asserted the fact that
8 he did not see the detainees on the Tuesday, so that one
9 seems to have been cleared up.

10 THE CHAIRMAN: Yes.

11 MR BOURNE: Was Dr Keilloh wrong not to visit the detainees?

12 Well, the glare of hindsight shines very brightly on
13 this subject. For anyone who has studied the evidence
14 in this Inquiry, anyone who has experienced the sheer
15 volume of evidence about the assaults and the injuries,
16 it is quite difficult to return mentally to a time when
17 the notion of detainees being assaulted by soldiers
18 would have been both new and shocking.

19 Conditions of detention and treatment of detainees
20 have been the unrelenting focus of this Inquiry for over
21 100 sitting days and many thousands of hours' work
22 outside this room. Contrast that, please, with the
23 summer of 2003 when, as Dr Bartels put it, detainees
24 were an insignificant part of day-to-day life. Putting
25 hindsight on one side, I urge you to revisit

1 Dr Keilloh's perspective at the time, beginning at the
2 beginning.

3 He arrives in Iraq with very little preparation or
4 explanation of what he will be doing. We have heard
5 about the lack of handover, the normal workload and very
6 difficult conditions, including Dr Keilloh's isolation,
7 both professional and social. He had never come across
8 detainees before coming to Iraq and didn't even know
9 there were detainees in BG Main until asked one day to
10 examine some. He says he was told that they just needed
11 a quick once-over to see if they could sit in a holding
12 room for up to 48 hours before being transferred
13 elsewhere.

14 Now, by 15 September 2003, he had still had very
15 little to do with detainees, but, importantly, there had
16 been a previous occasion upon which he was woken up in
17 the middle of the night to see a detainee. It is
18 mentioned in his Inquiry witness statement. That
19 incident alone must or should have given him an
20 expectation that, if any detainee needed him, the
21 detainee would be brought to his attention. Moreover,
22 that expectation was confirmed in the case of the
23 Op Salerno detainees because D004 and Ahmad Al-Matairi
24 were brought to see him.

25 True, there had, by that time, been a death in

1 custody, but to Dr Keilloh, the system for getting
2 medical attention appeared to be working because those
3 two detainees were brought to see him. That being the
4 case, I submit that it was perfectly logical for
5 Dr Keilloh to conclude that, if other detainees needed
6 him, they too would be brought to him and there was
7 therefore no need for him to go and see the others of
8 his own motion.

9 He accepted that any death in custody would be --
10 had to be -- treated as suspicious, and on this occasion
11 he immediately told the RMP about it, knowing they would
12 investigate. But he does not say he saw anything that
13 suggested foul play to him. Similarly, the complaint by
14 D004 of having been kicked by a soldier would, of
15 course, be a matter for concern, but Dr Keilloh found
16 nothing on examination which bore out that concern at
17 all.

18 His evidence was not that he either did or didn't
19 believe what either patient said to him. Rather, his
20 professional opinion was that the physical examination
21 didn't support the assertions being made. But it
22 wouldn't be fair to suggest that he had a dismissive
23 attitude because he explains that he made clear that he
24 wanted to see those men again if they didn't improve or
25 if they deteriorated and, in any event, to see them

1 before they moved on. He also indicated that he wanted
2 to see any other detainees who needed treatment.

3 I accept that all of this raises questions about the
4 correctness of his judgments, perhaps about his
5 sensitivity to what it is that he was seeing. It is
6 fair to ask whether he should have insisted then and
7 there on seeing all of the detainees; it is equally fair
8 to ask whether he should have felt more urgency in
9 reporting the allegation of a kick by a soldier, even
10 though he found no clinical support for it, instead of
11 doing what he did, which was to report it as soon as the
12 RMP sought his statement on the Wednesday.

13 Sir, when you put this evidence in its factual
14 context, when you put hindsight on one side and when you
15 do what may be one of your more difficult tasks of
16 trying to step into Dr Keilloh's shoes, I submit that
17 the right conclusion is the one which we set out in
18 writing, where we said, "Doubtless it would make
19 a better impression now if Dr Keilloh had gone to see
20 the other detainees that night, but that is not a fair
21 basis for criticising him for not having done so in all
22 the circumstances as they then were".

23 I return briefly and finally to my point about
24 Dr Keilloh's character and credibility. I hope that he
25 will have struck you as a serious man who was quite

1 capable of being self-questioning. He nevertheless has
2 maintained the view, however unpopular a view it might
3 be, that he would not do anything differently today. If
4 he was an honest witness and if you accept his evidence
5 that at the time he was doing his best, then the
6 conclusion must be that what he saw in the resuscitation
7 attempt and when the two detainees came to see him, what
8 he saw genuinely did not lead him to the conclusion that
9 he needed to do anything other than what he did.

10 For those reasons I respectfully submit that you
11 should roundly reject the allegations of bad faith,
12 misconduct, neglect or dereliction of duty.

13 THE CHAIRMAN: Yes.

14 MR BOURNE: Sir, I think I am right on my 45 minutes and,
15 unless I can assist you any further, those are my
16 submissions.

17 THE CHAIRMAN: No, your judgment in that matter is
18 impeccable and no doubt in others.

19 Do you want to add anything to paragraph 78 about
20 the "misdiagnosis of the hernia" or failure to diagnose
21 the hernia? That is really based on Dr Hill's evidence.

22 MR BOURNE: Quite. I think the literal answer is "no",
23 I will not add anything, I will merely repeat something.
24 The reference for your note is Day 33, pages 93 and 94,
25 the evidence of Dr Hill.

1 THE CHAIRMAN: Yes, you have it at 94/1 and 94/20, but it is
2 93, is it, as well?

3 MR BOURNE: The relevant passage starts a little earlier,
4 yes.

5 THE CHAIRMAN: I will read that again. Anything else then?

6 MR BOURNE: Sir, unless I can assist further?

7 THE CHAIRMAN: No, Mr Bourne, that is very helpful and I am
8 very grateful to you. Thank you very much.

9 Now I have temporarily forgotten who comes next. It
10 is you, Mr Ashley.

11 MR ASHLEY: Yes, Sir.

12 THE CHAIRMAN: If you just give me one second.

13 Yes, thank you.

14 Submissions by MR ASHLEY

15 MR ASHLEY: As you are well aware, I make submissions on
16 behalf of Staff Sergeant Davies and I think I can
17 confidently say that I can finish before the morning
18 break.

19 THE CHAIRMAN: Just tell me this -- I should know this --
20 but he is still in the army and he is now an officer, is
21 that right?

22 MR ASHLEY: I think, as of about maybe two weeks ago, he
23 left the army.

24 THE CHAIRMAN: Oh, he left the army, did he, two weeks ago?

25 MR ASHLEY: About two weeks ago.

1 THE CHAIRMAN: What rank did he --

2 MR ASHLEY: He was WO1 when he left, as I understand it.

3 THE CHAIRMAN: WO1, yes, I thought he --

4 MR ASHLEY: He was promoted since this incident.

5 THE CHAIRMAN: All right. Thank you very much.

6 MR ASHLEY: So far as the main points in relation to

7 Staff Sergeant Davies are concerned, of course they are

8 set out within the written submissions. There are a few

9 points that I would like to emphasise. One of them has

10 been highlighted on certainly two previously occasions,

11 but it is extremely important, so far as Staff

12 Sergeant Davies' position is concerned, that the use of

13 hindsight is carefully checked. I know and

14 I understand --

15 THE CHAIRMAN: As a curiosity, I shall see that we find out

16 how many times the word "hindsight" came up during the

17 course of this Inquiry. But it doesn't mean to say it

18 hasn't got some force.

19 MR ASHLEY: That is why I start with it because, so far as

20 Staff Sergeant Davies' position is concerned, one,

21 I think, needs to remember that he was, in effect,

22 a stranger within 1 QLR. He arrived after Op Salerno

23 had started. He, for want of a better word, had been

24 parachuted in and he arrived after the pre-operation

25 brief. It is for those reasons --

1 THE CHAIRMAN: He said -- and there is nothing to say
2 otherwise -- that he had not been to 1 QLR before; is
3 that right?

4 MR ASHLEY: I think he had been on one previous occasion,
5 but that TQ had not taken place because the operation
6 did not take place.

7 THE CHAIRMAN: I follow.

8 MR ASHLEY: So essentially he had not TQ'd --

9 THE CHAIRMAN: He hadn't carried out any TQ'ing there
10 before?

11 MR ASHLEY: No, and he had only actually been with them on
12 one previous occasion.

13 THE CHAIRMAN: Thank you.

14 MR ASHLEY: When he arrived at a point after which the
15 operation had begun, he operated on the basis that the
16 guards and those within QLR had been properly trained
17 and knew how to carry out their various tasks.

18 We certainly submit that the evidence that has been
19 provided to the Inquiry doesn't give him any reason to
20 believe that (i) that was untrue or that the way in
21 which the guard force and other members of QLR were
22 carrying out their duties was anything other than in
23 accordance with the way they should have been carried
24 out.

25 Importantly, it is the concept, it seems, of

1 conditioning that has led to a great deal of confusion.
2 Conditioning is something which, so far as Staff
3 Sergeant Davies was concerned, was a perfectly legal
4 concept. His understanding of it, of course, stems from
5 the teaching on the prisoner handling and tactical
6 questioning course and essentially it amounted to
7 keeping the detainees isolated.

8 There has been a suggestion that he may have been at
9 fault for allowing, for instance, conditioning to
10 continue after tactical questioning had been completed.
11 Firstly, I ask the Inquiry to remember, of course, that
12 he was the first of two questioners that were dealing
13 with tactical questioning on this particular occasion.
14 But because of his understanding of conditioning, that
15 it effectively amounted to isolation of the detainees,
16 there was no reason in his mind why conditioning could
17 not continue both before and after tactical questioning
18 for those, in particular, who were going to be taken on
19 to the TIF for further interrogation.

20 He was certainly unaware of the rather more sinister
21 understanding and connotations that seemed to be
22 attached to the understanding of "conditioning" from
23 those within 1 QLR and, in particular, those who were in
24 charge of and indeed carrying out the guarding of the
25 detainees. He was completely unaware of their

1 understanding of it. It is that misunderstanding and
2 being at cross-purposes that may have led to some
3 further confusion.

4 We say, in relation to his trust in others, that the
5 concept of mutual trust and understanding -- a concept
6 which lays really at the heart of the way that the army
7 performs its task -- is one which means that he was not
8 rash and he was not foolhardy in any way in making the
9 perfectly acceptable, we say, assumption that others
10 could carry out their tasks properly.

11 In particular, of course, so far as the little
12 knowledge that he did have of 1 QLR, through
13 conversations with other tactical questioners who had
14 previously worked there, there was no suggestion that
15 1 QLR were an outfit that needed to be watched
16 carefully. There was nothing on his radar that caused
17 him to be concerned. That, again, is a point which
18 I hope is well founded so far as he is concerned.

19 So far as the issue of chain of command is
20 concerned, that is, in my submission, an important
21 concept so far as Staff Sergeant Davies' position is
22 concerned for this reason: he was never within the 1 QLR
23 chain of command. To move between chains of command
24 requires a degree of formality. He was never, for
25 instance, detached from 19 Mech Brigade and then

1 attached to 1 QLR. The very fact that he does not
2 appear within their chain of command limits any
3 responsibility he could have or, should I say, any
4 control he would be able to have over the way in which
5 they were conducting their affairs.

6 So far as the prisoner handling and tactical
7 questioning course itself is concerned, it is our
8 submission that the evidence demonstrates that the
9 teaching was inconsistent. One only has to look at the
10 differing views of the instructors themselves on
11 hooding, the use of the harsh or briefing the guard. It
12 is quite clear that amongst themselves the instructors
13 had differing views.

14 We submit that it is extremely difficult to
15 criticise somebody who has had the training and that
16 training later appears to be incorrect. All he has done
17 is, we say, carried out his training in a very
18 professional way and he is entitled, we say, to assume
19 that the training he is receiving has been audited and
20 is correct.

21 THE CHAIRMAN: In summary, is this right, that he thought
22 hooding was all right, even hooding in the TDF for
23 TQing --

24 MR ASHLEY: In summary, yes, hooding was okay as a form
25 of --

1 THE CHAIRMAN: But stress positions were not?

2 MR ASHLEY: He was always of the view that stress positions
3 were not allowed.

4 THE CHAIRMAN: That raises the question of what he saw when
5 he went to visit the TDF, as he said he did.

6 MR ASHLEY: Absolutely, a point which I can either deal with
7 now or come on to in a moment.

8 THE CHAIRMAN: Sorry, I have obviously taken you out of your
9 normal course. You carry on how you want to put it.

10 MR ASHLEY: So far as the responsibility concerned, I hope
11 that I am pushing at a relatively open door when I say
12 that it seems clear that the responsibility for the
13 welfare of the detainees at all other times, other than
14 during tactical questioning, was with the arresting
15 multiples. That seems to be fairly uncontroversial --

16 THE CHAIRMAN: I don't think I would leave out the BGIRO
17 from that equation.

18 MR ASHLEY: Yes. It is not just those that have been either
19 teaching the PH&TQ course or indeed attending the course
20 that are of that similar view. The BGIROs, including
21 Major Peebles and indeed Barber before him and Royce,
22 all in evidence said that, as far as they were
23 concerned, it certainly wasn't the tactical questioner
24 that was responsible for the detainees.

25 So far as the significance of Staff Sergeant Davies'

1 visit to the temporary detention facility, I certainly
2 submit that the evidence that Davies has given -- not
3 just here at the Inquiry, but previously when
4 cross-examined at some length during the court
5 martial -- has been entirely truthful. His evidence is
6 clear that, yes, he recalls certainly one visit going
7 into the TDF. The detail of his recollection is that
8 firstly it was extremely dark --

9 THE CHAIRMAN: Firstly it was ...?

10 MR ASHLEY: It was dark.

11 THE CHAIRMAN: Yes.

12 MR ASHLEY: -- the only available light was the light coming
13 from others' torches, and that what he could make out
14 was that the detainees, as far as he could recall, were
15 hooded and that he considered that they were in what he
16 described as "prayer positions", which is a great deal
17 different than stress positions.

18 THE CHAIRMAN: Now, other than that it was dark, is there
19 any indication in his evidence as to what time it was,
20 do you say, that he went there?

21 MR ASHLEY: Well his evidence -- indeed, he can't say with
22 certainty. I think within the detail of the submissions
23 that I made in writing, I was able to set out the time
24 of sunset, which I think was some time shortly before
25 7 in the evening. There are some questions as to

1 whether it was 9 o'clock, which was a timeframe which he
2 did put forward, but the basis on which he put 9 o'clock
3 forward was that it was dark, so really the time of his
4 visit could have been much earlier.

5 THE CHAIRMAN: Just remind me. The time that he puts on the
6 first TQ'ing session was what?

7 MR ASHLEY: I think it was 7 or 7.15.

8 THE CHAIRMAN: I have in mind 7.30, but we are not far
9 apart. Would he have gone to the TDF before that or
10 after that or did he not say?

11 MR ASHLEY: I think he couldn't remember the exact
12 chronology of when it happened.

13 THE CHAIRMAN: I follow.

14 MR ASHLEY: That was the point, I think, in relation to the
15 timing of the visit. But he does recall that he went
16 with Major Peebles, rather than Livesey or anybody else,
17 in terms of the occasion when he actually went into the
18 facility.

19 THE CHAIRMAN: And the purpose of his visit then?

20 MR ASHLEY: It was to make sure that things -- when I say
21 "things" -- it was to assure himself that there was
22 a certain degree of isolation so that the detainees were
23 not discussing matters amongst themselves. I think the
24 point has been made that logically that would probably
25 be done before tactical questioning would start. But

1 that would still mean that if tactical questioning
2 started at around about 7.30, it would still have been
3 dark, with the sun, of course, setting before 7 o'clock
4 in the evening.

5 THE CHAIRMAN: Yes.

6 MR ASHLEY: The reason again -- I mention it in passing now
7 because obviously it is an important point so far as he
8 is concerned -- the submission is that he has no reason
9 to lie about what he saw within the temporary detention
10 facility because, had he have seen them in stress
11 positions and assuming, as I ask this Inquiry to assume,
12 that he is being honest in his recollection of what
13 happened, he would have asked -- because it was contrary
14 to his understanding -- what was going on. He was there
15 with his point of contact, as he described him,
16 Major Peebles, and the answer that he would have no
17 doubt got from Major Peebles was that, "It is
18 brigade-sanctioned, it's been checked, my predecessor
19 Major Royce has done all that".

20 Now, that didn't happen, but had it have happened,
21 of course that would put Staff Sergeant Davies in the
22 position where he would, if he wanted to countermand any
23 such process, be going against something that appeared
24 to be brigade-sanctioned. He could then rely on that
25 brigade sanction to abstain himself of any

1 responsibility. He does not do that. The point is that
2 he didn't see stress positions and there was no evidence
3 in terms of conversations with others to suggest that he
4 did.

5 THE CHAIRMAN: No evidence that he did, other than the fact
6 that they were in stress positions or most of them say
7 they were.

8 MR ASHLEY: With respect, the position, I think, must be
9 that they were not in stress positions all of the time.

10 THE CHAIRMAN: I have got that point. I take that point on
11 board.

12 MR ASHLEY: It has been made by others and I don't go into
13 it in any detail. But at the point in time when he was
14 there and in the conditions that he had, ie the lack of
15 light and the other points that I have mentioned, he saw
16 prayer positions and not stress positions.

17 I will jump ahead, if I may, very briefly, just
18 because it is relevant for the point that we are
19 addressing at the moment. Another way of considering
20 whether his evidence is credible on the point is to look
21 at what he has done in the past and what others say
22 about him when he has TQ'd for other battlegroups.

23 The evidence is clear. We heard evidence that when
24 he has seen rough treatment, he has stepped in and
25 stopped it. We heard evidence that where he attended on

1 previous occasions, where I think one of the
2 intelligence officers was called Hunt and one of the
3 BGIROs was Barber, he never asked for stress positions
4 to be used to be used.

5 So, though it was one of the last points I was going
6 to draw to your attention, I certainly submit that, when
7 one looks at his character and the way in which he has
8 previously conducted himself, there is nothing to
9 suggest any reason at all why, on this particular and
10 single occasion, he would change his methodology, go
11 against all that he has been taught and allow stress
12 positions to continue. My submission is that it simply
13 doesn't make any logical sense that he would do that.

14 So far as the occasions on which he was able to see
15 the detainees -- because, of course, the suggestion from
16 PIL is that, because he attended at the TDF, he must
17 have known that there was abuse going on -- well,
18 firstly, at the time he attended, there wasn't, but the
19 only occasions on which he was able to view any of the
20 detainees -- and of course it was only five in total --
21 was during the tactical questioning sessions. When one
22 looks and considers the circumstances that they were
23 tactically questioned, they were clothed and any
24 injuries, of course, under the clothing he would not
25 have been aware of.

1 Their injuries that have been shown by way of
2 photograph set out in the papers show very few injuries
3 facially and, of course, it was the face that he was
4 able to see during the tactical questioning sessions.
5 Indeed, even the medical evidence and in the evidence
6 from a number of the detainees themselves, they accept
7 that they did not have bruising on their faces.

8 If one considers one detainee in particular, which
9 is D002, of course there was an early suggestion that he
10 had a cut to the top of his eye and that Davies should
11 have been aware of that. That was one of the criticisms
12 that was highlighted in the warning letter that was
13 received. But the evidence, of course, has shown that
14 that injury was caused by an assault carried out by
15 Livesey on D002 on his way back from the TQ'ing. So as
16 a matter of timing, of course, one cannot say with any
17 certainty in terms of evidence outside that of Staff
18 Sergeant Davies and Major Peebles, who both say that
19 there were no injuries that they saw during tactical
20 questioning.

21 THE CHAIRMAN: Yes.

22 MR ASHLEY: So far as the use of the harsh technique, put
23 simply it was a taught method. It was assumed quite
24 properly, in my submission, that that was a method
25 therefore that was available to Davies, and if there is

1 criticism -- of course one has to accept that most
2 lawyers who have looked at the videos and looked at
3 Article 17, for example, will have difficulty in
4 squaring the two and there may well be criticism in due
5 course of the use of the harsh -- but it certainly is my
6 submission that anyone attending the course, where they
7 are entitled to assume that the proper legal audit has
8 been carried out, in those circumstances it would be
9 difficult to criticise them for carrying out, in effect,
10 what they were trained to do.

11 THE CHAIRMAN: Yes.

12 MR ASHLEY: One other aspect which has been, I suspect, of
13 interest to the Inquiry is the incident at the
14 generator. Now so far as that is concerned, Staff
15 Sergeant Davies has always accepted that he did ask that
16 D005 be sent out to the vicinity of the generator. His
17 reasons were clear. It was not for punishment. It was
18 a convenient point --

19 THE CHAIRMAN: Yes, that is what he said.

20 MR ASHLEY: That is what he said. Again, in considering
21 what happened at the generator, first of all Davies was
22 not at the generator. D005 was sent to the generator
23 with a guard and both were sat, as it were, in the
24 vicinity. There was no order for him -- by "him",
25 I mean the guard -- to in any way rough up -- and again

1 inconsistent with previous methods of TQ that Davies had
2 carried out. There was no suggestion that that took
3 place.

4 Indeed, when one looks at the evidence of D005 in
5 relation to the generator and in particular to his
6 tactical questioning session with Staff Sergeant Davies,
7 he is still alone in saying that Davies was a kind man,
8 that he was a nice man. If there had been some
9 mistreatment of him at the generator, one would have
10 expected a rather different response from the person who
11 apparently was beaten up and indeed subjected to
12 splashes of boiling hot water on his skin, which of
13 course we know from the medical evidence does not appear
14 to have caused any injury.

15 THE CHAIRMAN: What do you say about Peebles' evidence, the
16 remark about the "naughty boy syndrome"?

17 MR ASHLEY: I am so sorry, I didn't quite hear.

18 THE CHAIRMAN: What do you say about Peebles' evidence, when
19 he was ask about this in the Inquiry, and he came up
20 with the expression "Well, it was sort of naughty boy
21 syndrome" -- "naughty schoolboy", I think he said.

22 MR ASHLEY: The way in which Staff Sergeant Davies gave his
23 evidence was that there were a number of methods used on
24 D005. The harsh was used, as he accepted, on all, but
25 it was not just a harsh that was used on those that were

1 tactically questioned and there were a number of methods
2 that were used. Yes, it was designed to extract as much
3 information as possible from the detainees.

4 THE CHAIRMAN: I think you --

5 MR ASHLEY: He was sent away to think about his answer, and
6 if that is what is meant by the "naughty boy syndrome",
7 then so be it. But it wasn't chosen as a place that
8 would be particularly uncomfortable; it was chosen as
9 a location close to the TQ which would maximise, as it
10 were, isolation from anything that was said or done in
11 the intervening questioning session that took place.

12 THE CHAIRMAN: I find that a little hard to take in.

13 Putting him by a generator which is making quite a
14 substantial noise -- there is, I accept, in the evidence
15 differences of opinion as to how far or how close he
16 was --

17 MR ASHLEY: That is a fair point, but --

18 THE CHAIRMAN: -- there is Mr Kendrick's evidence
19 about it --

20 MR ASHLEY: Mr Kendrick's evidence about the generator
21 changed depending on who was asking the questions. He
22 initially said that it was for reason of punishment, but
23 when he was cross-examined he stepped away from that
24 position and said that he couldn't know that that was
25 the case.

1 THE CHAIRMAN: Yes, he may have stepped away, but he didn't
2 step very far away from that.

3 MR ASHLEY: Of course it is a matter for you, Sir, of what
4 you make of it, but one, I think, has to be rather
5 careful in particular with Mr Kendrick's evidence. The
6 detail of the statement which he gave to the RMP is of
7 a particularly odd nature, given the way in which the
8 statement was drafted by the RMP and in the way in which
9 it was signed whilst not being checked and the evidence
10 that Kendrick gave shows that there were a number of
11 inconsistencies and difficulties and simply matters that
12 were plain wrong within his statement.

13 He was never formally interviewed. It was a general
14 discussion with the RMP. He was presented, as he was
15 about to get on a plane to return home, with a document
16 which he had not drafted and which he did not read.

17 THE CHAIRMAN: Yes.

18 MR ASHLEY: He was questioned at length not only here at the
19 Inquiry, but certainly he was one of the witnesses who
20 was memorable during the court martial for the fact that
21 the circumstances of the taking of that statement made
22 it rather difficult to hold the statement up as
23 a credible document.

24 I would certainly invite, Sir, a re-reading of what
25 was said during the course of the court martial because

1 it became absolutely evident that there were serious
2 shortcomings in the statement and, of course, it is the
3 statement which serves as the best way of trying to
4 assist him with his memory before he comes and then
5 gives further evidence here at the Inquiry.

6 Sir, those are the main points that I ask you to
7 consider --

8 THE CHAIRMAN: Yes.

9 MR ASHLEY: -- again, highlighting finally --

10 THE CHAIRMAN: Do you want to say anything about his
11 evidence about sleep deprivation?

12 MR ASHLEY: So far as that is concerned, his evidence was
13 clear that he didn't believe that sleep deprivation was
14 a relevant concept until a certain period of time had
15 passed. That is something which, of course, was agreed
16 with by the subject matter expert, S011, in his
17 evidence.

18 S011, certainly in our submission, is an important
19 witness to this Inquiry and certainly an important
20 witness in relation to Staff Sergeant Davies because
21 a number of the procedures and practices that were
22 carried out were certainly approved by him and taught by
23 him. Whilst there might be serious questions asked
24 about that now, Davies, we say, is entitled to
25 believe -- as I have already said on a number of

1 occasions -- that what he is taught is correct.

2 THE CHAIRMAN: Yes.

3 MR ASHLEY: That included, of course, hooding in the TDF and
4 of course, Sir, I think you have expressed a view that
5 hooding during the daytime in the heat of September is
6 obviously inhumane. But I do ask you to consider that
7 it might not be quite so obviously inhumane in
8 circumstances where military personnel regularly wear
9 headwear and full combat uniforms in the heat of the day
10 and locals --

11 THE CHAIRMAN: I think that is not a very fair comparison.

12 Two hoods your client said detainees should have on;
13 am I right about that?

14 MR ASHLEY: Well, partially correct. Can I just finish the
15 last point before I move on?

16 THE CHAIRMAN: I am sorry, I interrupted you and
17 I shouldn't.

18 MR ASHLEY: I don't use the example of military uniform as
19 the best example, but the point is this: the suggestion
20 has been that it would be obviously inhumane, but on the
21 ground at that time many people wore different outfits,
22 whether it be for religious reasons or whether it be for
23 military reasons.

24 THE CHAIRMAN: Yes.

25 MR ASHLEY: As far as the use of double hooding is

1 concerned, again, so far as the evidence on that is
2 concerned, Davies accepts that he was party to the order
3 or he advised, shall I say, Major Peebles that two hoods
4 be used, but it was in a very particular context. It
5 was in the context of it becoming clear that detainees
6 were able to see through a single hood and that double
7 hooding was only to be used in transit between the
8 temporary detention facility and the tactical
9 questioning room. Those were the very specific
10 circumstances in which that was, as it were, advised.

11 If it were the case --

12 THE CHAIRMAN: Just remind me, what was the distance between
13 the room --

14 MR ASHLEY: It was around about, I think, 150 yards, so it
15 was a short distance over a short period of time and one
16 needs to remember the fact that there were genuine
17 security issues. So far as hooding within the TDF is
18 concerned, we know that the building was frankly totally
19 inadequate. It didn't even have a door. The ability to
20 properly isolate the detainees without some form of
21 sight deprivation, in this particular case hooding,
22 which had not been taught as being banned on the PH&TQ
23 course and was, in evidence before this Inquiry,
24 endorsed by the subject matter expert -- I say in those
25 circumstances again it is difficult to criticise Staff

1 Sergeant Davies for doing that which is endorsed by
2 those who train on the course.

3 THE CHAIRMAN: He knew, did he not, that they were going to
4 remain hooded in the TDF because he had been in there
5 and seen them hooded?

6 MR ASHLEY: Yes, but again the point about that is that the
7 TDF was an inadequate location for its task. Not only
8 were there problems with the security of that particular
9 building, but the Inquiry has also heard evidence about
10 the need to obviously have a degree of security for, for
11 instance, the interpreters because, if their
12 identification had been known, were obviously in danger.
13 Indeed I think there was evidence from -- I am afraid
14 I forget who it was -- but there was a threat made to
15 one of the interpreters who asked for hoods to be kept
16 on.

17 I am not saying that Davies personally knew about
18 that, but the point is he knew there were a number of
19 security issues that could be quite properly addressed
20 with sight deprivation measures being taken, and the
21 sight deprivation measure was a hood which had been, as
22 it were, endorsed by those who taught on the course.

23 THE CHAIRMAN: The only one other thing I want to ask you
24 about is this: I think your submission says that he
25 carried out a TQ task which was very substantial, not

1 just a filtering role. Ought it to have been very
2 substantial and ought it not to have been something
3 pretty short?

4 MR ASHLEY: I think the position is this: initially before
5 document exploitation took place, it was unknown exactly
6 the nature of what would be found, but on seeing the
7 weaponry and importantly the false identification cards
8 and the knowledge that C001 had, as it were, escaped, it
9 was at that point that it became clear, I think, that
10 there was a need for information as quickly as possible.
11 The need for locating, if possible, C001 and the need to
12 determine who should and who should not be interned
13 required a certain level of tactical questioning.

14 THE CHAIRMAN: Yes. All right. Is there anything else you
15 want to say?

16 MR ASHLEY: No, thank you.

17 THE CHAIRMAN: Thank you very much, Mr Ashley. I am very
18 grateful to you.

19 I think we deserve a break now before you start,
20 Ms Edington, to give you a clear run through. Ten
21 minutes, please.

22 (11.17 am)

23 (A short break)

24 (11.29 am)

25 THE CHAIRMAN: I am sorry I am late, Ms Edington.

1 Yes.

2 Submissions by MS EDINGTON

3 MS EDINGTON: Sir, I think there is a book going on how many
4 times I can be heard by you from the back anyway, so I
5 fear that that's probably --

6 THE CHAIRMAN: Might I possibly ask you -- that's it.

7 MS EDINGTON: I can try it the best I can, Sir. I think the
8 LiveNote has asked for it to be turned up as well.

9 THE CHAIRMAN: What I ought to have said is that anybody who
10 is making submissions who wanted to come up and be
11 closer to the front of the room could certainly do so
12 from my point of view, but I am sure we will be able to
13 cope.

14 MS EDINGTON: Sir, now, as it is, I feel like a figure 11
15 target, so I should stay here.

16 Sir, obviously you have heard a copious quantity of
17 evidence and it goes without saying that you are
18 entitled to make the findings of fact that you consider
19 appropriate. It is hoped that the written submissions
20 that we have made and the opening note that we forwarded
21 at the beginning of the Inquiry is of some assistance to
22 you and there is little to add, really, to those
23 submissions.

24 I have no need to remind you that obviously the
25 battalion was in a very busy operational theatre for the

1 six months and it is fairly simple to say that there
2 were petty incidents of petty violence along with this
3 horrendous incident which happened at BG Main on 14 to
4 16 September. But, Sir, despite what you have heard in
5 submission, I would submit that there is no conclusion
6 that you can make that there was a culture of casual
7 violence within 1 QLR and certainly not within C Company
8 of 1 QLR, who, of course, was commanded at the time by
9 Major Kenyon.

10 There were limited occasions when some soldiers
11 misbehaved and there were incidents of petty violence
12 which were dealt with, as you have heard from various
13 witnesses -- and certainly Major Kenyon was one of
14 them -- by that chain of command and he dealt with those
15 which came to his attention.

16 It would be our submission, Sir, that the events of
17 14 to 16 September were not a conspiracy of stealth
18 torture and there was not an elaborate cover-up of any
19 mistreatment which occurred. It was an isolated weekend
20 in a busy tour, where some people misbehaved, others
21 were not as vigilant and observant as they might have
22 been and the detainees were treated as they should not
23 have been.

24 The radio logs, the watchkeeper logs and the other
25 logs were not, in our submission, drafted in

1 a deliberately tactical manner and they were not
2 designed to sustain deniability. Those losses were, we
3 would submit, completed in a normal workman-like process
4 of military staff duties and they were written by busy
5 radio operators and watchkeepers who may or may not have
6 been competent, thorough and better trained than other
7 than that at the basic level.

8 You heard evidence from some of the radio
9 watchkeepers and logkeepers to say that they basically
10 took what they thought to be important, and we would ask
11 that there could be no conclusion that the logs were
12 anything other than a near-contemporaneous note for the
13 events within them and they were not necessarily
14 complete of the record of activities within the
15 companies and battlegroups because obviously they were,
16 as those witnesses you have heard from said, a matter
17 for what they considered to be important at the time.

18 The same can be said, we would submit, about the
19 battalion war diary, particularly that entry on 8 and
20 9 September about the robust treatment to be handed out
21 to the Garamsche. Staff at all levels complete these
22 logs and war diaries, Sir, and the situation is required
23 for reference at a later date, but not for forensic
24 analysis, as they have been used in this Inquiry.

25 As you have heard, young soldiers were being asked

1 to work terribly long hours in uncomfortable conditions
2 and increasingly hostile situations and it is inevitable
3 that some petty violence occurred, sadly. Some
4 misbehaved -- and I am mindful of your comment about the
5 word "hindsight" -- but some have been giving evidence
6 with the hindsight of further experience in Iraq and
7 Afghanistan and you have been able to hear, in 2009 and
8 2010, we would submit, the benefit of their professional
9 development and education and seen some of the lessons
10 that they have learnt in the intervening years.

11 As I have said, we would submit that the chain of
12 command, certainly in Corunna Company, dealt with petty
13 violence. Police investigations were started within the
14 battalion where Colonel Kenyon's company were concerned,
15 both -- obviously there is the police investigation into
16 Baha Mousa's death, but also there was the police
17 investigation into the Garamsche incident, which was
18 undertaken in April 2004 and thereafter and other
19 investigations did take place in theatre, the laptop
20 computer in Corunna Company and also the incident
21 between Lieutenant Jones and Major West.

22 You have heard independent -- and we would say it
23 they are independent -- witnesses in regard to
24 Colonel Kenyon, that he was not a man to condone
25 violence or encourage misbehaviour, but it is

1 inevitable, we would say, that soldiers do get up to
2 things they shouldn't do and that that is where the
3 chain of command should stop it.

4 You have heard -- and I would ask you to accept on
5 his behalf, as he said to you -- that in the hindsight
6 of having been a commanding officer, Colonel Kenyon
7 perhaps should have told Colonel Mendonca more of what
8 was going on in the company or certainly he would have
9 liked to have known, as a commanding officer, more of
10 what was going on in his company.

11 But we would say that the Garamsche incident, which
12 I accept is perhaps a peripheral issue for the
13 Inquiry -- there is no allegation in our submission that
14 it was not an act of ill-discipline, which presupposes
15 that if you accept that it was not a matter of
16 ill-discipline and you accept the allegation made by the
17 detainees that the treatment was deliberate, that you
18 are bound to find that discipline had broken down within
19 C Company on 9 September with the Garamsche and we would
20 say that did not happen. The Quick Reaction Force came
21 equipped to make an arrest, for which they were not
22 correctly equipped, and soldiers like S037 did misbehave
23 and should have controlled their behaviour better. We
24 would ask --

25 THE CHAIRMAN: Well, something must have happened, mustn't

1 it, otherwise Major Kenyon would not have hauled them
2 all up and spoken to them?

3 MS EDINGTON: Sir, yes, but we would say that he called them
4 up because he was asked to do so or discussed the matter
5 with both Major Pinchen and the now Captain Parry, the
6 company sergeant major, because they were worried that
7 things might get out of hand, not that things had got
8 out of hand. And we would point to the fact that the
9 photographs were the first interview under caution that
10 Major Kenyon saw of -- those rather nasty photographs of
11 the gaffer tape put round people's heads. That was the
12 first time that he was aware of the extent of what had
13 happened on that morning. We would ask that the
14 volleyball incident is looked at in no more and no less
15 than saying that this type of behaviour must not go on,
16 not an apology from Kenyon to say that it had gone on
17 and that things must now not get out of hand.

18 THE CHAIRMAN: Yes.

19 MS EDINGTON: Sir, you said on numerous occasions that where
20 the Op Salerno detainees are concerned, you have heard
21 considerably more than the criminal trial in evidence,
22 but it would be submitted on behalf of Fallon and Stacey
23 that you have heard really no more than was heard at the
24 criminal trial.

25 THE CHAIRMAN: I don't think that is quite right, is it?

1 I have heard quite a bit more and I have heard rather
2 more from Mr Cooper, quite apart from anything else.
3 That does not, I agree, necessarily concern Mr Fallon,
4 but ...

5 MS EDINGTON: We would say that really, where Mr Stacey is
6 concerned, the evidence still rests with Mr Lee, Mr Hill
7 and obviously Mr Payne, as well as Mr Stacey himself.
8 You indicated on Monday to Mr Singh QC that he was there
9 for a relatively short period of time on that Sunday
10 morning. We would submit that he was there for -- be it
11 45 minutes or an hour, as he says himself, or the 10 to
12 15 minutes that MacKenzie says they were there.

13 It is fair to say that the logs would look at
14 a two-and-a-half-hour period, but again I would then
15 revert to my submission where the logs are concerned, to
16 say that they cannot be taken as an absolute accurate
17 timing. These are particularly important where, we
18 would submit, the Payne video is concerned and the
19 identification by D003 of his attendance in the video.

20 In our written submissions we have said that we
21 would ask you to consider Sergeant Stacey's evidence and
22 the other evidence of Mr Hill and others, that actually
23 that was not taken at 2 minutes past 12. If one looks
24 at the vehicle logs for the G30B multiple arriving with
25 D003, they appear to show that he is en route from

1 Camp Stephen at 11 ...

2 THE CHAIRMAN: 40 something?

3 MS EDINGTON: -- 11.51, and at 12.02 that video is taken.

4 In considering that time, Sir, we would ask you to
5 look at the transit time between Camp Stephen and
6 BG Main, the time that it would have taken for
7 Corporal Payne to have processed D003, hooded him,
8 perhaps re-plasticuffed him, and then placed him in the
9 room. We would say that it is not possible to have done
10 that in the 11 minutes between the log saying he is
11 en route to Battle Group Main and the video being taken,
12 which is based on the time of 2 minutes past 12 --

13 THE CHAIRMAN: Well, suppose that the film at 12.02 --

14 supposing that it was five or ten minutes out -- it is
15 the middle of the day, isn't it?

16 MS EDINGTON: Sir, no, we would say it is actually the next
17 day.

18 THE CHAIRMAN: The next day. Why do you say that?

19 MS EDINGTON: Because of the clothing that Corporal Payne is
20 wearing. Sergeant Stacey has always maintained that
21 when he was there that Payne was wearing a black
22 T-shirt, not a sandy coloured T-shirt. So we say that
23 the clothing that Payne is wearing indicates that it is
24 the next day. This we have put in our written
25 submissions --

1 THE CHAIRMAN: Your client would say that, but --

2 MS EDINGTON: Indeed, and we would submit that that is the
3 case.

4 Also Sergeant Stacey had said to you in evidence
5 that Payne's behaviour was similar to that, but it was
6 not as aggressive when he was there. So we would ask
7 you to consider those when looking at trying to time
8 that particular piece of camera.

9 Hill also says that, although he accepts that some
10 of the photographs on the camera are his, that he
11 doesn't know and he did not take that particular piece
12 of camera footage. Ultimately, Sir, as we know -- and
13 it is correct to say it is a matter for you -- but we
14 would ask you to consider those matters very carefully
15 before concluding a definite time before that --

16 THE CHAIRMAN: Do you want to make any submissions about
17 when you say D003 arrived at the TDF?

18 MS EDINGTON: Sir, to do that we would obviously point to
19 the fact that Sergeant Stacey says that the behaviour
20 that Payne -- the misbehaviour from the video -- was not
21 as extreme when he was there, wasn't as aggressive.
22 D003 we would say also was not there when
23 Sergeant Stacey was there.

24 So, therefore, if one looks at the potential arrival
25 times with Lieutenant Crosbie and Brzezinski, we really

1 can go from any time from early afternoon to, in
2 Brzezinski's time, some time in the afternoon, when he
3 manages to do two hours of guard shift with Fallon and
4 Crowcroft, neither of whom remember him being there.

5 So the difficulty is, Sir, in our submission, that
6 we can't say that he did, but first of all Crosbie says
7 in his written statement that he took D003 and D005 and
8 D006 together to the TDF. We know that D005 and D006 do
9 not arrive until the middle of the afternoon. He then
10 conceded in oral examination that perhaps he might have
11 been wrong about taking those, but even --

12 THE CHAIRMAN: Well, it looks as if he was obviously wrong
13 about that, doesn't it?

14 MS EDINGTON: Sir, we can't assist, other than
15 Sergeant Stacey was not there when a separate detainee
16 from the --

17 THE CHAIRMAN: That is his evidence, yes.

18 MS EDINGTON: That is his evidence, as you have heard him
19 say.

20 THE CHAIRMAN: Whether I accept it or not is a different
21 matter.

22 MS EDINGTON: Indeed, Sir. Stacey obviously says all he did
23 was assist Payne with the initial processing. He does
24 accept that he kicked feet into the position that Payne
25 had placed them in, but was nothing like as aggressive

1 as is seen on the video and he certainly did not
2 participate, as Mr Lee says, in a "frenzied attack" on
3 any detainees, either laughing or not laughing, as
4 Mr Lee says.

5 Stacey says that he keeps away the multiple from the
6 TDF while he is helping Payne with the initial
7 processing and then, at some stage goes off to talk to
8 Major Peebles with the list of the detainees and then
9 comes back. He is asked by Payne to leave two guards,
10 leaves the same-said Fallon and Crowcroft, and then
11 departs back to Camp Stephen. It is fair to say that
12 the log indicates that they may have been back at
13 Camp Stephen at about 13.11.

14 THE CHAIRMAN: Just pause a moment. I am sorry to
15 interrupt. Hill was his radio man, was he not?

16 MS EDINGTON: He was the Saxon driver and radio operator,
17 yes.

18 THE CHAIRMAN: Hill says he went into the TDF for the
19 purpose of finding Stacey, is that right?

20 MS EDINGTON: To find the names to read over the radio back
21 to Camp Stephen.

22 THE CHAIRMAN: Although Hill denies that he took the
23 photograph, if it is right that it was taken at 12.02
24 and he is looking for Stacey at that time, it would seem
25 that Stacey was there.

1 MS EDINGTON: Then we have to, we would say, fall back on
2 the evidence of D003, who identifies himself, and then
3 there is the clash between the evidence --

4 THE CHAIRMAN: I have that point in mind.

5 MS EDINGTON: -- between Stacey and D003, Sir.

6 Obviously, Sir, there have been some
7 inconsistencies, we would say, in the detainees'
8 evidence, but you have point and I don't wish to go
9 through that any further.

10 THE CHAIRMAN: Thank you.

11 MS EDINGTON: We would say, Sir, that there is no
12 corroborative evidence of Lee's assertion against
13 Stacey, but again they make no better for the repetition
14 and we can add nothing really to the assertion by D003
15 in his Inquiry statement that he saw two soldiers
16 punching his colleagues in the chest because we would
17 say that none of our clients were involved in that.

18 Fallon is left, Sir, as a 20-year-old to guard with
19 Crowcroft under the orders of Corporal Payne. Fallon
20 has accepted to you that he manhandled the detainees
21 into positions when instructed to do so by Payne, but
22 that he did give them water and he did lift the hoods
23 for that purpose and he didn't give any petty violence
24 other than the manhandling, and there was certainly no
25 beating, kicking or participation in "the choir", Sir.

1 There were proper visitors to the TDF on the Sunday
2 before the handover to G10A, who would -- and we would
3 say certainly would -- have commented upon anything
4 untoward going on. We would say that Crosbie and
5 Brzezinski come with D003 and also people arrived when
6 D005 and D006 come to the detention centre.

7 There is no credibility -- and we would agree with
8 the detainee's submissions on this -- that D005 was
9 placed in the toilet area when Fallon and Crowcroft were
10 guarding. It is known that Fallon was relieved by G10A
11 when it was dark.

12 You have had a discussion with Mr Ashley before me
13 as to what time certainly Staff Sergeant Davies went
14 there and it was ascertained that the first TQ'ing
15 session, Sir, was about 19.30, which of course we would
16 say is after Fallon has left and that would fit with the
17 evidence that he took nobody to any TQ'ing sessions.

18 Also, there are the visits of the medics -- the two
19 Winstanleys and Baxter -- who come in the middle of the
20 afternoon; there is Ingram who arrives to take the
21 detainees' names; Kendrick arrives to take his
22 photographs --

23 THE CHAIRMAN: Pausing there, what do you say about Ingram's
24 evidence? It rather looks as if one of the guards
25 punched a detainee.

1 MS EDINGTON: If you accept Ingram's evidence that he
2 chastised one of them --

3 THE CHAIRMAN: Why should I not?

4 MS EDINGTON: There is no reason, Sir, why you should not,
5 other than Fallon maintains it was not him that punched,
6 nor was he around when somebody was punched by a guard,
7 so therefore --

8 THE CHAIRMAN: It looks a little bit as if it must have been
9 either Fallon and Crowcroft.

10 MS EDINGTON: Other than, Sir, we now have Brzezinski and
11 others, and Ellis, who now say that they were guarding
12 the detainees that afternoon as well. So it may not be
13 as apparent as to who was or was not guarding, albeit
14 that Fallon says that it was him and Crowcroft with
15 Payne coming occasionally. But certainly Ingram says
16 there was nothing malevolent. He felt that the
17 detainees were not in any threat, hence his chastisement
18 was there and then and he felt it would be left at that
19 and it would not occur again.

20 THE CHAIRMAN: Yes.

21 MS EDINGTON: Peebles himself says that he comes at 4.30 --
22 16.30 -- and instructs conditioning to start once the
23 detainees have been identified as non-friendly. Of
24 course the G10A handover is at about -- and I say
25 "about" again because we know it is dark, but the logs

1 would indicate later than perhaps they were -- but it
2 was about 19.00.

3 Obviously Provost Sergeant Smith then visits and
4 Colonel Mendonca then comes. It is known on the
5 handover, Sir, that there was a rugby tackle incident on
6 Private Fallon and that is mentioned on the handover to
7 the Rodgers multiple by Corporal Payne.

8 The difficulty with the video, Sir, we would submit,
9 is that if that is not deemed to be conditioning, but
10 merely control positions, it shows appalling manhandling
11 by Payne. But if it is conditioning, then it must have
12 occurred after 16.30 when Peebles comes and orders that
13 conditioning is to start.

14 THE CHAIRMAN: I am afraid I don't follow that. I simply
15 don't see why it must have happened after Peebles came.
16 Peebles comes at 4.30 and he says "start conditioning".
17 Odd, I agree, when people are in stress positions --

18 MS EDINGTON: Indeed.

19 THE CHAIRMAN: -- and hooded, but it doesn't follow that it
20 must have been only after that that that event occurred.

21 MS EDINGTON: Sir, we would say that it is inconceivable
22 that any form of conditioning would have commenced
23 before it was decided whether or not the detainees were
24 friendly or non-friendly. There is no evidence that
25 conditioning would have started before then, but

1 I accept your reasoning. It is a conundrum that is
2 there for you to make a finding on, Sir.

3 Sir, we would say that Fallon was not involved in
4 any TQ'ing and so therefore could not have been involved
5 in any moving of anybody --

6 THE CHAIRMAN: No, that I think is a fair point.

7 MS EDINGTON: Thank you. We would say there is no credible
8 evidence as to a mass beating at 19.00 on the Sunday,
9 when the guards change over, and we would adopt the
10 Kingsley Napley submissions made by Mr Dingemans QC
11 yesterday on that basis.

12 Fallon says he went straight to the Saxon on arrival
13 and got in and sat waiting for the rest of the multiple
14 to return to Camp Stephen. We would say that Reader and
15 Cooper are self-serving in theirs and that Redfearn is
16 incorrect when he says that his guard had told him that
17 the detainees looked as if they had been beaten up when
18 they arrived on the Sunday. We would point to Appleby,
19 who says that he didn't witness any members and
20 certainly didn't see Fallon beating any of the detainees
21 and he has consistently asserted that it was only Payne
22 that he saw on that occasion. Hunt says nothing about
23 Fallon's behaviour and Rogers just mentioned that
24 a bruised detainee was pointed out to him by Payne.

25 Then, Sir, obviously, we have the evidence of the

1 boasting claims which both Hill and Lee assert. We
2 would submit that Lee's assertions that there were minor
3 injuries on Fallon are not credible and that the
4 allegation was not seen or heard by anybody else in that
5 multiple and he certainly didn't see the company medic.

6 Hill has wavered, Sir -- and obviously it is
7 a matter for you to look at the credibility of Mr Hill
8 as a witness per se -- but he has wavered between
9 hearing Fallon and Crowcroft talk about seeing "the
10 choir" and hearing them taking part in it. So, Sir,
11 I would submit you are not assisted by Mr Hill's
12 evidence on this at all, other than to say that perhaps
13 it was -- and it certainly is in Fallon's case -- that
14 he did not see or hear "the choir". But what we would
15 say is that Fallon, as a young soldier, was under the
16 command of Payne throughout and he was merely acting as
17 a guard.

18 You asked yesterday, Sir, about soldiers guarding.
19 The guarding that we would say that soldiers have done
20 in state that he was -- him having joined the battalion
21 in early 2003 after training -- would only be camp guard
22 rather than guarding detainees or even other soldiers.

23 Slicker, of course, is a different matter --
24 THE CHAIRMAN: Just before you leave Fallon, do I understand
25 it that your client's position, so far as that period of

1 time when he was guarding, is that nothing happened at
2 all that he saw which was in any way untoward?

3 MS EDINGTON: No, he would accept that he manhandled, Sir,
4 as instructed to do so by Payne -- he manhandled people
5 back into the stress positions when Payne instructed him
6 to do so.

7 THE CHAIRMAN: But not violently in any way?

8 MS EDINGTON: Not other than if that is deemed to be petty
9 violence, which it must be, because, of course, it is
10 lifting people into positions they don't want to be in.

11 THE CHAIRMAN: He didn't see Ingram come in?

12 MS EDINGTON: He doesn't recall seeing Ingram at all.

13 THE CHAIRMAN: Nor Crosbie?

14 MS EDINGTON: Nor Crosbie at all, Sir, no.

15 THE CHAIRMAN: I suppose that means that he doesn't accept
16 the detainees when they say that the beating and the
17 like started from the moment they got into the TDF?

18 MS EDINGTON: Sir, no.

19 THE CHAIRMAN: None of that happened?

20 MS EDINGTON: He would say that --

21 THE CHAIRMAN: Well, if it did happen, he must have seen it,
22 mustn't he?

23 MS EDINGTON: If it did happen, yes. So, ipso facto, he
24 says it did not --

25 THE CHAIRMAN: As indeed must Mr Crowcroft have seen it.

1 MS EDINGTON: I will leave Mr Crowcroft's counsel to deal
2 with Mr Crowcroft, Sir.

3 THE CHAIRMAN: Yes, all right.

4 MS EDINGTON: Obviously Slicker has accepted his disgraceful
5 behaviour and he names others' bad behaviour and
6 disgraceful behaviour, which may or may not assist you,
7 Sir. He doesn't accept Felton's allegations that he
8 knew that Colour Sergeant Huxley was bullying or
9 threatening Mr Felton, but he has accepted throughout
10 his own disgraceful behaviour, and on that I don't think
11 I can assist any further, Sir. He accepts that he was
12 identified by Mr Hughes on the Monday afternoon. I am
13 not sure really whether I can assist further with
14 Mr Slicker's rather disgraceful behaviour.

15 THE CHAIRMAN: All right. He says something about other
16 people, though, doesn't he?

17 MS EDINGTON: He does, Sir, and we would say that that
18 points to and is evidence that you should consider when
19 looking at things in the round.

20 THE CHAIRMAN: Yes.

21 MS EDINGTON: Mr Suss-Francksen was not responsible for the
22 detainees and the allegations by Major Fenton over his
23 knowledge and attempts to extend the 14-hour rule we
24 would say, Sir, are incorrect. He does accept he was
25 called by Major Seeds to assist on the Monday night and

1 the detainees were moved out on the Tuesday morning.

2 THE CHAIRMAN: Just pausing there for a moment, remind me,
3 did he not say that he visited the TDF several times or
4 am I wrong about that?

5 MS EDINGTON: No, Sir, he didn't. He merely visited on that
6 one occasion. He used to, as a matter of course, when
7 he was using his mobile telephone, go to the back of the
8 camp to the area was just behind where the TDF was, and
9 there were a set of portaloos by the TDF, but he doesn't
10 accept that he visited the TDF, other than when summoned
11 to do so by Major Seeds on the Monday evening.

12 THE CHAIRMAN: And he didn't see anything very much to
13 concern him, apart from the fact that they were still in
14 handcuffs?

15 MS EDINGTON: Yes, and the handcuffs were removed.

16 THE CHAIRMAN: Is that not a little surprising, that he did
17 not see what Captain Seeds graphically described?

18 MS EDINGTON: I think when he gave evidence to you, Sir, he
19 said he was -- "unimpressed" I think was the word he
20 used -- with what he saw, but he wasn't alerted to
21 a smell or anything particularly untoward. He removed,
22 with Major Seeds, the handcuffs. It may be a matter of
23 perception on the two men, Sir, that --

24 THE CHAIRMAN: There is obviously a stark contrast between
25 his evidence and Major Seeds'.

1 MS EDINGTON: It would appear to be a dilemma for you, Sir,
2 yes.

3 THE CHAIRMAN: Sorry?

4 MS EDINGTON: It would appear to be a dilemma between the
5 two. One says he saw some disgusting behaviour --

6 THE CHAIRMAN: It doesn't seem that both of them can be
7 right, does it?

8 MS EDINGTON: Sir, it may be a question of perception. It
9 may be that Major Suss-Francksen was not as alert as he
10 should have been to what was going on. But he certainly
11 says that he was not impressed with that behaviour, with
12 what he saw, but he was not alerted to anything
13 untoward. And he knew -- and the guards who were there
14 had told him that the doctors -- now whether that is the
15 medics or Dr Keilloh is a matter for you and, of course
16 you have heard counsel for Dr Keilloh say he didn't
17 visit the TDF, but he was assured that the medics had
18 been to the TDF.

19 THE CHAIRMAN: We can be sure about one thing, that he
20 didn't actually do anything about it; is that right?

21 MS EDINGTON: He didn't, Sir, no.

22 THE CHAIRMAN: All right.

23 MS EDINGTON: He does on the next morning. When
24 Lieutenant Rodgers returns from the TIF at Umm Qasr, it
25 is fair to say he does write a memo to the commanding

1 officer and copied to the brigade, complaining about
2 S018's behaviour towards Lieutenant Rodgers. But
3 I think S018 conceded in evidence that he had been --
4 used his physical appearance and was very, very angry
5 with the state of the detainees and so may have actually
6 been slightly verbally aggressive towards Rodgers.

7 But we would say there was nothing sinister in
8 pointing out to the chief of staff of 19 Brigade and the
9 commanding officer that that had occurred because, of
10 course, by this stage the service police had already
11 started their investigation because Sergeant Colley had
12 been at the TDF and taken everybody's names and the
13 details the night before, after the death of Baha Mousa.
14 There is nothing sinister, we would say, in him pointing
15 out that it is not helpful to pre-judge what may or may
16 not have occurred.

17 Major Sweeney. Sir, he is, we would submit, on the
18 periphery really.

19 THE CHAIRMAN: Yes, he is a late entrant to this.

20 MS EDINGTON: He is a late entrant to the Inquiry insofar as
21 he was brought in because of the video which Mr Giblin
22 had seen in Cyprus. The laptop was --

23 THE CHAIRMAN: The real issue for him, it seems to me, is
24 whether or not he did hand it on to the SIB or whether
25 he kept it or put it somewhere else.

1 MS EDINGTON: Sir, he says the laptop was handed in. He
2 said he didn't view the laptop and I would submit that
3 that evidence is credible evidence. It comes from him,
4 it is not rebutted by anything and we do know from the
5 papers that the RMP do get some media and material from
6 1 QLR at about the same time that the RMP in England are
7 undertaking the Daily Mirror photographs investigation
8 in Preston with the TA unit, whereas of course this
9 battalion is in Cyprus. He certainly says to you that
10 it was handed in and that he did not view it. So
11 without any positive evidence to assert otherwise, Sir,
12 we would say that that's the evidence that you have and
13 the weight that should be given to a credible witness.

14 THE CHAIRMAN: And it hasn't been traced since?

15 MS EDINGTON: Giblin says that he got the laptop back, Sir,
16 and gave evidence to that end to you, and he doesn't
17 know what the service police did with the laptop in the
18 intervening time.

19 THE CHAIRMAN: Yes.

20 MS EDINGTON: Sir, my last remaining client is, of course,
21 Colonel Mercer.

22 THE CHAIRMAN: Yes.

23 MS EDINGTON: I have very little to add on his behalf, other
24 than to confirm his view of what he saw at the JFIT on
25 29 March was not a security situation in his opinion.

1 He considers that it was a softening-up process prior to
2 interrogation and it has been confirmed by others, Sir,
3 that the prisoners arrived at the PWHO, the Prisoner of
4 War Handling Organisation, commanded by S009, hooded,
5 and then they were unhooded and processed in the PWHO.
6 It was then and only then that they are moved into the
7 JFIT, where they are rehooded.

8 That is where Colonel Mercer sees them hooded,
9 plasticuffed, outside, in what he considered to be
10 stress positions in his memorandum to the general
11 officer commanding, and which S002 has described as "not
12 more extreme stress positions".

13 Sir, it may be that this is where the comment that
14 you made on Monday about a definition of "stress
15 positions" may assist you. Certainly what
16 Colonel Mercer complained of was hooding and stress
17 positions. S002 says that they were not more extreme
18 stress positions. Then, of course, we had the Davies
19 memo sent to "Sirs and S034", as you will remember,
20 which relates the information given to him as done by
21 S002.

22 Obviously S034's note to the Secretary of State's
23 office in May 2004 mentions harsh treatment. So whether
24 or not they are stress positions properly so-called,
25 Sir, is a matter really for you. But they were

1 positions which were seen by Colonel Vernon, who said
2 that he saw the detainees at the JFIT kneeling in the
3 sun in what could be considered stress positions and
4 S009 said that he saw them kneeling in the sun and he
5 considered their treatment to be morally objectionable.

6 So whether you are assisted by whether they were
7 stress positions, properly so-called, is, Sir, a matter
8 obviously for you. The Treasury Solicitor has come up
9 with a definition, but certainly Colonel Mercer would
10 say that he found the positions objectionable and he
11 thought that they were uncomfortable.

12 Again, it may be on the periphery of your terms of
13 reference, Sir, but certainly recent disclosure has
14 shown that there was in fact an in-theatre management
15 board that set on 17 March 2003, and Major Gavin Davies
16 was the LEGAD, it appears, sitting on that.

17 It becomes apparent from that recent disclosure that
18 of course the NCC had decided to exclude the divisional
19 legal adviser in the process of what was and wasn't
20 happening in the JFIT. That maybe, Sir, negates any
21 influence that Colonel Mercer may or may not have been
22 able to have over the JFIT, despite the fact that they
23 were in the divisional area of responsibility. But as
24 I said, that is recent disclosure and you have not heard
25 evidence on that.

1 Finally, on Colonel Mercer's behalf, it must be said
2 that he was constantly aware of the need to care for
3 detainees and internees in accordance with international
4 and domestic obligations. You heard from him that he
5 had no involvement in the drafting of FRAGO 29, nor was
6 he consulted, but he felt -- and he gave evidence to
7 you -- that the BGIRO was no more than a filter, not
8 necessarily even needing to ask any questions, just
9 taking evidence from what had happened on the arrest of
10 the person.

11 THE CHAIRMAN: I expect you have seen a note sent to you by
12 the Inquiry.

13 MS EDINGTON: I have, Sir, yes.

14 THE CHAIRMAN: What do you say to that?

15 MS EDINGTON: FRAGO 152 and FRAGO 136 were drafted and
16 received by everybody, Sir. The question is whether or
17 not -- we made comment in our closing submissions about
18 the use of tactical questioning and interrogation and it
19 may be a matter for you. I think it ties in with
20 FRAGO 29, Sir, that if FRAGO 29 was just deemed to be
21 a filter, as Colonel Mercer felt it could be, then no
22 questioning would necessarily need to be pertained to
23 the internee/detainee at that point.

24 Article 17 allows for name, rank, number and date of
25 birth. Other questions may be asked and they don't need

1 to be answered by the detainee or internee. So the
2 question is, Sir, had FRAGO 29 had more legal scrutiny,
3 Sir, perhaps the follow-over from FRAGO 163 -- certainly
4 Colonel Mercer's intention was that no questioning took
5 place, but then I would have to fall back on Ms Rose's
6 letter to the Foreign and Commonwealth Office that
7 Mr Singh QC raised on Monday, to say that her impression
8 of interrogation was that it was no more than mere
9 questioning. So these terms of art of "tactical
10 questioning", "questioning" and "interrogation" --
11 perhaps it is a matter for you, Sir, but perhaps this is
12 one thing that does need to be defined once and for all
13 as to what the terms of art mean.

14 It may be said that FRAGO 163 -- because
15 Colonel Mercer inserts in the actual FRAGO that is
16 distributed that no questioning or no interrogation may
17 be made until the JFIT -- that he was lax in his use of
18 the word and should have put "questioning" in FRAGO 163.

19 THE CHAIRMAN: He could have said both, "tactical
20 questioning and interrogation out".

21 MS EDINGTON: Indeed, and perhaps if one had understood the
22 technicalities of the two meanings of "tactical
23 questioning" or "questioning" and "interrogation",
24 perhaps one would have been more alert to that in
25 May 2003.

1 Again we use hindsight, Sir, but the point is at
2 least the original draft of FRAGO 163 you can see has
3 nothing about interrogation in it at all. It is added
4 by Colonel Mercer and it makes its way into the FRAGO.
5 Perhaps it should have said "questioning and
6 interrogation".

7 THE CHAIRMAN: All right.

8 MS EDINGTON: Certainly it can be said that his knowledge
9 and his animation and agitation on the subject of
10 detainees and hoods in general was passed on in theatre
11 to Colonel Barnett. It is said on his behalf that he
12 did expect the Ministry of Defence to make a decision
13 about what he had seen at the JFIT. That did not
14 happen. But we would say on his behalf that there was
15 nothing more he could or should have done. He did what
16 he could do in theatre to ensure that detainees and
17 internees were as safe as they might be in his area of
18 responsibility.

19 THE CHAIRMAN: Yes.

20 MS EDINGTON: Sir, it just leaves me to thank all involved
21 in the Inquiry for their help and assistance to the
22 Lewis Cherry legal team and for you, Sir, in the way
23 that you have dealt with this Inquiry.

24 THE CHAIRMAN: Well, that is kind and courteous of you.

25 Thank you very much. I am very grateful to you for your

1 this week, when you alluded to the succinctness of some
2 submissions. I accept that mine may well have been one
3 of the most succinct, and I say that not --

4 THE CHAIRMAN: Save that succinct you said you would be at
5 page 2 or 3, but I noticed that it went on for a further
6 60 pages. That is merely a tease. Don't worry
7 about it.

8 MR ENGLAND: I say that, Sir, not in an attempt to be
9 congratulated, but because I recognise that I have had
10 the least to do in this Inquiry in terms of the number
11 of clients whom I represent.

12 THE CHAIRMAN: Yes.

13 MR ENGLAND: Nevertheless I hope our submissions adequately
14 and concisely represent our client's interests and his
15 position as a core participant in this Inquiry. It is
16 understood that he has as much interest in the
17 conclusions and recommendations of the Inquiry as any
18 other core participating soldier, whether serving or
19 retired, who has had the benefit of representation.

20 He remains, Sir, through all of this, a dedicated,
21 decorated and professional junior NCO who is proud to
22 serve in HM Armed Forces. He is not proud to be
23 associated with the events of 14 to 16 September 2003.

24 I am further extremely conscious that some soldiers
25 have admitted unlawful violence and behaviour that went

1 way beyond acceptable limits, even in the face of what
2 must have been challenging, hostile and at times
3 horrendous conditions for soldiers young and old.

4 I know, Sir, that you will appreciate all of those
5 matters before reaching any conclusions or decisions
6 and, ultimately, recommendations in accordance with your
7 terms of reference.

8 As I said in my written submissions, which will not
9 be repeated, we accept the gravity and importance of
10 this Inquiry and the appropriate attribution of
11 responsibility. We recognise that this will be one of
12 many concerns for you, Sir, and the family of Baha Mousa
13 and the other Iraqi detainees. Crowcroft continues to
14 share these objectives and nothing I say is intended to
15 excuse the behaviour that occurred.

16 The evidence that the Inquiry has heard about
17 Operation Salerno and, in particular, Crowcroft's stag
18 in reality has encompassed a relatively small period in
19 this Inquiry's timetable. Although we have heard more
20 detailed evidence than at the court martial, we
21 generally submit that there has been nothing more
22 damning and nothing more damning has been learnt about
23 the stag that Crowcroft was ordered to participate in,
24 save, of course, as, Sir, you commented earlier to
25 Ms Edington, on the evidence of Mr Cooper, who I simply

1 say, when he prepared his statement to the Inquiry,
2 makes no mention of seeing Crowcroft and/or Fallon
3 punching and yet, when he gave his evidence to the
4 Inquiry, he somewhat changed his account -- I hasten to
5 add, not supported by the likes of Appleby, Aspinall or
6 Hunt.

7 Sir, we simply submit that the reason for the
8 assertion in relation to Crowcroft's account to this
9 Inquiry is that we say he was telling the truth and we
10 say he has continuously maintained that account for some
11 seven years now. There was and is, we respectfully
12 submit, in relation to Crowcroft's behaviour, little
13 more to learn, nothing more damaging to be revealed.
14 The gathering of evidence has been full, exhaustive and,
15 we respectfully submit, no stone has been left unturned.
16 Putting it plainly, we would suggest on his behalf that
17 nothing of any real substance has been discovered that
18 it could be argued materially affects Crowcroft's
19 position since the court martial. We suggest that he
20 simply obeyed his orders and did not, as we say, engage
21 in unlawful and deliberate violence. That, of course,
22 must be entirely a matter for you, Sir.

23 I made it clear, during the course of my written
24 submissions, that my function was not to join into an
25 arena of speculation about what occurred following

1 Crowcroft's departure. However, we do, of course, rely
2 upon the fact that the evidence both from the detainees
3 and some members of the Rodgers multiple points to an
4 increase in the number of soldiers participating in the
5 violence as the length of time the detainees spent in
6 detention increased.

7 There is, we submit, clear and compelling evidence
8 that the levels and intensity of violence increased
9 after Crowcroft was relieved of his stag on the Sunday
10 night. We rely on the same as some evidence to support
11 Crowcroft's assertion that he was not a participant in
12 the gratuitous violence: firstly, because it goes some
13 way to explaining how and when the injuries were
14 sustained. Plainly if others had not been involved with
15 guarding the detainees and admitting violence, then
16 there would be no other possible explanation as to how
17 the injuries were caused.

18 Secondly, we submit, Sir, that if you were satisfied
19 that the medics were giving a truthful and accurate
20 account about medical examination, however detailed or
21 cursory, then that would lend some support to
22 Crowcroft's account. Moreover, the plain fact of
23 examination cannot sensibly be challenged, putting aside
24 the issue of whether an FMed5 was filled out or not.

25 We submit that no one would suggest that the failure

1 or otherwise to fill in an FMed5 would mean that they
2 also failed to discharge their medical duty to examine
3 or that they were lying about carrying out that
4 examination. We further submit that the evidence of the
5 medics' first visits adds, we say, some additional
6 support to our general submission that the serious
7 injuries, those normally associated with unlawful
8 violence, must have come later or at the very least
9 after the medics had gone, unless, of course, they
10 deliberately ignored them.

11 We respectfully remind you, Sir, that Crowcroft was
12 an 18-year-old private soldier at the time who had never
13 received any training, formal or otherwise, on the
14 handling of civilian detainees. We adopt the
15 submissions to that effect made by Mr Dingemans at
16 page 29 of his address yesterday and would support, Sir,
17 your assertion in response, reference permissible
18 boundaries and moral compasses and the assumption by
19 young soldiers of permitted practice.

20 Crowcroft you may well feel was following orders in
21 circumstances that were completely alien to him as
22 a young soldier on his first tour. We would submit
23 those facts do provide some helpful background. It is
24 not said to try and excuse any critical findings that
25 you may reach, nor is it intended to.

1 It is of further note that the Inquiry has not heard
2 any real or compelling evidence to suggest that
3 Crowcroft would have had any knowledge of the detainees'
4 status or rumoured status at the start and during his
5 guard duty. In any event, even if that information had
6 become available to the chain of command or disseminated
7 at some stage, it is respectfully submitted that it
8 would be highly unlikely that an 18-year-old private
9 soldier would know or even be privy to the same.

10 As far as the evidence of bragging and "the choir"
11 is concerned, we simply say that Lee's account lacks any
12 real credibility and is peppered with inconsistencies
13 and plain untruths. The presence at the time of Atree,
14 Bamber, Macmillan, Broadbent, Woods and Strong, who do
15 not hear any of the comments allegedly attributed to
16 Crowcroft, we submit is telling and provides additional
17 support to our submission that Lee was not giving an
18 accurate or reliable account to this Inquiry and further
19 that Hill was simply mistaken. I will turn to that
20 later following the three specific requests, Sir, that
21 I have received.

22 We ask the Inquiry to conclude that, had the
23 bragging occurred to the extent alleged, then it is
24 inconceivable that the other private soldiers sharing
25 the accommodation would not have heard it or at least

1 have remembered the bare bones of it. It is of note
2 that Sergeant Stacey neither saw "the choir" nor heard
3 bragging about it. Mr Appleby confirmed, when he
4 witnessed Payne performing "the choir", he could not
5 remember Crowcroft being present.

6 I do not think it necessary to repeat orally my
7 written submissions in relation to the Cyprus incident
8 or deal in any more detail with the bragging incident.
9 We submit that it would be naturally difficult in all
10 the circumstances existing in Cyprus at the time to
11 conclude with any certainty exactly what was said or
12 what was meant by it.

13 I finally turn to our submissions regarding the
14 three specific areas: firstly, the evidence from the
15 detainees that beatings started shortly after the
16 arrival at the TDF. Sir, Crowcroft has always
17 maintained and denied being present inside the TDF
18 during the initial arrival of the detainees. Payne was
19 present during that phase and he has admitted rough
20 treatment throughout their detention, albeit with an
21 increased intensity following the handover to the
22 Rodgers multiple.

23 We continue to submit, in any event, that the
24 detainees' accounts are the subject of understandable
25 exaggeration and that the perception of some, such as

1 D001, was that the beatings started almost immediately.
2 The difficulty is that other detainees have a different
3 recollection and we will never really know whether the
4 use of the word "beating" was referring to admitted
5 manhandling or the deliberate and unlawful use of
6 violence that followed later on during that detention,
7 admitted, we say, by the likes of Payne and the other
8 members of the Rodgers multiple.

9 When deciding the same, we submit that one has to
10 consider the reasons behind the detainees' apparent
11 trajectory of increasing seriousness from their initial
12 complaints until their final statements to Public
13 Interest Lawyers. This is one of the many areas that we
14 say you may wish to consider when determining whether
15 the detainees' accounts bear such exacting and somewhat
16 artificial scrutiny.

17 Further, claims of beatings from the outset on the
18 face of it would appear to clash with the findings -- or
19 should I say the lack of findings -- of all the company
20 medics who visited the TDF. Even witnesses that one
21 could argue are trying to implicate others, such as
22 Kendrick and Ingram, did not give accounts of seeing
23 injuries consistent with the detainees' complaints.

24 Sir, secondly, Kendrick's evidence that when he
25 photographed the detainees on Sunday there were slight

1 cuts and bruises to some of their faces. It is
2 submitted that it would be unrealistic for
3 Messrs Crowcroft and Fallon to be in a position to
4 notice slight cuts and bruises, bearing in mind the
5 conditions that existed at the time. In any event, for
6 a large duration of their stay, the detainees were
7 mostly hooded.

8 The existence of slight cuts and bruises is
9 inconsistent, we submit, with sustained and deliberate
10 beating as described by some of the detainees. We
11 submit rhetorically whether a plausible explanation is
12 that the injuries could correspond with some accounts of
13 rough treatment at the Hotel Haitham or, perhaps less
14 controversially, during their transport to the TDF.
15 Further Kendrick did not note, comment upon or report
16 the injuries he is alleged to have seen. Moreover he
17 failed to mention noting the injuries in the detail he
18 now seeks to rely upon in his evidence to this Inquiry.

19 Thirdly, whilst Hill originally stated that he heard
20 Fallon and Crowcroft brag about assaulting detainees by
21 means of "the choir", he now says that he cannot recall
22 whether they said they had participated in "the choir".
23 However he still recalls Fallon and Crowcroft mentioning
24 "the choir" on their return to Camp Stephen --

25 THE CHAIRMAN: Mr England, I wonder if I could ask you to

1 just slow down a little bit because it all has to be
2 interpreted. You may not appreciate it, but it does and
3 it is not all that easy if you go as fast --

4 MR ENGLAND: I am most grateful. My absence for the last
5 four months has --

6 THE CHAIRMAN: Speeded you up a bit, yes.

7 MR ENGLAND: -- left me a little rusty.

8 Sir, I am now asked how this affects Crowcroft's
9 assertion that he witnessed no physical violence towards
10 these detainees. We would continue to submit on
11 Crowcroft's behalf that he did not witness any
12 deliberate physical violence towards the detainees and
13 that no such conversation took place. The differing
14 accounts the witness has given suffer from inherent
15 unreliability, bearing in mind his shift in recollection
16 of what was said, who said it and in what context.

17 Further, on the evidence the Inquiry has heard, it
18 is not clear whether he was simply attributing by
19 mistake the rumour of "the choir" to Messrs Crowcroft
20 and/or Fallon, hence the comment that he could not
21 recall whether "they said they had participated in 'the
22 choir'".

23 Finally, Sir, may I thank yourself and both Counsel
24 to the Inquiry for their overriding fairness and
25 understanding and all the team behind the scenes and

1 front of house for their guidance, hard work and
2 dedication in what has been a steep learning curve for
3 those of who do not normally practice in this field.
4 I hope that both my written and oral submissions have
5 been of some assistance to the Inquiry, whilst
6 fundamentally protecting Corporal Crowcroft's interests
7 as a core participant.

8 THE CHAIRMAN: Yes, well, I am very grateful to you for
9 those thanks on behalf of all the Inquiry. Just one or
10 two odd questions, if I may ask you.

11 Your client's case, as I understand it, or evidence
12 about this is that he saw nothing at all that was
13 untoward and took part in nothing at all that was
14 untoward.

15 MR ENGLAND: That's right, Sir.

16 THE CHAIRMAN: I would have to find, would I not, that the
17 detainees or those who say that it all started from the
18 moment they got into the TDF were simply not right about
19 that, saying that it started -- if that is correct,
20 is it?

21 MR ENGLAND: That must be right, Sir.

22 THE CHAIRMAN: Because if, for instance, "the choir"
23 happened on that afternoon, your client must have seen
24 it.

25 MR ENGLAND: Save, of course, for this caveat: that there

1 were times when either Fallon or Crowcroft were out of
2 the TDF, either smoking or having a break.

3 THE CHAIRMAN: Well, one or other of them must have seen it
4 because they would not both be out together.

5 MR ENGLAND: That must be right.

6 THE CHAIRMAN: You don't say, do you, as has been said on
7 behalf of Mr Fallon, that anybody else was taking part
8 in the guard other than your client and Crowcroft?

9 MR ENGLAND: No.

10 THE CHAIRMAN: He would also have had to have missed the
11 incident, if I were to find it happened, of Mr Ingram
12 coming round and somebody -- a guard -- hitting
13 a detainee --

14 MR ENGLAND: He would, Sir.

15 THE CHAIRMAN: -- and I think Crosbie's evidence about him
16 seeing -- having seen D005 and D006, seeing "the choir"
17 being organised at that stage.

18 MR ENGLAND: Sir, again, I think it has already been
19 submitted that those are matters that, of course, you
20 have to take into consideration when weighing up all of
21 the evidence. I don't think there is anything I can
22 usefully add.

23 THE CHAIRMAN: Yes. What would you say if I were to find
24 that he can't be right about that and hadn't told the
25 truth about it as to the effect that has on the

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