



CRIMINAL APPEAL ACT 1995

STATEMENT OF REASONS FOR A DECISION TO MAKE A REFERENCE TO THE COURT MARTIAL COURT OF APPEAL

CCRC Reference:	01545/2015
Applicant:	Alexander Wayne Blackman
Applicant's Representative:	Jonathan Goldberg QC
Court:	Court Martial Court of Appeal FAO Master Egan QC Royal Courts of Justice Strand London WC2A 2LL
Other parties to the appeal:	Mr Andrew Cayley QC Director of Service Prosecutions Service Prosecuting Authority RAF Northolt West End Road Ruislip Middlesex HA4 6NG

In the exercise of its powers under the Criminal Appeal Act 1995 ("the Act") the Criminal Cases Review Commission ("the CCRC") has considered the application of Mr Blackman for review of his conviction and sentence.

The CCRC has decided to refer Mr Blackman's conviction and sentence to the Court Martial Court of Appeal.

Details of Conviction and Sentence

Date:	8 November 2013
Court:	The Court Martial at Military Court Centre Bulford
Offence	Sentence
Murder contrary to section 42 Armed Forces Act 2006	6 December 2013 Life with a minimum term of 10 years' imprisonment (reduced to 8 years on appeal).

Summary

- i. The CCRC has decided that there is a real possibility that Mr Blackman's conviction and sentence will not be upheld and is referring them to the Court Martial Court of Appeal. The CCRC's decision is explained in the "Analysis and Reasons" section of this Statement of Reasons. The grounds on which this case is being referred are summarised in the "Decision" section.
- ii. The position in relation to papers considered and disclosure of material is set out at Annex 1. A summary of the CCRC's powers is at Annex 2.

Summary of the CCRC's findings

1. New expert evidence from three consultant and academic psychiatrists, obtained since conviction, creates a persuasive consensus that Mr Blackman had been suffering from a recognised medical condition – namely an adjustment disorder – at the time of the incident.
2. The expert evidence indicates that symptoms of that adjustment disorder are relevant to Mr Blackman's defence at trial in that the condition operated in such a way as to interfere with his ability to diligently and competently assess the injured insurgent's status. The expert evidence adds to a number of factors which indicate that unlawful act manslaughter would have been a legitimate alternative verdict.
3. The failure of Mr Blackman's legal representatives to recognise, prior to trial, that he was susceptible to a conviction for manslaughter led to identified deficiencies in the standard of defence Mr Blackman received which impact on the safety of his conviction for murder.
4. In particular, a psychiatric report should have been obtained to assess Mr Blackman's state of mind at the time of the incident. The failure to obtain a Proof of Evidence statement, take detailed instructions and give persuasive legal advice potentially contributed to the reasons why that was not done. Had psychiatric evidence been obtained prior to trial it would have identified Mr Blackman's medical condition and should have caused both Mr Blackman and his legal representatives to re-assess the incident, his level of culpability and the nature of his defence. In the absence of such evidence Mr Blackman was able to explain only partially, and in an unsatisfactory way, his actions and belief.
5. The new expert evidence of Dr Fegan-Earl, Home Office and Consultant Forensic Pathologist, adds further context to the factors bearing on Mr Blackman's assessment of the injured insurgent's status and the difficulties a layman – in a normal mental state – might experience in conducting such an assessment. This issue was not raised with Dr Hunt, the Prosecution's Pathologist, at trial.
6. The new evidence known as the "Telemeter Report" adds further context bearing on Mr Blackman's assessment of the injured insurgent's status and factors potentially relevant to his mental state at the time of the incident.

7. Had the new evidence been available at trial it would have added to the matters indicating that it was necessary to make available to the Board a finding of unlawful act manslaughter.
8. It is arguable in any event that the failure to leave this option to the Board, on the facts as they were at trial, may amount to a material irregularity affecting the safety of Mr Blackman's conviction for murder.
9. Such a direction would have been justified on the evidence at trial; specifically, the nature of Mr Blackman's defence, the admissions he made in evidence and his conduct during *Herrick 14* being demonstrably out of character.
10. The new psychiatric evidence now available raises also the possibility of an alternative partial defence to murder applying, which was not recognised prior to trial. Specifically, a consensus exists between the three psychiatrists that the defence of diminished responsibility may have been available to Mr Blackman, subject to the Board's assessment of his abnormality of mental functioning being a significant contributory factor in his conduct.
11. Although *prima facie* inconsistent with the defence advanced at trial, and in spite of the fact that he has still not fully admitted the killing, consideration of diminished responsibility as a partial defence should be made in the knowledge that Mr Blackman lacked insight into his recognised medical condition and, during the trial process, had not considered himself to have been unwell at the time of the incident. In addition, fuller and more persuasive advice from his legal representatives may have led Mr Blackman to obtain appropriate medical evidence and reassess his apparent conduct objectively. Had psychiatric evidence been obtained, a compelling case for a partial defence on the basis of diminished responsibility would have been appreciated and an informed decision been possible.
12. Even if the Court of Appeal is not minded to accept that the matters summarised above are sufficient to impact on the safety of Mr Blackman's conviction, the CCRC considers that the consensus of medical opinion and the diagnosis of a recognised medical condition amounts to evidence capable of further mitigating the tariff Mr Blackman received. There is a real possibility, therefore, that the Court of Appeal will further reduce the tariff element of Mr Blackman's sentence.

The Trial

This section summarises the case as presented at trial. It does not necessarily reflect the CCRC's view of that evidence or of those arguments or indeed the applicant's assessment of the evidence or arguments as presented to the CCRC.

Conviction summary

1. In October 2013 Mr Blackman was one of three Royal Marines tried by Court Martial for the murder of an unidentified man killed in Afghanistan on 15 September 2011, while the men were there deployed.
2. At the time of the man's death Mr Blackman and his co-defendants, known as Marine B and Marine C, had been serving with J Company, 42 Commando, 3 Commando Brigade, Royal Marines, part of Task Force Helmand.
3. On 8 November 2013, the Board of the Court Martial found Mr Blackman guilty of murder and acquitted his co-defendants. Mr Blackman was sentenced to life with a minimum tariff of 10 years' imprisonment, and was dismissed with disgrace from HM Armed Forces. The tariff was later reduced to eight years' on appeal.

Operational context

4. In 2001, HM Armed Forces were deployed as part of the International Security Assistance Force to Afghanistan. During the deployment they became engaged in *Operation Herrick* combating the Taliban insurgency in Helmand province, southern Afghanistan. The specific counter-insurgency operation during which the index offence occurred was known as *Herrick 14*.
5. *Herrick 14* was part of the UK Government's commitment to withdraw HM Armed Forces from Afghanistan by 2014, by increasing the capability and capacity of the Afghan National Security Forces to deliver security.
6. 42 Commando comprised three rifle companies: M, L and J Company, and had responsibility for an area of operations known as Nad-e Ali North. Other Royal Marines, 45 Commando, were responsible for the Nad-e Ali South area. In early September 2011, the two areas were merged under the command of 45 Commando.

7. 42 Commando group headquarters was located at a forward operating base at Shazad in south west Helmand, which itself had other smaller Check Points ("CP") under its control including CP Taalanda and CP Omar. A high-definition camera system ("PGSS") was mounted on a balloon above the Shazad base and acted as watch for enemy activity.
8. Mr Blackman was in command at CP Omar and had been deployed as part of *Herrick 14* in April 2011. His six-month tour ended in October 2011. The index offence occurred less than a month before his tour ended. CP Omar housed 14 Marines including Mr Blackman.

Background to the incident

9. On the afternoon of 15 September 2011, CP Taalanda, approximately 1.5 km from CP Omar, had come under small arms fire from two insurgents observed by PGSS at Shazad. An Apache helicopter from Camp Bastion was deployed. One of the armed insurgents, observed in an open field, was engaged by the Apache, which fired 139 rounds from its 30-millimetre cannon. This was observed live by PGSS feed to the operations rooms both at Shazad and central command at Camp Bastion.
10. Just prior to the Apache engagement a patrol of nine Royal Marines from CP Omar led by Mr Blackman – and including Marine B and Marine C – had been ordered to search compounds north of CP Omar where, according to reports received, the insurgents were located. The patrol had found nothing and was returning to CP Omar when Mr Blackman received an order via his radio, to undertake a battle damage assessment following the Apache engagement.
11. The patrol located a severely injured man of apparent Afghan nationality whom the patrol believed to have been fired upon by the Apache. The man was lying in the middle of a field and was found to be armed with an AK-47 assault rifle, two magazines of ammunition and a grenade. He was disarmed by Mr Blackman and another Marine, while the other members of the patrol provided protective cover.

The Case for the Prosecution

12. The Prosecution's case was that the man had not been killed in the Apache helicopter attack; rather, he had been severely wounded and Mr Blackman subsequently murdered him assisted by his co-defendants, who were also guilty of murder on the basis of joint enterprise.

13. The case against Mr Blackman was based on two main sources of evidence: a video recording of the incident and Mr Blackman's police interview. This evidence was supplemented by other sources such as a pathology expert and a journal kept by Marine C.

Video recording

14. The incident was captured by a camera mounted on the helmet of Marine B. It was his personal property. The use of privately owned video cameras is officially prohibited in theatre, regardless of rank or role.
15. There were a total of five clips of events following the Apache engagement of the insurgent, which can be summarised as follows:
 - Clips 1&2: The patrol poised, during and immediately after, the Apache engagement;
 - Clip 3: Mr Blackman and Marine C in the middle of a field approaching and then standing over a person (who cannot be seen) and undertaking various procedures to disarm them;
 - Clip 4: The injured man is dragged through the field to a position under cover of shrubbery and trees. No attempt to provide first aid is observed. The group discuss shooting the injured man;
 - Clip 5: The injured man, now on his front, is rolled onto his back. Mr Blackman leans in and shoots the injured man once in his chest. The injured man reacts by moving his arms and legs. Mr Blackman makes several audible comments.
16. From these clips the Prosecution summarised the relevant actions and accompanying dialogue as follows:
 - i. The man had been alive when he was found by Mr Blackman, despite the apparent extent of his injuries;
 - ii. Mr Blackman ordered the injured man be moved in order to prevent the PGSS and the Apache crew from seeing what they were planning to do to him;
 - iii. Marine B and another Marine dragged the injured man through the field to an area on its boundary, in the tree line;

- iv. Despite the seriousness of his injuries, the man was handled brutally and no attempt was made to give him medical assistance. Marine B said "Don't give a fuck about you son". Mr Blackman said "Anyone want to do first aid on this idiot?" There was a negative response;
- v. Although the injured man had been disarmed and posed no threat, Marine C kept his weapon trained on him and wanted to shoot him. He spoke of putting a bullet in the injured man's head to which Mr Blackman responded "No, not his head, 'cause that'll be fucking obvious".
- vi. Mr Blackman expressed concern that they could be seen by the Apache helicopter which had remained in the vicinity, circling. Marine C said that the Apache would be behind the tree line "in a minute";
- vii. Marine B pretended to administer first aid, encouraged by Marine C who said "just pretend to do it", until the Apache had gone behind the tree line;
- viii. Mr Blackman informed the operations room at Shazad over the radio that the injured man had died. He said that the patrol would biometrically enrol the man before moving back to CP Omar;
- ix. Having completed the radio message Mr Blackman said that, as the injured man was dead, Marine B should not waste a first aid field dressing on him;
- x. Mr Blackman asked the whereabouts of the Apache and was told by Marine B that it had gone;
- xi. Mr Blackman then shot the insurgent in his chest with his sidearm from close range and said "There you are, shuffle off this mortal coil you cunt."
- xii. He paused for some 15 seconds, crouching by the side of the insurgent, and then said "It's nothing you wouldn't do to us";
- xiii. He then said to the patrol "Obviously this doesn't go anywhere fellas. I've just broken the Geneva Convention";
- xiv. Marine B replied in the affirmative and said that if anything got heard that he would say that a "warning shot went down."

17. Following the shooting, biometric data was collected from the body which was then left in situ and the patrol returned to CP Omar. No official mention or report was made that Mr Blackman had shot the injured man.

Police Interviews

18. The incident came to the attention of Suffolk Police during an unrelated civilian criminal investigation in September 2012, a year after the events. A clip of Marine B's video footage - clip four of the five clips that were eventually recovered - was found on a laptop unconnected to the three defendants. The Police viewed the clip and, concerned, referred the matter to the Royal Military Police ("RMP") for investigation. Clip four did not show the shooting of the insurgent.
19. Mr Blackman was arrested by civilian and RMP officers at his home in Somerset on Saturday 22 September 2012. He was cautioned and interviewed at Taunton Police station in the presence of a duty solicitor where he was shown clip four. He provided the following account of the incident captured on the footage.
 - i. While on patrol, Mr Blackman had been informed by headquarters that a possible insurgent had been spotted as he had moved across a field, where he was engaged by the Apache helicopter;
 - ii. Following the engagement, he had been ordered to conduct a battle damage assessment. Upon arrival he, together with Marine C, approached the man lying in the field and disarmed him;
 - iii. Mr Blackman made the decision to move the injured man because they were in an exposed position. The injured man was moved not in a "particularly friendly manner" and there had been some banter about "topping" him. That did not happen;
 - iv. Mr Blackman admitted that he had asked if anyone wanted to do first aid on the "idiot". He accepted that the question would have had a negative impact upon a young soldier, but he thought the insurgent had been an idiot for moving across open ground;
 - v. Mr Blackman accepted he had heard someone say whether "one should be put" in the insurgent's head and that he had

replied that that would be too obvious. He said first aid was administered shortly after clip four ended but that the man died of his injuries. He said that he, personally, administered first aid to the injured man. He said they then moved on gathering the evidence and took biometric information from the corpse.

- vi. He said to interviewing officers "All joking aside, no one killed him" and "he died of his injuries". After the injured man had passed away, he said, Mr Blackman had ordered the patrol to leave the body where it lay.
20. Mr Blackman did not mention that he had discharged his sidearm into the injured man. He was asked if there was anything else he wanted to add or clarify but said there was not. The interviewing officer thanked Mr Blackman for his honesty in his answers to which Mr Blackman replied that there no use "in telling lies". He was not charged with any offence and was released.
 21. The relevant footage of the actual shooting - clip five - was not available at the time of Mr Blackman's first police interview because the headcam on which it was later located was not seized from Marine B until four days later, on 26 September 2012, when he too was arrested. RMP found that both the headcam and its memory card had been wiped of all footage but experts were able in due course to retrieve all five clips that had been deleted.
 22. Mr Blackman was consequently interviewed a further three times.
 23. The second interview took place three weeks later, on Thursday 11 October, by which time he had instructed a solicitor, Ms Issy Hogg, to represent him. Upon advice he did not answer any questions. He instead submitted a short prepared statement stating that there was nothing he wished to add to what he had previously said.
 24. Following the second interview it was disclosed to Ms Hogg that further footage had become available. The third interview took place the next day, on Friday 12 October 2012, for the purpose of watching all five video clips together. A detailed interview was then arranged to take place the following day.
 25. The final interview took place on Saturday 13 October 2012. Mr Blackman did not answer any questions. Ms Hogg had taken a further prepared statement from him, that was submitted to the interviewing officers, setting out what became his defence. At the conclusion of the interview Mr Blackman was charged with murder.

26. At the Court Martial all three defendants admitted that they had told lies to the interviewing officers when questioned about how the injured man had died. The Prosecution argued that it was a factor relevant to the assessment of their credibility as witnesses: they were willing to lie and their lies were capable of being treated as evidence indicative of their guilt.
27. The Prosecution also relied upon the evidence of expert witness Dr Nicholas Hunt, a Home Office Pathologist, whose opinion was that the insurgent had been alive at the material time, albeit badly injured following the Apache engagement. The Prosecution submitted that it was not trial by expert: the video footage was enough for the Board of the Court Martial to assess whether the injured insurgent had in fact still been alive. The footage had been transcribed by an audio expert, Professor French.
28. In summary, the Prosecution's case was that Mr Blackman had shot the injured man at a time when he knew he had been alive and with the full intention to kill the insurgent. That was clear from his words and acts both immediately before and after the shooting.
29. The Prosecution submitted that Mr Blackman had lied to the RMP officers and that his evidence before the Board was unconvincing and untruthful. The video footage spoke for itself and demonstrated clearly that the injured man had been executed. It was not a killing in the heat and exercise of armed conflict. At that time the injured man posed no danger.

The Case for the Defence

30. Mr Blackman gave evidence consistent with his second prepared statement. He accepted that he had discharged his sidearm at the insurgent and had said what he had been recorded as saying. His case was that he had no intention to kill because his genuine belief at the crucial time was that the man had already been dead. In the absence of intention he could not be guilty of murder.
31. Mr Blackman explained that his comments regarding the Geneva Convention did not relate to him murdering the insurgent, but rather that he had desecrated a corpse.
32. Mr Blackman explained his lies during the first police interview on the basis that he was ashamed of what he had done, in shooting a corpse. It was probably, in truth, unrealistic to expect Mr Blackman to have confessed to his full role in the incident at that stage, bearing in

mind there had been no evidence of the offence at the time of the first police interview.

33. The Board found Mr Blackman guilty of murder and acquitted his two co-defendants.

The Appeal

This section summarises the arguments raised on appeal and the outcome of the appeal.

34. Following advice received from trial counsel, Mr Blackman sought and was granted leave to appeal against both conviction and sentence.
35. Against conviction, the sole ground of appeal related to the suggestion that Mr Blackman's position, at Court Martial, had been less fair than that guaranteed by civilian jury trial in that the procedure allowed for a guilty verdict by way of simple majority. It was arguable, therefore, that the risk of a guilty verdict having been by simple majority indicated that the Prosecution need not have satisfied the criminal standard of proof.
36. Against sentence, Mr Blackman submitted that the tariff imposed was manifestly excessive in the exceptional circumstances of the case, and that insufficient mitigation had been given following the psychiatric report obtained from Dr Orr for sentencing purposes.
37. On 22 May 2014 judgment was delivered by the Court of Appeal.¹ Mr Blackman's appeal against conviction was rejected. His appeal against sentence was allowed to the extent of the minimum term being reduced to a period of eight years' imprisonment. The Court of Appeal identified mitigating factors which, it considered, indicated that a greater reduction from the starting point had been appropriate. As pertains to Mr Blackman's application to the CCRC, paragraph 75 of the judgment is noted:

"On all the evidence before us it is clear that in the events surrounding the murder of the insurgent the appellant acted entirely out of character and was suffering from combat stress disorder. It is very unfortunate that the only medical evidence before the Court Martial and before us was obtained over two years after the murder. We have accorded particular attention to the view of the Court Martial that thousands of other service personnel experienced the same or similar stresses and still acted properly and humanely. However, in assessing the evidence of stress and its effect on the appellant, we attach particular importance to the evidence in relation to the remoteness of the command post at which the appellant had been stationed for five-and-a-half months and the limited contact with those commanding him. His mental welfare had not been assessed in the way in which it would ordinarily be assessed by a commanding officer and there is evidence that he was becoming somewhat paranoid about the Taliban's 'gunning' for him. Taking into account the whole of the evidence, we

¹ [2014] EWCA Crim 1029; [2014] 2 Cr.App.R. 18

conclude that combat stress arising from the nature of the insurgency in Afghanistan and the particular matters we have identified as affecting him ought to have been accorded greater weight as a mitigating factor."

The Applicant's Submissions

38. On 16 December 2015 the CCRC received Mr Blackman's application comprising seven lever-arch files including fresh evidence, correspondence and transcripts together consisting of over 1000 pages of submissions and supporting documentation. The application was prepared by Mr Blackman's new legal representatives headed by Mr Jonathan Goldberg QC.
39. The issues raised by Mr Blackman's representatives include:
- i. New evidence, in the form of an expert pathology report by Dr Ashley Fegan-Earl, which supports Mr Blackman's trial defence that the insurgent had appeared dead and that he believed him to be so, before he shot him;
 - ii. New evidence in the form of a psychiatric report by Professor Neil Greenberg, who concludes that Mr Blackman had been suffering from an abnormality of mental functioning at the time of the incident and which thus reduces his level of culpability; a further report from Dr Orr agreeing with the findings of Professor Greenberg.
 - iii. New evidence has been identified which indicates that manslaughter by reason of loss of control ought to have been left to the Board as an alternative to murder;
 - iv. New argument that, on the evidence adduced at trial, the lesser verdicts of unlawful act manslaughter and gross negligence manslaughter ought to have been left to the Board as an alternative to murder;
 - v. New argument that Mr Blackman was subjected to improper cross-examination on inadmissible evidence;
 - vi. New argument that Mr Blackman's defence representation was incompetent.

The CCRC's Review

40. The CCRC has considered all relevant papers and the video footage of the incident. The extensive public body material the CCRC obtained using its statutory powers is listed at Annex 1.
41. During the course of the review the CCRC met and/or spoke to, or attempted to speak to, or received a statement from the following:
 - Royal Military Police senior investigating officer, *Operation Telemeter*, Lt Col John McAllister;
 - Prosecution lead counsel, David Perry QC;
 - Defence solicitor, Ms Issy Hogg;
 - Defence lead counsel, Anthony Berry QC;
 - Defence junior counsel, Peter Glenser;
 - Defence assisting officer, Major Steven Cox;
 - The Judge Advocate General ("JAG"), His Honour Judge Blackett;
 - Marine B's defence counsel, Martin Meeke QC.
 - Brigadier Ian Huntley, author of the Telemeter Report
42. The CCRC met with Mr Blackman's new legal team and his wife on 27 April 2016.
43. The CCRC instructed consultant forensic psychiatrist Dr Philip Joseph of St Charles Hospital, London, to provide a critique of the fresh psychiatric evidence submitted from Professor Greenberg, and Dr Orr; and to undertake a fresh and independent psychiatric assessment of Mr Blackman. Dr Joseph's report was submitted to the CCRC on 3 November 2016.
44. The CCRC learned of a telephone call that was made by the President of the Board after the Board had retired to consider its verdict. This was not an issue raised with the CCRC by Mr Blackman's representatives. The CCRC decided to consider the matter, the details of which are discussed below.

Analysis and Reasons

Context of assessing Mr Blackman's intention

45. As a precursor to proving that Mr Blackman had, in fact, committed murder, it was necessary for the Prosecution to show first that, factually, the insurgent had been alive at the time that Mr Blackman discharged his sidearm and that, as a result of that shot, death had been caused or hastened. Mr Blackman's Defence Case Statement included the requirement for proof: "No admission is made that the person who [Mr Blackman] shot that day is in fact dead."²
46. There were two aspects of the evidence presented at trial which, the CCRC considers, were fundamental in establishing that in all likelihood the insurgent (hereinafter referred to as "the victim") had been alive at the relevant time: the footage contained in Clip 5 and the evidence of Dr Nicholas Hunt, the Home Office Pathologist.
47. To a large extent, the events featured in Clip 5 speak for themselves. The footage was, of course, before the Board at trial and featured centrally in the Prosecution's case. The CCRC has reviewed all recorded footage and considers, in particular, that the degree of movement demonstrated by the victim both before and after Mr Blackman discharged his sidearm may be particularly telling to a layman, in terms of evaluating the victim's condition at the crucial time.
48. Dr Hunt gave evidence at trial and answered questions raised regarding the footage recorded. He stated that in his expert opinion the victim had been alive at various points shown in the footage. The CCRC notes in particular the following exchange during his evidence-in-chief:

Q: And we hear the sound of the weapon discharging. What is the reaction that we see from the injured individual?

A: The hands -- particularly the right hand comes up to the area in which the weapon has been discharged. That's the first thing I noted.

Q: That is the hands, what about the legs? What do we see in relation to the legs?

A: The legs also seem to move really quite significantly immediately after the hands had come up to the chest.

Q: And then if we could just ask you please about the head?

² At page three, paragraph two

A: Yes, his head starts to move and his breathing becomes very obviously laboured. It's much more rapid than it has been before and much deeper breaths.

Q: So far as we are concerned, at the beginning of my questioning you, Dr Hunt, I identified one of the matters that you have been asked to provide an opinion upon was whether the male that we see in the film was alive at the point at which he was shot. May I just ask you what is your expert opinion as to whether or not he was alive at the point he was shot?

A: He was still alive at the point he was shot."³

49. No serious challenge was made at trial to the Prosecution's evidence on this point. Dr Hunt was cross-examined, but the defence had no basis for sensibly challenging his expert opinion that the victim had been alive when Mr Blackman shot him.

50. Prior to trial Mr Blackman's legal team had obtained a report from Dr Jason Payne-James, a forensic physician. Dr Payne-James had available to him Dr Hunt's written report. Having considered various witness statements, transcripts of police interviews and the five video clips, Dr Payne-James indicated that he was "in general agreement with Dr Hunt's assessment of the video clips."⁴ He was not called at trial. In his conclusion, Dr Payne-James stated that:

"...the spontaneous and varied movements identified both before, and in response to, the discharge of the sidearm indicate that the Afghan National was alive at the time of the discharge."⁵

51. Mr Blackman's legal team did not obtain a report from a pathologist.

52. In the context of the above, the CCRC considers, Mr Blackman's legal representatives should have recognised that little challenge could be made to the suggestion that, factually, the victim had been alive at the time Mr Blackman had discharged his sidearm.

53. That position should have been clear at the latest from 10 April 2013, when Dr Payne-James attended a three-hour conference with defence counsel Mr Berry QC and Mr Glenser. That was approximately five months prior to trial. In a witness statement dated 18 August 2016, submitted to the CCRC, Mr Berry QC discussed that conference and stated, at paragraph 15:

"We also discussed the questions of agonal breathing and post-morbid movement in some detail. It was clear that Professor Payne-James

³ Transcript of Proceedings, 29 October 2013, at 18B

⁴ Paragraph 345

⁵ Paragraph 356

could not provide evidence to assist our cause. Indeed, had he given evidence he would have been cross-examined in such a way as to destroy any possibility in the eyes of the jury that the insurgent might have been dead."

54. In addition to the expert evidence on this point, the CCRC notes that Mr Blackman's solicitor, Ms Hogg, has indicated that, when she first was shown the footage from Clip 5, she was of the view that it constituted evidence sufficient with which to charge Mr Blackman with murder.⁶ It must, therefore, have been her opinion that it at least *prima facie* indicated that the victim had been alive at the crucial time.
55. A later conference note, dated 10 June 2013, contained within the defence files seen by the CCRC, states, "Evidence against him is overwhelming".
56. The CCRC concludes that, if it is correct to identify that, factually, the victim had been alive when Mr Blackman discharged his sidearm and that he thereby caused or hastened death, then in law Mr Blackman's actions must have rendered him susceptible to be convicted of either murder or manslaughter. This was not a situation in which Mr Blackman's actual belief as to the victim's condition could ever have been likely to provide him with a complete defence and result in his release.⁷
57. At trial, no real challenge was made or indeed could be made to the evidence which indicated the victim had been alive. The JAG directed the Board regarding the need so to find, in his Summing-up:

"...In relation to the evidence of the pathologist, you must decide whether the prosecution has satisfied you so that you are sure that the insurgent was alive when [Mr Blackman] fired a bullet into him, and the bullet accelerated his death."⁸
58. If it was a possibility that the Board would find that, factually, Mr Blackman had caused or hastened the victim's death, then it should have been empowered with the option of returning a verdict of guilty of manslaughter, depending on the view it took as to Mr Blackman's intention. In the event, the JAG did not direct the Board that manslaughter was a legitimate option, although the CCRC concludes that Mr Blackman's legal representatives should have anticipated that such a direction could be made. The inability of the Board to make such a finding potentially amounts to a material irregularity.

⁶ See Record of Taped Interview, 13 October 2012, at p4

⁷ An analogy could be drawn with a hypothetical insurgent who had merely been asleep rather than seriously wounded. In law, the distinction should not matter

⁸ Transcript of Proceedings, 6 November 2013, at 43F

59. In *R v Coutts*⁹ Lord Bingham stated, at paragraph 12:

"In any criminal prosecution for a serious offence there is an important public interest in the outcome... The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (*Von Starck v R* [2000] 1 WLR 1270, 1275; *Hunter v R* [2003] UKPC 69 [27])."¹⁰

60. At Mr Blackman's trial the JAG gave the Board an appropriate direction regarding what would constitute murder¹¹:

"So, before you can find [Mr Blackman] guilty of murder, you must be sure of the following things: first, when he fired the bullet into the body of the wounded insurgent, the insurgent was alive; [Mr Blackman] knew he was alive. [Mr Blackman] intended to kill him. Secondly, you must be sure that the shot caused or accelerated the insurgent's death, whether alone or in combination with his other wounds.

[Mr Blackman] says that he believed the insurgent was dead when he discharged the weapon into his chest. You must judge him by what he believed at the time. If [Mr Blackman] believed or may have believed the insurgent to be dead, when he discharged his weapon, even if that belief was mistaken, he cannot be guilty of murder. Only if you are sure that he knew or believed the insurgent to be alive may you find him guilty."

but he did not go on to give any consideration to manslaughter.

⁹ [2006] UKHL 39; [2007] 1 Cr.App.R. 6

¹⁰ And see also the comments of Lord Rodger at para. 83

¹¹ Transcript of Proceedings, 6 November 2013, at 44G

61. The CCRC met with His Honour Judge Blackett, JAG at Mr Blackman's trial, on 16 June 2016. Among the matters discussed was the position regarding unlawful act manslaughter at trial. Judge Blackett advised that he had no memory of having considered its potential relevance at trial and that it had not been raised by any counsel.
62. The CCRC considers that it would have been appropriate to leave to the Board the option of finding Mr Blackman guilty of manslaughter on the basis of an unlawful and dangerous act, if the Board considered it appropriate to do so.

Manslaughter – Unlawful and dangerous act

63. Unlawful act manslaughter has been contextualised in the following terms:

"In respect of manslaughter arising from the unlawful act of the accused, the following propositions appear to be established:
(a) the killing must be the result of the accused's unlawful act (though not his unlawful omission);
(b) the unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting therefore, albeit not serious harm;
(c) it is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm; the *mens rea* required is that appropriate to the unlawful act in question;
(d) 'harm' means physical harm."¹²

64. The knowledge attributed to the sober and reasonable person is that which such a person would acquire as an observer of the defendant's conduct throughout the unlawful act.¹³
65. Insofar as it is necessary to establish that Mr Blackman's actions constituted an unlawful act, the CCRC agrees with his legal representatives' identification of the following criminal acts¹⁴ as potentially applicable:
- i. Performing a duty negligently, contrary to section 15(2) of the Armed Forces Act 2006 ("AFA");
 - ii. Conduct prejudicial to good order and discipline, contrary to section 19(1) AFA;

¹² Archbold 2017, at 19-112

¹³ *R v Watson* (1989) 2 All ER 865; *R v Dawson* (1985) 81 Cr App R 150; *R v Carey & Ors* 920060 EWCA Crim 17

¹⁴ Each of which is punishable by a term of imprisonment not exceeding two years

- iii. Disgraceful conduct of a cruel or indecent kind, contrary to section 23(1) AFA.

66. The CCRC considers that there is a real possibility that the Court of Appeal will consider Mr Blackman's conviction for murder to be unsafe consequent on the failure at trial to leave to the Board the option of returning a verdict of guilty to manslaughter on the basis of an unlawful and dangerous act.

Mr Blackman's defence at trial

67. Mr Blackman's defence rested on the proposition that he had lacked the required intention to commit murder, since he believed the victim to have been dead when he discharged his sidearm. That stance was one he maintained consistently from the time he first commented upon the events depicted in Clip 5.
68. In a prepared statement, read by Ms Hogg on Mr Blackman's behalf at the outset of his final taped interview¹⁵, Mr Blackman accepted that he had discharged his sidearm into the victim's body. The prepared statement continued:

"4. In my interview on 22 Sept 2012 I made reference to first aid and to his death. In the second video footage I am heard on the radio making reference to the fact that he has 'passed'. This comment is prior to my discharging my sidearm. At the time I made this comment I genuinely believed he was dead.

5. Following my return to theatre from R&R in mid-August and up to this incident, my multiple was subject to numerous contacts. On the majority of occasions we went out, when I was multiple commander, there was some form of incident. Also during the tour there were a number of casualties and fatalities.

6. By the time of the incident I had lost my troop commander, who I highly respected. I also witnessed how badly affected other members of the multiple were by other deaths and life-changing injuries. I was upset by the loss of Mr Augustine and was worried for the welfare of my lads. This was a very stressful time.

7. Returning to this incident, I regret to say that following the death of this insurgent, my stress and anger took over and I discharged my sidearm. The comments that I am heard to make during the video footage are a demonstration of my anger at the time. I accept I should not have reacted in this way.

8. However, I wish to emphasise that at the time I discharged my sidearm, I was firmly of the opinion that the insurgent was already dead."

¹⁵ Being his first interview after being shown Clip 5

69. Mr Blackman maintained in evidence that he had been of the opinion that, at the time he discharged his sidearm, the victim had already died. He, personally, had carried out a triage assessment of the victim between video clips four and five and had concluded that, "he probably wasn't long for this world."¹⁶ The Prosecution disputed this as it had not been mentioned previously.

70. When giving evidence-in-chief Mr Blackman gave the following explanation:

"Q: Right, there you are. You take your pistol out and shoot him in the chest or thereabouts.

A: I don't know exactly where in the chest; just in the chest.

Q: You thought he was dead?

A: Yes.

Q: So why did you shoot him?

A: Stupid, lack of self-control, momentary lapse in judgement.

Q: What was the purpose of it? What did you think you were doing?

A: I – well, I can't say. I've thought about it a lot obviously over the last year as we've been going through all these pleadings. I can't give a – anything to say – other than to say, you know, it was a lack of poor judgement on my part, a lack of self-control."¹⁷

71. He was prepared to accept, however, when asked to comment on the victim's movement after the shot, that he might have been mistaken:

"Q: He appears to be moving.

A: I was – I was very surprised the – the amount he did move. Obviously I believed he was dead and, having not seen any movement in him for the last few minutes, he suddenly became very animated after I'd discharged my sidearm.

Q: So what did you think to yourself?

A: I questioned whether I was right in my mind, had I made a mistake."¹⁸

72. Despite the evidence which might reasonably have led the defence team to the view, prior to trial, that the victim was likely to be found to have been alive at the relevant time, the CCRC has not identified from the defence files it has seen that any specific inquiries were made to scrutinise Mr Blackman's claim that he believed the victim was dead. If it was Ms Hogg's belief that Clip 5 had been sufficient to justify charging, then it should have occurred to Mr Blackman's legal representatives to investigate why Mr Blackman might have believed otherwise than the footage suggested and how lack of intention might

¹⁶ Transcript of Proceedings, 30 October 2013, at 30C

¹⁷ At 39C

¹⁸ At 40A, and see cross-examination by the Prosecution on this point, beginning at 58E and in re-examination at 126G

be shown. There were various aspects of the video footage and Clip 5 in particular which potentially were very damaging to Mr Blackman's claim to have suffered a momentary lapse in judgement or loss of self-control.¹⁹ It is also appropriate to question why it did not occur to them to advise Mr Blackman that a realistic outcome, if factually he was shown to have hastened the victim's death, was a conviction for manslaughter.

73. The CCRC considers that Mr Blackman's admissions, as they emerged at trial, both during his evidence-in-chief and cross-examination, could not have come as a surprise to his legal representatives had they given appropriate scrutiny to his stated belief and relevant instructions taken. The CCRC notes the summary given by the JAG, as he reminded the Board during his Summing-up:

"Several times in his evidence, [Mr Blackman] reiterated that he was surprised how animated the insurgent became. He said:

'Because in my opinion he was dead when I discharged the weapon. I have seen a lot of dead people move after they are dead before, but I questioned in my own mind whether or not I had made a mistake. The thought crossed my mind that I might have shot a person who might have been alive. I didn't think to ask anyone if he was alive in the heat of the moment. I believed I fired into a corpse and I was ashamed. After the fact there was a possibility of doubt but I didn't want to dwell on it and I didn't want to talk about it. In retrospect and looking at the video, I accept there is a strong possibility that he was alive when I shot him, but I didn't speak to anyone about this afterwards. I was ashamed of my actions and wanted to forget about it.'"²⁰

74. The CCRC considers it is notable that no Proof of Evidence statement was obtained from Mr Blackman. In the wholly exceptional circumstances of this case it was, arguably, of even more importance than normal to clarify Mr Blackman's position and investigate factors potentially of relevance. The setting involved matters entirely outside the experience of civilian observers – including the defence team – and, despite the superficially simple nature of the defence, consideration should have been given to factors which might have operated in the background to the shooting. As a preliminary step towards making such investigations, a Proof of Evidence would have been invaluable.
75. During its own investigation the CCRC met with Mr Blackman's trial solicitor, Ms Hogg, to discuss various aspects of the case. That

¹⁹ See paragraph 16, above.

²⁰ Summing-up, 7 November 2013, at 18B

meeting took place on 24 May 2016.²¹ When asked about the absence of a Proof of Evidence statement Ms Hogg indicated that she had been satisfied that Mr Blackman's prepared statement, read at the outset of his final taped interview, contained the entirety of his instructions in the case and from which he at no stage deviated. The CCRC considers, however, that Mr Blackman's claim to have believed the victim to be dead at the crucial time must have appeared to lack credibility in view of the likely factual findings and his own inability to explain that belief adequately. It should also have led to the reasonable view that a conviction for manslaughter would be a realistic prospect even if the Prosecution could not satisfy the Board that Mr Blackman's claim to have lacked intent had been false.

76. No evidence supportive of Mr Blackman's stated belief was brought at trial. No investigations were undertaken with the aim of attempting to explain that belief, which stood in the face of the video and expert evidence that was described as "overwhelming" and which Mr Blackman himself could explain only superficially. That Mr Blackman's actions had been demonstrably out of character was highlighted by Mr Berry QC in his closing address, during which he quoted at length from various excellent or outstanding performance reviews compiled on Mr Blackman's conduct during his period of service.²²

Psychiatric evidence – pre-sentencing

77. Following Mr Blackman's conviction – and for the first time – a psychiatrist was engaged by Mr Blackman's legal representatives. The psychiatrist concerned, Dr Orr, was briefed orally and no letter of instruction is available.²³ He was aware that Mr Blackman had by that stage been convicted. His report, dated 27 November 2013, was before the Court for mitigation purposes in sentencing. At paragraph 1.2 of his report Dr Orr advised that he had:

"...been asked to focus on [Mr Blackman's] deployment to war zones in Iraq and Afghanistan and to report on any aspects of his experiences during his tours in Iraq and Afghanistan which might have affected his psychological well-being and/or influenced his judgment or behaviour."

78. Dr Orr identified a number of factors which might, in his opinion, have been relevant to Mr Blackman's mental state at the time of the incident. At paragraph 8.15 he concluded:

²¹ A copy of the CCRC's notes of that meeting was provided to Ms Hogg with a request for her to confirm their accuracy. No response has been received to date

²² Defence Closing Address, Transcript of Proceedings, 5 November 2013, at 6A – 11A

²³ See Dr Orr's second report, dated 4 December 2015, at 3.2.4.

"I felt that there were particular aspects of his situation and mental state which could be taken into account in determining the just consequences of his offence and these related to (a) the evidence of accumulated frustration with some aspects of his past and recent military experience (b) the likelihood of [Mr Blackman's] resilience having been compromised by a reactivation of his bereavement reaction following his father's death and (c) the emergence of some symptoms of a combat stress disorder characterised by paranoid interpretations of combat situations while on patrol and the increasing intensity with which [Mr Blackman] took this as a personal matter."

79. Dr Orr's conclusions were taken into account by the Court of Appeal in its consideration of Mr Blackman's sentence.²⁴
80. The Court also referred, at paragraph 40, to the absence at trial of any consideration of circumstances which potentially bore on Mr Blackman's state of mind, calling that a "very unfortunate circumstance".

Psychiatric evidence – post appeal

81. Submitted to the CCRC with Mr Blackman's application were two new expert reports from psychiatrists. The first, dated 15 November 2015, is from Professor Neil Greenberg. The second is an updated report from Dr Orr dated 4 December 2015 which principally contains his revised and expanded conclusions, following his consideration of Professor Greenberg's report.
82. The reports submitted to the CCRC contain a number of issues, bearing on a variety of potential defences to a charge of murder. They will be outlined and considered further below. The CCRC will here confine discussion to aspects of those reports which potentially bear upon Mr Blackman's defence at trial – that he had believed the victim to be dead when he discharged his sidearm.
83. Professor Greenberg's report considered remarkably wide source material and followed his interviewing a number of relevant persons. At paragraph 33.1, he gave the following opinion:

"In my opinion, there is good evidence that, at the time of the killing, Sergeant Blackman was suffering from symptoms consistent with an adjustment disorder. An adjustment disorder is a diagnosis within the International Classification of Diseases Volume 10 (ICD 10) which is a very widely used diagnostic classification system published by the World Health Organisation. Adjustment disorders follow the

²⁴ See paragraph 37, above

experiencing of psycho-social stressors, which do not have to be of a highly unusual or catastrophic type, within the month before the onset of symptoms. The emotional symptoms and or behavioural disturbances associated with this diagnosis can be highly variable in their form [e.g. anger, irritability, being withdrawn etc] and severity. It is my view Sergeant Blackman experienced a substantial disturbance of both emotions and conduct as a result of his adjustment disorder. It is notable that adjustment disorders do not ordinarily persist for more than six months after the cessation of the stressor. In this case the relevant stressors included the challenging nature of the deployment itself, the logistical and manpower frustrations he experienced and the reports he and his team had received about the inhumane behaviour of the insurgents (e.g. hanging limbs in trees)."

84. Dr Orr, in his second report, was asked to consider Professor Greenberg's diagnosis. He agreed that the evidence indicated Mr Blackman had been suffering from symptoms consistent with an adjustment disorder at the time of the incident.
85. Following consideration of Dr Orr's and Professor Greenberg's reports, the CCRC instructed a further consultant forensic psychiatrist to examine Mr Blackman, consider the previous reports and address Mr Blackman's condition. On 3 November 2016 that psychiatrist, Dr Philip Joseph, reported to the CCRC. At paragraph 37 of his report Dr Joseph agreed that Mr Blackman had been suffering from the effects of an adjustment disorder at the time of the shooting:

"On 15 September 2011, the day of the killing, Mr Blackman was suffering from an abnormality of mental functioning. It arose from a recognised medical condition, namely an adjustment disorder, which is defined at F43.2. in the International Classification of Diseases 10th Edition (ICD-10). The symptoms of an adjustment disorder are variable, but include depressed mood, anxiety, worry, a feeling of inability to cope, plan ahead, or continue in the present situation, with some degree of disability in the performance of daily routine. Depressed mood can, as in Mr Blackman's case, be experienced as a numbing of the normal range of feelings."

86. The CCRC considers it clear from the above that new evidence exists which indicates a consensus between three distinguished psychiatrists that, at the time of the shooting, Mr Blackman had been suffering from a recognised medical condition.
87. The CCRC considers that recognised medical condition is relevant to Mr Blackman's defence at trial: that he believed the victim to have been dead when the shot was fired and therefore lacked the necessary intention to kill. At paragraph 33.7. of his report Professor Greenberg stated:

"The impact of his adjustment disorder would have been to make him less able to make properly judged decisions particularly ones which he was being asked to do in quick time with limited time to think through the consequences of his actions...In my view one of the effects of the adjustment disorder was to make him less inclined to care about what he did..."

88. Professor Greenberg continued, at paragraph 33.8:

"In my view his adjustment disorder would have made him less likely to pay due care and attention to possible signs of life in an individual who had clearly been seriously injured and whom he continues to report that he thought was dead at the time he shot him. In my view it was unfortunate that the Court Martial, by reason of having no psychiatric report before conviction, did not have the opportunity to consider the impact of his state of mind at the time of the killing in relation to his ability to judge whether the insurgent was truly dead or not. Whilst it is apparent that he did not particularly desire to help the injured insurgent, in my view it is more likely than not that his adjustment disorder would have significantly impacted on his assessment of whether the insurgent was alive or dead. The impact of the adjustment disorder is relevant to both how diligently he carried out the assessment as well as his competence to do so."

89. A similar view was expressed by Dr Joseph who, at paragraph 43 of his report, stated:

"Mr Blackman now accepts that at the time he shot the insurgent, although he thought he was dead, he did not really care or think it through. He is accepting the possibility that as a result of not really caring, the deceased may have been alive when he shot him. His medical condition of an adjustment disorder is likely to have affected his judgement of the situation in a battlefield setting, because the condition has caused a numbing of his normal emotional response, leading to feelings of apathy, a lack of care, consistent with a depressed mood, with some inability to cope or plan ahead, leading to a degree of disability in the performance of his daily routine. It is notable that some individuals when suffering from an adjustment disorder may feel liable to dramatic behaviour or an outburst of violence, although this rarely occurs. This can impair an ability to exercise self-control. However the adjustment disorder would not have created a delusional belief in Mr Blackman that the insurgent was dead when he was not, but it would induce a recklessness about checking properly whether he was alive or dead, or caring whether he was. If Mr Blackman was mistaken, in believing the insurgent was dead when he was not, then this was not caused directly by the condition and therefore when the adjustment disorder resolved the mistaken belief would persist."

90. In the CCRC's view, the evidence now available would have been of significant assistance to Mr Blackman at trial in terms of its offering a possible explanation – either in full or in part – for his actions. His evidence both in chief and in cross-examination lacked persuasiveness in the absence of any explanation for his belief.
91. Further, as Dr Joseph indicated at paragraph 38 of his report, "...It is important to point out...that Mr Blackman's demeanour on the video around the time of the killing does not preclude him from suffering from an adjustment disorder."
92. In the context of unlawful act manslaughter potentially applying in Mr Blackman's case, once it was established that he had discharged his sidearm intentionally, the objective observer would not take into account Mr Blackman's erroneous belief that the victim had been dead.²⁵
93. The effect of the new medical evidence if admitted, the CCRC considers, would be to raise or reinforce a real possibility that the Court of Appeal would accept that manslaughter on the basis of an unlawful and dangerous act would have been the appropriate verdict, had the new medical evidence been available for consideration at trial, in view of its impact upon Mr Blackman's intention and mental competence at the time of the incident.

Admissibility of the new psychiatric evidence

94. At this stage, and for the purposes of any further appeal, the new evidence must be considered in the context of section 23 of the Criminal Appeal Act 1968 to assess whether the Court of Appeal would receive it. Section 23 provides that the Court of Appeal may receive evidence if it finds it necessary or expedient in the interests of justice to do so. In applying this test, section 23 goes on to state that the Court of Appeal must have regard in particular to whether:
 - i. The evidence appears to the Court to be capable of belief;
 - ii. It appears to the Court that the evidence may afford any ground for allowing the appeal;
 - iii. The evidence would have been admissible in the proceedings from which the appeal lies and on an issue which is the subject of the appeal; and
 - iv. There is a reasonable explanation for the failure to adduce the evidence in those proceedings.

²⁵ *R v Ball* 1989 CLR 730

95. The Court of Appeal will consider an application for receipt of new evidence in its fact specific context. In applying that test to the circumstances in Mr Blackman's case, the CCRC considers it likely that the first three criteria would be found to be met.
96. Had it been available at trial, the evidence of all three psychiatrists on this subject would have been relevant to the Board's consideration of Mr Blackman's state of mind and belief at the time the shot was fired. It could have explained, in full or in part, Mr Blackman's actions.
97. The CCRC considers that the psychiatric evidence would have increased awareness that it was appropriate for the Board to have the option to find Mr Blackman not guilty of murder but guilty of manslaughter. Had such psychiatric evidence been available, it could have reinforced the view of the JAG that unlawful act manslaughter was a realistic option for the Board to consider, if it found that factually Mr Blackman had hastened the victim's death. In *R v Coutts*²⁶ Lord Bingham stated:

"The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinary knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

98. Bearing in mind its apparently fundamental relevance to the defence offered by Mr Blackman at trial, the CCRC finds that the Court of Appeal would in all likelihood admit the new psychiatric evidence, subject to satisfactory explanation of the failure to raise this matter at trial or on appeal. This issue is considered further below.

²⁶ [2006] UKHL 39; [2007] 1 Cr.App.R. 6, at para. 23; and see *von Starck v The Queen* [2000] 1 WLR 1270 at 1275C

Mr Blackman's lack of insight

99. Although no psychiatric evidence had been obtained prior to trial, the possibility was at one stage raised with Mr Blackman. In a conference note, dated 10 June 2013, contained within the defence papers seen by the CCRC, the following is recorded:

"[ABQC:]Afghanistan: any point of seeing a psychiatrist to say that what had happened had affected you so much that you behaved in a way you would not otherwise behave? No.

ABQC: So, psychiatric assessment will only inform a board of the background rather than be evidence that you behaved in an out of character manner.

AB: Agreed. Would be a created scenario.

ABQC: CM [court martial] would be more impressed by the fact you were trying to deal with lots of things you did not want to show but knew how to handle. So, let's leave the medical evidence aside."

100. A second note of the same conference states, "AB not keen on potentially disingenuously relying on a psychiatric explanation when his behaviour was not radically altered."
101. Relevant to consideration of those comments and also Mr Blackman's defence at trial are the comments of Professor Greenberg and Dr Joseph regarding Mr Blackman's lack of insight into the psychiatric illness from which he had been suffering at the time of the incident.
102. At paragraph 11.7. of his report Professor Greenberg repeated Mr Blackman's perception, as related to him in interview, of his mental health at the time of the shooting:

"Mr Blackman did not feel that he was currently ill. He said at the time he had been on tour he had not thought of himself as being ill. He had recognised that he was suffering a number of symptoms [e.g. poor sleep, poor concentration and being highly alert to potential threats] and that his behaviour was somewhat different from normal; however at the time he felt [that] his situation was 'just the way that things were'"

103. In his conclusion, at paragraph 33.17. Professor Greenberg commented that:

"In my view, Sergeant Blackman's personality is one which does not lend itself to self-disclosure of emotional material or indeed to speaking openly about fears or concerns with those he worked with

directly... Sergeant Blackman reported to me that he does not try and dwell on any difficulties he might be experiencing and indeed whilst he had acknowledged that he was experiencing a number of psychological symptoms during *Herrick 14* he did not consider that they were indicative of him suffering from a mental health disorder. As such he did not ask for any help at the time nor did he ask that the legal team on whom he relied during his trial should have paid particular attention to his mental health status."

104. Dr Joseph, in his report at paragraph 42, added to those comments regarding lack of insight:

"...Mr Blackman was not aware of the psychiatric condition he was in in the period leading up to and including the killing, and therefore there was a lack of insight on his part."

105. These comments will be relevant to the Court of Appeal's consideration of the reasons why expert psychiatric evidence was not brought at trial. The standard of defence that Mr Blackman received both before and at trial will also be relevant, and is considered in more detail below. It is appropriate to note here Dr Joseph's comments regarding lack of insight contributing to Mr Blackman's reluctance to obtain psychiatric evidence:

"Mr Blackman has explained to me what he meant by the term '*creative scenario*' by which he meant that he did not want to create a psychiatric defence. He did not know whether he had any psychiatric disorder at the time of the killing, nor would I expect him to. He thought the psychiatric route meant creating the psychiatric diagnosis of post-traumatic stress disorder (PTSD), which he had seen in various colleagues and which he was not suffering from. He was not aware that there are other stress-related psychiatric disorders apart from PTSD. He went along with the legal advice because he considered his barrister to have the expertise to advise him and he is used to respecting the views of authority, bearing in mind his military training. It is also likely that Mr Blackman resisted the partial defence which might have been available to him because of the stigma, perception of weakness and the end of his career which he associated with such a defence... I am unable to say whether there was a potential oversight on the behalf of his lawyers in failing to advise Mr Blackman to further explore the defence. I doubt that it was a tactical decision on Mr Blackman's part to avoid undergoing psychiatric assessment prior to his trial."²⁷ (CCRC's emphasis)

106. It is relevant also that Dr Joseph confirmed that a belief which arose during the continuance of the adjustment disorder would have persisted even after the resolution of the condition itself. If the mental

²⁷ At paragraph 42

illness caused Mr Blackman's reduced diligence and competence to assess the victim's condition, then the belief formed due to that reduced capacity would have persisted following his return to a normal mental state.²⁸

New pathology evidence

107. As discussed above²⁹ the evidence at trial of the Home Office Pathologist, Dr Nicholas Hunt, was that the victim had been alive at the time Mr Blackman had discharged his sidearm. That went to the fact of his being alive.
108. As to Mr Blackman's subjective belief of the victim's status (which bore on Mr Blackman's intention), Dr Hunt was not in a position to offer an expert opinion. He was not asked, either, to comment upon the capacity for a layman generally to make such an assessment in a military operational setting.
109. Submitted to the CCRC with Mr Blackman's application was the report of Dr A W Fegan-Earl, a Home Office and Consultant Forensic Pathologist, dated 29 November 2015. That report constitutes new evidence in the sense that it was obtained after Mr Blackman's appeal. Dr Fegan-Earl states in his report that he had been instructed to provide an opinion as to:
- "i) Whether the insurgent was alive or dead when Sgt Blackman discharged his firearm;
 - ii) Whether he was already mortally wounded (i.e. whether death was imminent and inevitable) and thus whether the discharge of the firearm definitely accelerated the death;
 - iii) Whether it is possible from a forensic viewpoint that Sgt Blackman could have reasonably believed that the insurgent had died prior to him discharging his firearm into the insurgent's chest, given the appearance he then presented."
110. In view of Dr Fegan-Earl's conclusions regarding questions i) and ii), and the CCRC's views expressed above, the CCRC considers it necessary to comment only on Dr Fegan-Earl's consideration of question iii) and only insofar as it may be applied to a lay perspective generally rather than Mr Blackman's personal belief.
111. Dr Fegan-Earl's report includes a number of comments potentially of relevance to a layman's assessment of a severely injured person's actual condition:

²⁸ See paragraph 89, above

²⁹ At paragraph 48

"...it may be the case that individuals who have suffered from traumatic hypovolaemia (severe blood loss due to injury) may be unconscious with no palpable pulse, any yet there remains cardiac activity and the condition may be ameliorated by aggressive fluid resuscitation. For all intents and purposes they may appear dead, but are actually in an extremely low output state although technically alive."³⁰

"In my opinion, it is entirely plausible that this individual could have sustained serious lung injuries (evidenced by a sucking wound) with a progressive deterioration in blood pressure such that he became less responsive and could be perceived as having died, albeit he was alive at that time, but in a low output state. (He still had a heartbeat but had lost so much blood that no pulse could have been detected even had it been sought and the individual may be perceived as dead.) It is worth stating that in many injuries such as these, blood loss may be predominantly internal rather than external, i.e. blood from a bleeding lung, or other major structure in the chest, may 'seal' within the chest space. Thus, the external blood loss may be deceptively small compared to the ongoing internal bleeding that cannot be visualised. It is also important to emphasise that subtle signs of life can be difficult to elicit. There is a distinct difference between a modern emergency department with multiple designated individuals monitoring the vital signs of an individual, and the capacity for soldiers who are present in an extraordinarily dangerous situation with the risk of ongoing attack, to seek and identify such subtle signs."³¹

"Overall, given that the insurgent had suffered multiple wounds from a high-velocity weapon with a high level of lethality, and that his movements became progressively less apparent, in my view it is reasonable to suggest that he may have been in so-called traumatic cardiac arrest, albeit alive, and thus have potentially been perceived as having died prior to discharge of the firearm."³²

112. It is arguable, the CCRC considers, that there is no reason why evidence to this effect could not have been elicited from Dr Hunt at trial had appropriate questioning been raised. It is noted that Dr Payne-James had considered relevant factors at paragraph 357 of his report for the defence where, in response to the question, "...how an untrained lay person may see this situation and whether they might justifiably assume that the person is already dead" he stated:

"The passivity between spontaneous movements and in response to other interventions (eg lifting, dragging) may to an untrained, lay person, if any of the other movements had not been observed, suggest that the person could be dead. I believe an untrained, lay

³⁰ Page 11, paragraph three

³¹ Page 12, paragraph three

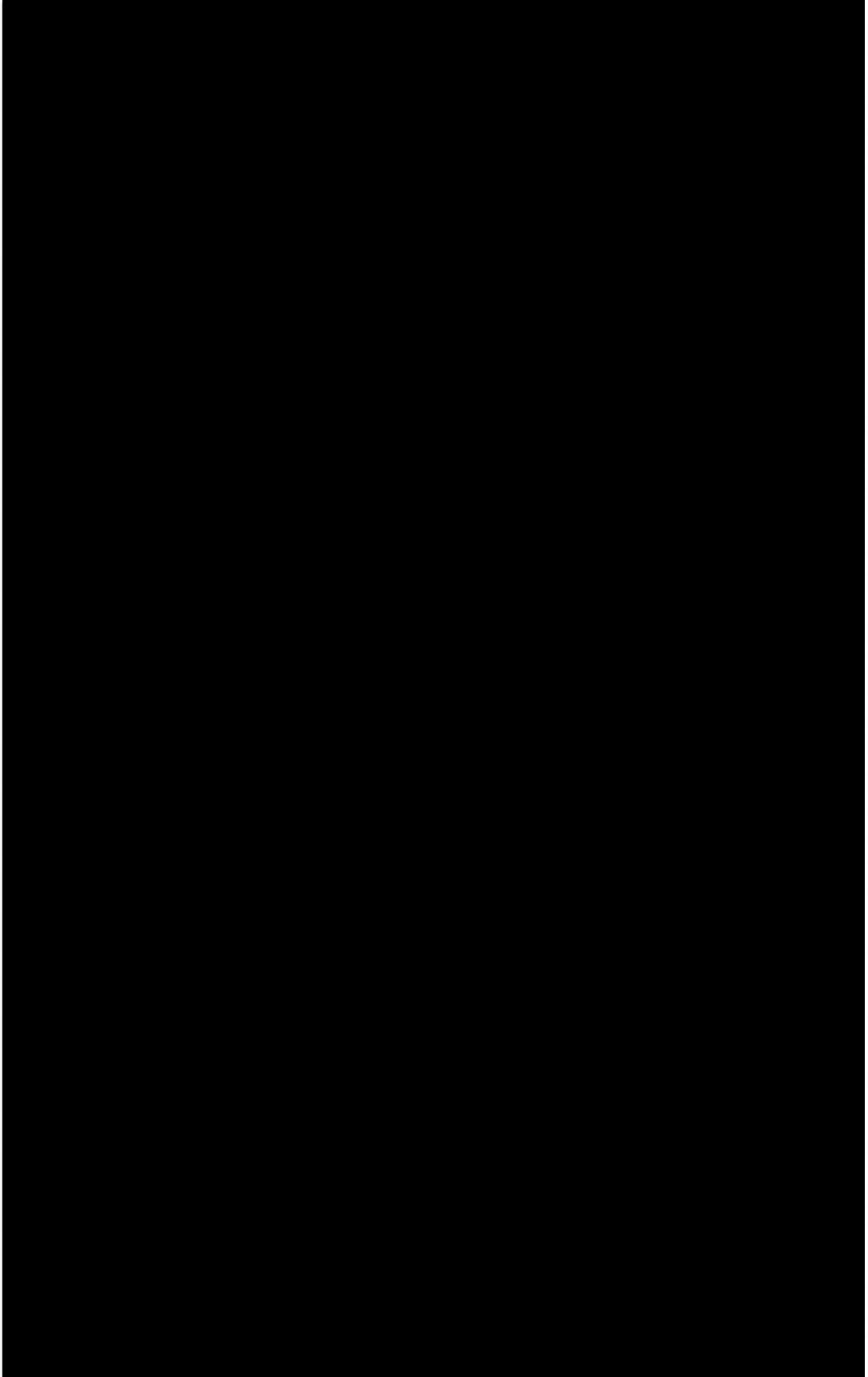
³² Page 13, paragraph three

person observing any movement in a body might assume that there is a possibility of life. An untrained lay person who has experienced death in other settings may draw different conclusions to someone who has not been in such settings.”

113. The failure is not, the CCRC considers, that a pathologist's report was not obtained prior to trial. In view of Dr Payne-James's response to question iii) – and indeed the level of insight as to the relevance of a lay perspective suggested by the raising of the question in the first place – the failure is to use that knowledge to positive effect at trial.
114. The failure of Mr Blackman's legal representatives to pursue relevant lines of enquiry in the field of pathology and to cross-examine Dr Hunt or call Dr Payne-James, as deemed appropriate, will be a factor that the Court of Appeal will bear in mind when considering whether the evidence now brought is 'new' and whether a reasonable explanation exists for not raising it at trial.
115. Despite the failure it cannot be ignored that, considered specifically in the context of Mr Blackman's mental illness, the new evidence offered by Dr Fegan-Earl regarding the layman's perspective might have had a bearing on the Board's deliberations. In the context of Mr Blackman's lack of insight and the reduced competence and diligence provoked by the adjustment disorder, he arguably ought not to be penalised for any failure on the part of his legal team to pursue this issue.
116. The effect of Dr Fegan-Earl's potential evidence, at this stage is, the CCRC considers, twofold. First, to add context to the views of the three psychiatrists regarding the relevance of Mr Blackman's mental illness to his capacity to form a rational judgement of the victim's status prior to discharging his sidearm. Secondly as an additional factor in its own right indicating that unlawful act manslaughter would have been a legitimate option for the Board to consider, though its identification of difficulties faced by the layman – in a normal mental state – in assessing a severely injured person's condition.

Additional new evidence

117. Following Mr Blackman's conviction, Brigadier Ian Huntley of the Centre for Defence Leadership and Management was instructed by Navy Command Headquarters, on 7 March 2014, to commence an internal review and prepare a report on matters ancillary to the incident. Brigadier Huntley's report, known as 'Telemeter', was delivered on 11 March 2015.



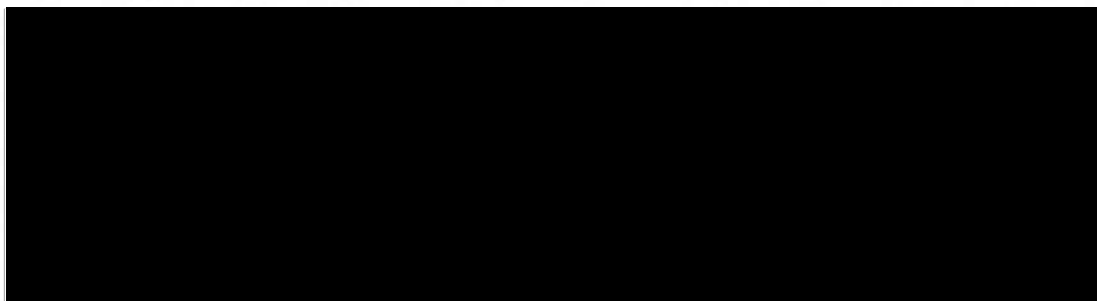
was not permitted to visit CP Omar, as the area was considered too dangerous. There was, therefore, also a lack of access to pastoral care."³⁵

120. Professor Greenberg noted that within the Multiple at CP Omar, Marine B was a qualified TRiM practitioner. He was transferred to CP Omar only during early September 2011, however.

121. It is arguable that the TRiM process operating was, in practice, insufficient either to a) recognise a potential problem with Mr Blackman's mental health at the relevant time, or b) expect Mr Blackman to have availed himself of it voluntarily, bearing in mind his status as commander at CP Omar. It is probably unrealistic to expect an NCO commander in such a setting to approach a TRiM practitioner of lower rank. Such pastoral care and psychological support as Mr Blackman was entitled to must be the responsibility of those higher in the chain of command.

122. This issue was alluded to by Brigadier Huntley:

"With regard to Trauma Risk Management (TRiM) it would be worth considering whether it should be conducted more formally, rather than on a voluntary basis. In small, close-knit teams, such as Blackman's Multiple, a voluntary or informal system may be compromised by peer pressure."³⁶



124. The CCRC notes that CO 42 Commando filed a complaint regarding Brigadier Huntley's review. The CCRC understands that the complaint has recently been upheld insofar as a) Brigadier Huntley exceeded the terms of his remit and b) gave insufficient opportunity to various personnel to respond to criticisms made of them. A covering statement to be appended to the Telemeter Report following the service complaint, provided by the Ministry of Defence, is appended at Annex 3³⁷. Brigadier Huntley's comments should be considered in that context. The CCRC understands that Brigadier Huntley's recommendations remain unaffected.

³⁵ Telemeter Report, paragraph 79

³⁶ Telemeter Report, paragraph 167.b

³⁷ Tab 25

125. In addition to the Telemeter Report the CCRC has noted with interest the witness statements of Retired Colonel Oliver Lee dated 26 November 2015 and Retired Regimental Sergeant Major Stephen Moran dated 19 November 2015.

126. Such new evidence as is discussed here is, the CCRC considers, potentially relevant to the background in which Mr Blackman's actions took place. Had such evidence been available at trial, it would have added to the factors which indicated that a conviction for unlawful act manslaughter would have been a legitimate option for the Board to consider. Potentially it is relevant also to consideration of so-called "slow-burn" loss of control, for the purposes of the partial defence of loss of control, considered below.

Standard of Defence

127. In considering the adequacy of the defence Mr Blackman received at trial the CCRC has borne in mind the requirement that the fairness of the trial process be affected in an identified manner if unsafety is to be shown. In *R v Thakrar*³⁸ it was held:

"The mere fact that the appellant's solicitors may have failed to carry out their duties to the appellant in a proper manner does not itself mean that a conviction is automatically unsafe. Nor is a conviction to be quashed as a means of expressing the Court's disapproval of the solicitor's failures. The test is whether, in all the circumstances, the conviction is safe. Nonetheless, if such failures have prevented an appellant from having a fair trial, within the meaning of Article 6 of the European Convention on Human Rights, that will normally mean that the conviction is unsafe and should be quashed: *Togher* [2001] CLR 124.

Therefore, the first question is whether the appellant received a fair trial or whether such a trial was prevented by the failing in preparation on the part of his solicitors. Such an issue is to be determined by considering the proceedings as a whole, as the jurisprudence of the European Court of Human Rights makes clear, and it follows that one cannot confine one's attention merely to the solicitor's preparations in isolation."

128. In *R v Day*³⁹ the Court of Appeal stated:

"While incompetent representation is always to be deplored...it cannot *in itself* form a ground of appeal or a reason why a conviction should

³⁸ [2001] EWCA Crim 1096, at para. 34

³⁹ [2003] EWCA Crim 1060, at para. 15

be found to be unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."

129. In Mr Blackman's case, it is necessary to consider first what steps arguably ought to have been taken in the preparation period, leading up to trial, and then consider whether any failings identified can realistically be said to impact upon the fairness of the trial he received.
130. Insofar as any submissions raise matters suggesting inadequate or incompetent representation, it is necessary to bear in mind that Mr Blackman's appeal was pursued on his behalf by the same legal team, and that he therefore appeared to retain confidence in them at that stage. It is necessary to consider, therefore, why the dissatisfaction now expressed was not raised when leave to appeal was sought.
131. In considering these questions – and the criticisms made of Mr Blackman's solicitors and counsel at trial – the CCRC would under normal circumstances make enquiries with those legal representatives both in written correspondence and through face-to-face meetings where appropriate, to obtain their comments on the matters raised. Although the CCRC has met with Ms Hogg to discuss various aspects of the solicitors' conduct of the defence, it has been unable to facilitate such meetings with Mr Blackman's trial counsel. The CCRC understands that Mr Blackman's current representatives have instigated legal proceedings in the civil court against his former legal team and that, on legal advice, the former legal representatives now deem it inappropriate for them to make further comment to the CCRC.
132. The CCRC has, however, received a written statement from Mr Berry QC dated 18 August 2016, through his legal representatives, and has taken into account also a bundle of correspondence between Mr Blackman's current legal team and his former legal team⁴⁰ in considering issues bearing on the standard of defence he received.

⁴⁰ Submitted to the CCRC with Mr Blackman's application

133. The CCRC has had particular regard to an exchange of correspondence between Mr Jonathan Goldberg QC, Mr Blackman's current legal representative, and Mr Anthony Berry QC, lead counsel for Mr Blackman at trial and on appeal. In response to a question regarding the defence run for Mr Blackman, Mr Berry QC provided the following response, in a letter dated 2 October 2015:

"We did obtain an expert [report] in the hope of addressing the evidence of the pathologist, Dr Hunt. His name is Payne-James. Mr Glenser⁴¹ and I had a long conference with him in Chambers. Unfortunately, he was not able to give any evidence which would have been of meaningful assistance in challenging Dr Hunt's opinion. You will have seen his report.

Nevertheless, I was firmly of the opinion that it WAS viable to 'run this defence' without expert evidence to support it.

During the crucial minutes before Sgt Blackman fired his sidearm, the headcam was pointed mainly at the injured insurgent.

The insurgent had been removed to the corner of a field from the open space where he had been found and was extremely badly injured and largely motionless. Looking at the whole footage, it is possible to discern what appeared to be the odd occasional sign of life including, as I recall, a piece of straw lifted from his mouth suggestive of a breath.

Of course, Sgt Blackman was busy doing other things in the vicinity and, in particular, preparing to send up a 'nine liner' as part of the process of evacuating the insurgent for medical assistance.

It was, therefore, our argument that, even if the Board was to conclude that the insurgent had been alive, Sgt Blackman may well have thought he was dead at the point when he told his soldiers that he was dead. In other words, his belief that the insurgent was dead was, in all the circumstances, understandable. The argument, if successful, provided a complete defence.

His 'moment of madness' or 'loss of control' thus extended only to a period AFTER he had definitely concluded that the insurgent was dead."

134. As discussed at various points, above, the CCRC considers that it should have become apparent to Mr Blackman's legal advisers at an early stage that he was liable to be convicted of manslaughter, at least, if the evidence was sufficient to show, factually, that the victim had been alive when Mr Blackman discharged his sidearm.

⁴¹ Mr Berry's junior

135. Although the CCRC has noted Mr Berry QC's view of the defence being a 'complete defence', that would have applied only to murder. There remained a foreseeable likelihood that Mr Blackman was highly susceptible to a conviction for manslaughter, even if the Board was to accept the 'complete defence' to murder. There was a failure to appreciate that position and a consequent failure to advise Mr Blackman accordingly. Further, and as a consequence, no steps were taken to investigate factors potentially of relevance to Mr Blackman's intention and state of mind at the time he discharged his sidearm. That his evidence on this subject at trial would appear weak should have been anticipated.

136. The failure to obtain a full Proof of Evidence statement from Mr Blackman is, the CCRC considers, arguably a significant one in the context of:

- Mr Blackman's inability to explain convincingly his belief;
- The possibility of there having been psychiatric or psychological factors operating at the relevant time;
- Mr Blackman's lack of insight (which should have occurred to his legal team as being a possibility);
- The exceptional circumstances of the incident, the military setting and the background (all of which were outside of the experience of the civilian observer);
- The gravity of the charge Mr Blackman faced;
- The evidence going to the victim having been, factually, alive.

137. It has been suggested by Mr Berry QC in his letter of 2 October 2015 that various manslaughter 'partial defences' were discussed with Mr Blackman in conference but that Mr Blackman remained firmly against such a possibility because of his stated desire to resume his career in the Marines:

"I'm afraid I must completely reject [Mr Blackman's] suggestion that had he known of his manslaughter options he would have wanted to run them in supplement to his 'main defence'. On the contrary. Over the twenty odd hours I spent in conference with him at CTC RM Lympstone, during May and June 2013 he made it crystal clear that he would do nothing which might jeopardise his career in the Marines.

The stakes were high but there was no question of offering a plea to manslaughter on any basis. He had a straightforward defence to murder which, if successful, as he believed it would be, would almost certainly result in serving the rest of his career with the Corps, perhaps as an officer and without losing any kudos or respect from anyone.

We certainly discussed manslaughter in its various forms during the conferences I had with him pre-trial. However, any such discussion was comparatively limp when set beside his obvious determination to stick to his guns. He well understood that, via possible psychiatric evidence, he could explore the possibility of offering a plea to manslaughter on the basis of 'diminished responsibility'. He would not countenance it or anything which might tend to undermine the force of his defence to murder. That included 'loss of control' and involuntary manslaughter defences."⁴² (CCRC's emphasis)

138. It was foreseeable, the CCRC considers, that Mr Blackman's desire was unrealistic in view of his susceptibility to a manslaughter conviction, even if his defence were to be 'successful' at trial. That should have been appreciated by Mr Blackman's legal representatives by the time of their conferences with Mr Blackman, because of their earlier conference with Dr Payne-James, and advice given in the strongest terms that his wish was in all likelihood unrealistic. It would have been sensible to demonstrate a determined stance contrary to that advice in an endorsement signed by Mr Blackman.
139. There were compelling reasons why Mr Blackman's state of mind should have been considered by a psychiatrist. The only relevant discussion the CCRC has identified in the defence papers that it has seen is that contained in the conferences notes of 10 June 2013, repeated above at paragraphs 99 -100. The discussion recorded is not framed in terms of legal advice, which arguably should have strongly recommended psychiatric assessment. The fact that Mr Blackman was unable to offer any explanation for his actions other than a lack of self-control, stress and anger⁴³, should have provoked the defence team into action in this regard.
140. It may be appropriate to note, also, that there is authority to indicate that the Prosecution would, under similar circumstances in the civilian courts, appear to bear some responsibility towards assessing the mental state of a person charged with murder. The CCRC notes that, in *Robinson v The State*⁴⁴ the Privy Council held, at paragraph 29:

"...It is an important contribution to this process that every person charged with murder is routinely assessed by such a psychiatrist instructed by the prosecution, and early after arrest, either in prison or, in the relatively few cases in which s/he is on bail, as a condition of bail."

⁴² Mr Blackman's opposition to investigation of 'manslaughter options' needs also to be considered in the context of his lack of insight into the psychiatric condition which operated

⁴³ As he was to say in cross-examination at trial

⁴⁴ [2015] UKPC 34

141. During its investigation the CCRC met, on 2 June 2016, with Mr David Perry QC, who had been lead Prosecuting Counsel at trial. During discussion of the absence of psychiatric evidence at trial Mr Perry offered his recollection of the reasons why the Prosecution had not sought psychiatric examination:

"I think from my point of view if the defence had served a psychiatric report then clearly I would have advised that we commission an expert. The difficulty from the Prosecution's point of view is that I can't simply say you must provide us with a medical, you must submit yourself to medical examination at the request of the Prosecution because the defendant and his lawyers will say that is not for you to say and we do not give our consent. Ordinarily it would arise because you are remanded in custody and the prison authorities have to know what your mental condition is because they have to know how to manage you during your incarceration. Or it would arise with the Prosecution responding to a defendant this is my condition and as the quid pro quo for you accepting my expert report of course I will submit to examination by your expert. But I don't see that I would say to the defence I want your client to submit to an examination by an expert of my choice because I think they would say [no].

...and the other thing about that I don't know what it was now but I think I rationalised the distinction myself because I was looking to see what the position was in the military context. And I think I rationalised the position myself on the basis that being a hierarchical organisation if there were things that gave rise to concern, either it would be in the military context or it would be done through the defence who would be exploring this type of issue, if, I don't know what their instructions were, if it was an issue that arose for consideration but trying to put another way I suppose the military is an organisation that is constantly monitoring their personnel and providing reports on them and progress reports and writing reports for promotion and giving indications of how they have coped with positions of command I suppose I thought well if there is anything it will be raised within the military. I don't think I ever raised it with the Judge Advocate General but I was conscious of the distinction between the civilian and military jurisdictions."

142. Notwithstanding the apparent failure to recognise the position regarding manslaughter during the trial and to direct the Board appropriately, the CCRC considers that the defence preparation fell below the standard required. Investigations should have been made to explain Mr Blackman's stated belief and also the possibility of manslaughter being the appropriate finding. Had fuller preparation been made the relevance of unlawful act manslaughter should have become apparent. Mr Blackman would have been able to approach his defence from a more enlightened perspective. The failings arguably led to unfairness in the trial process.

143. Although Mr Blackman retained confidence in his legal team for appeal purposes, that requires consideration in the context of a) the advice he received from them both before and after trial and b) his lack of insight into his psychiatric condition. The CCRC finds that the Court of Appeal would consider that the failure to pursue the issues as are now identified, on appeal, should not be held against Mr Blackman in that context.

Consequences of the defence shortcomings

144. Because of the failure to appreciate that Mr Blackman's belief did not amount to a 'complete defence' to all criminal culpability, no steps were taken prior to trial to investigate alternative bases for a finding of manslaughter which potentially might have flowed from investigation of the circumstances surrounding the incident itself, or of Mr Blackman's mental state at the time of the incident.

145. The CCRC considers that appropriate investigation would have led not only to the view that unlawful act manslaughter was a realistic possibility but, in addition, would have provoked consideration of other bases for a finding of manslaughter.

146. It has been submitted for Mr Blackman that voluntary manslaughter on the basis of loss of control⁴⁵ or diminished responsibility⁴⁶ (on the basis of the psychiatric evidence now available⁴⁷) would have been realistic propositions.

147. If lack of awareness on Mr Blackman's part clouded his appreciation of the relevance of his mental illness that a) partly explains the failure to pursue such a defence at trial and b) goes some way towards demonstrating that voluntary manslaughter is not entirely inconsistent with Mr Blackman's stance at trial.

Manslaughter – Diminished Responsibility (Abnormality of mental functioning)

148. In addition to Mr Blackman's state of mind at the time of the event, Professor Greenberg was asked to consider also the position regarding the availability of the partial defence of diminished responsibility, or abnormality of mental functioning as it is now known.

⁴⁵ Per section 54 Coroners and Justice Act 2009

⁴⁶ Per section 2 Homicide Act 1957 (as amended by section 52 Coroners and Justice Act 2009)

⁴⁷ The CCRC includes, for these purposes, the report of Dr Joseph

149. At the time of the victim's death the provisions of section 52(1) of the Coroners and Justice Act ("CJA") had come into force. Section 52(1) amended section 2 of the Homicide Act 1957 in relation to the requirements of the defence of diminished responsibility (henceforth to be known as 'abnormality of mental functioning'). Section 2, as applicable, reads:

"2(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –

- (a) arose from a recognised medical condition,
- (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
- (c) provides an explanation for D's acts and omissions in doing or being party to the killing.

(1A) Those things are –

- (a) to understand the nature of D's conduct;
- (b) to form a rational judgment;
- (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

2(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

2(3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

2(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it."

150. In interpreting whether section 2(1) applies, the case of *R v Byrne*⁴⁸ remains the appropriate reference. The guidance given includes:

"Abnormality of mind"⁴⁹ ... means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its respects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with rational judgment. The expression 'mental responsibility for his acts' points to consideration of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will-power to control his physical acts.

⁴⁸ [1960] 44 Cr.App.R. 246, approved in *R v Bunch* [2013] EWCA Crim 2498

⁴⁹ The CCRC interprets 'abnormality of mind' to mean essentially the same as 'abnormality of mental functioning', the modern terminology

Whether the accused was at the time of the killing suffering from any 'abnormality of mind'...is a question for the jury. On this question medical evidence is, no doubt, important, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which, in their good judgment, conflicts with it and outweighs it... The etiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) does, however, seem to be determined on expert evidence...

Assuming that the jury are satisfied on a balance of probabilities that the accused was suffering from 'abnormality of mind'...the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is of course relevant, but the question involves a decision not merely whether there was some impairment but whether such impairment can properly be called 'substantial' a matter upon which juries may quite properly differ from doctors."

151. As noted at paragraph 83, above, Professor Greenberg is of the opinion that at the time of the killing Mr Blackman had been suffering from a recognised medical condition. On his view, therefore, section 2(1)(a) of the Homicide Act 1957 (as amended) is satisfied. This is a view shared by Dr Joseph (repeated at paragraph 85, above) and Dr Orr.
152. Working for present purposes from the premise that Mr Blackman had been suffering from a recognised medical condition at all relevant times, reliance on diminished responsibility as a partial defence to murder rests on demonstrating to the Board's satisfaction that the medical condition caused 'substantial impairment'⁵⁰ to his ability either:
- i. To understand the nature of his conduct;
 - ii. To form a rational judgment; or
 - iii. To exercise self-control;

and the Board concluding that it had, as a consequence, been at least a significant contributory factor in explaining Mr Blackman's actions.

⁵⁰ Per section 2(1)(b) of the Homicide Act 1957, as amended

153. Professor Greenberg provided his conclusions regarding substantial impairment, beginning at paragraph 33.12 of his report:

"33.12. It is my opinion that, on the balance of probabilities, whilst the adjustment disorder did not impair Sergeant Blackman's ability to understand the nature of his conduct, it did substantially impair his ability to form a rational judgment about what he was going to do in the moments before he shot the insurgent. Whilst I discussed his rationale for the shooting with him at some length he was not able to form any clear view about why in fact he had shot the body of the dead insurgent. He felt, with hindsight, that he had done so out of anger and frustration at the ongoing, difficult and futile situation in which he and his team were operating in. Whilst he may of course have been hiding his true intentions from me when I interviewed him, having considered the various evidence documented in this report, it is my opinion that he had not formed any rational judgment about the shooting; instead he just acted and then regretted his decision immediately once he had carried out the shooting.

33.13. In my opinion, on the balance of probabilities, his abnormality of mental functioning, arising because of his adjustment disorder, substantially impaired his ability to exercise self-control at the time he shot the insurgent. In my view the adjustment disorder was a significant contributory factor to him failing to exercise self-control. It is evident that Sergeant Blackman had been highly disgruntled that the Apache attack had not killed the insurgent. It is notable that the Telemeter report commented that the finding of a grenade upon the insurgent when he was first searched may have been particularly distressing for Sergeant Blackman because of him having been nearly killed by the 10th August grenade attack. He was also upset that having discovered, during the initial examination of the insurgent, that he was still alive, he then had a duty, which he accepts he did not want to carry out, to provide first-aid to the insurgent. It is my view that the adjustment disorder had affected his ability to clearly think about what he was required to do and what he actually did. At this point of the tour, he really did not care about maintaining high professional standards nor did he think through the impact of not behaving in a highly ethical manner [which British troops are required to do]. Instead, in my view, his ongoing frustration and anger 'got the better of him' and he failed to exercise control of his contempt for the insurgent and instead he shot him." (CCRC's emphasis)

154. When considered alongside Professor Greenberg's conclusion about Mr Blackman's assessment of the victim's physical state (repeated at paragraph 88, above) it is apparent that he considers the requirement for substantial impairment is made out.

155. Dr Orr's view of this issue is contained in his second report, beginning at paragraph 5.17:

"5.17. In my opinion, and on the balance of probabilities, Mr Blackman's state of mind at the time of the index event was characterised by a mixture of frustration, disillusion and disaffection. 5.18. While neither Professor Greenberg or I was of the opinion that he was showing signs of a dissociative state, we agreed that his mental state at the time of the index event would have been likely to have been affected by a numbing of his feelings and that this would explain his having 'stopped caring'. In my opinion the temporary numbness to events experienced by Mr Blackman would have impaired his innate capacity and ability to make considered and rational judgments and would have substantially compromised his capacity to exercise self-control. " (CCRC's emphasis)

156. Dr Joseph held a similar view to Professor Greenberg stating, at paragraph 38 of his report:

"On the facts of this case the adjustment disorder is capable of substantially impairing Mr Blackman's ability to form a rational judgement and exercise self-control. It is a matter for a jury to determine whether there was in fact a substantial impairment of his ability to do either or both of these things and therefore it would not be appropriate for me to provide that opinion. It depends to some extent on the assessment of the video-taped evidence and the interpretation of what Mr Blackman said at the material time and the role, for example, of banter and dark humour. It is important to point out, however, that Mr Blackman's demeanour on the video around the time of the killing does not preclude him from suffering from an adjustment disorder. If there was substantial impairment of his ability to form a rational judgement and/or exercise self-control, it is my opinion that his abnormality of mental functioning, arising from the adjustment disorder, provides an explanation for the killing as it was a significant contributory factor." (CCRC's emphasis)

157. Professor Greenberg did not explicitly comment on whether the abnormality of mental functioning had been a 'significant contributory factor'⁵¹ in explaining Mr Blackman's actions although to the CCRC this appears implied by the language of his report. As Dr Joseph identified, however, the question is one for the jury in the context of all the evidence.⁵² Dr Joseph did conclude his report with his expert opinion, at paragraph 44, that:

"I conclude therefore that when considering the partial defence of manslaughter on the grounds of diminished responsibility, as contained in the amended homicide legislation, Mr Blackman was suffering from the recognised medical condition of an adjustment

⁵¹ Per section 2(1B) of the Homicide Act 1957

⁵² Per Byrne, above at paragraph 150

disorder, which caused an abnormality of mental functioning at the time of the killing, which is capable of affording him a defence to murder or manslaughter on the grounds of diminished responsibility. It would be a matter for a jury to determine whether his mental responsibility for the killing was in fact substantially impaired. However, if I was asked for my opinion I would conclude that his abnormality of mental functioning probably substantially impaired his ability to form a rational judgement and exercise self-control at the time of the killing.”

158. As a partial defence to a charge of murder, advancing diminished responsibility would have required as a prerequisite an acceptance by Mr Blackman that his act resulted in the victim's death, knowing him to have been alive. Such a stance would have been contrary to Mr Blackman's stated belief at trial, that he had believed the victim to be dead.
159. When considering this paradox, the CCRC considers, two factors are relevant. First, that the medical evidence now available indicates a lack of insight or awareness on Mr Blackman's part as to his mental state at the time of the incident, and that the lack of insight persisted at the time of trial.⁵³ Secondly, there are reasons to consider that Mr Blackman's defence preparations were inadequate, and that fuller investigation of the circumstances wider than the incident itself, including obtaining psychiatric evidence prior to trial, would have revealed the possible availability of this partial defence.
160. Had the psychiatric evidence now available been obtained prior to trial it would have enabled discussion about the choices Mr Blackman faced. The medical evidence indicates that diminished responsibility could have been advanced realistically. Mr Blackman was denied the opportunity to reassess his actions in the knowledge of the psychiatric condition and make an informed decision as to which to pursue. The CCRC cannot conclude that diminished responsibility is the 'correct' verdict since Mr Blackman has not unequivocally accepted that he caused the victim's death and the necessary state of mind cannot, therefore, be implied.
161. The CCRC has considered whether the new evidence relating to the availability of the defence would be deemed by the Court of Appeal to be admissible at this late stage. In *R v Erskine & R v Williams*⁵⁴ it was held that there must exist a "reasonable and persuasive explanation" for the failure to raise the matter at trial.⁵⁵ The judgment in *Erskine* refers, at paragraph 48, to the following:

⁵³ See paragraphs 101-106, above

⁵⁴ [2010] 1 WLR 183; [2009] EWCA Crim 1425

⁵⁵ Paragraph 39

"In *R v Gilfillan* (unreported) 7 December 1998, the defendant did not advance diminished responsibility at trial. He gave no instructions which would have supported the defence and, because he made no relevant disclosure to the medical experts, there was no medical evidence which would have supported the defence. Accordingly it was not 'fully explored' before the trial. After the appellant's conviction, new facts emerged which supported diminished responsibility. The explanation for the failure to advance the defence at trial was 'to be found in the very mental condition' of the defendant himself. He was 'fearful of the possible consequences of a finding that he was mentally ill and, more importantly, did not consider that he was.' The true state of his mental condition was concealed from his professional advisers as well as his parents. The Crown did not oppose the admission of the evidence."

162. Bearing in mind the shortcomings in the defence preparation and Mr Blackman's lack of insight, both of which are discussed above, the CCRC concludes that the Court of Appeal would consider that a reasonable and persuasive explanation exists and that it is necessary and expedient in the interests of justice to admit the evidence under section 23 of the Criminal Appeal Act 1968.
163. In the context of the medical evidence now available, the CCRC considers that there is a real possibility that the Court of Appeal would consider that manslaughter on the grounds of diminished responsibility would have been an appropriate finding, had Mr Blackman raised that defence at trial.

Sentence

164. It is submitted for Mr Blackman that even should the new psychiatric evidence not amount to evidence capable of rendering his conviction for murder unsafe, the evidence remains relevant to sentence. It is submitted that the evidence of the operation of a psychiatric illness at the time of the incident should reasonably be accepted as impacting upon his culpability and, thus, mitigate further the minimum tariff he received.
165. The CCRC notes the content of the new medical evidence and the experts' consensus that Mr Blackman had, at the time of the incident, been suffering the effects of an adjustment disorder. Although Mr Blackman's tariff has already been reduced by the Court of Appeal in recognition of his "combat stress", the CCRC considers that there is a real possibility that the Court of Appeal would further reduce the tariff in view of the medical evidence now available indicating with greater

precision than previously was known that he had been suffering from a recognised medical condition.

Conclusions

166. Due to the failure to leave to the Board the option of returning a verdict of guilty to unlawful act manslaughter, if the Board was satisfied that, factually, Mr Blackman's shot had hastened the death of the victim, the CCRC considers that there is a real possibility that the Court of Appeal would find Mr Blackman's conviction to be unsafe.
167. Further, and in the alternative, had Mr Blackman's legal representatives appreciated the legal position and the unfeasibility of a complete defence existing, it is arguable that proper investigation prior to trial would have led to the identification of Mr Blackman's mental illness and further highlighted the relevance of unlawful act manslaughter.
168. No scrutiny took place of Mr Blackman's stated belief that the victim had been dead. Such scrutiny should have included, as a preliminary step, the taking of a full Proof of Evidence statement discussing the background to the incident, Mr Blackman's military experiences and conditions and pressures operating at the time.
169. Further, it was appropriate in the unique circumstances to investigate through psychiatric evaluation the nature of Mr Blackman's belief and mental health factors which might have borne on that.
170. Psychiatric evidence would have borne not only on the defence advanced at trial but also raised the possibility of the partial defence of abnormality of mental functioning being relevant. Had Mr Blackman's lack of insight into the condition been explained to him, it could have led him to reassess his own actions, culpability and the appropriate defence.
171. The CCRC concludes that there is a real possibility that the Court of Appeal would consider Mr Blackman's conviction for murder to be unsafe on the basis that the conduct of his defence prior to trial was deficient to the extent that it led to identifiable errors which rendered the trial process unfair.
172. The evidence of Dr Hunt was not challenged so far as was possible and no evidence elicited at trial regarding the 'lay perception' of the victim's condition.

Decision to Refer

173. The CCRC has decided to refer this conviction and sentence under section 12A of the Act and this statement sets out the CCRC's reasons in accordance with section 14(4) of the Act. This decision has been made by a committee consisting of three Commissioners in accordance with paragraph 6 of Schedule 1 to the Act and is signed by one of the committee on behalf of the CCRC.

174. In accordance with section 14(4A) of the Criminal Appeal Act 1995 as inserted by section 315 of the Criminal Justice Act 2003, this conviction and sentence is being referred on the following grounds:

- There is new psychiatric evidence which creates a compelling consensus, among three eminent psychiatrists, that Mr Blackman was suffering from a recognised medical condition, namely an adjustment disorder, at the time of the killing.
- The new psychiatric evidence indicates that Mr Blackman lacked insight into his medical condition, which bears on his inability at trial to explain in a compelling manner his actions and belief, and also upon the question of whether the failure to obtain a psychiatric report before trial amounted to a tactical decision.
- The new psychiatric evidence exposes arguably flawed decision-making prior to trial and appeal; in particular there were failures to obtain a comprehensive Proof of Evidence, take adequate instructions, scrutinise the weaknesses in Mr Blackman's defence and provide robust legal advice.
- The new psychiatric evidence indicates that an alternative verdict of unlawful act manslaughter should have been left to the Court Martial Board. Arguably, the need to do so existed on the facts as they were at trial in any event.
- The new psychiatric evidence supports the proposition that Mr Blackman's abnormality of mental functioning was capable of affording him a partial defence of manslaughter on the grounds of diminished responsibility. However, as Mr Blackman has not accepted he intended to kill or cause grievous bodily harm he lacks the *mens rea* for the defence. There are reasons to consider that Mr Blackman's defence preparations were inadequate, and that fuller investigation of the circumstances wider than the incident itself, including obtaining psychiatric evidence prior to trial, would have revealed the availability of this partial defence, thus enabling

Mr Blackman to make an informed choice about the appropriate defence at his Court Martial.

- In respect of sentence, the CCRC considers that the consensus of medical opinion and the diagnosis of a recognised medical condition amounts to evidence capable of further mitigating the tariff Mr Blackman received.

Signed:

Date: 15 December 2016

Handwritten signatures of three individuals, likely the signatories listed below. The first signature appears to be 'D J Smith', the second 'C Hughes', and the third 'A L Marks'.

D J Smith

C Hughes

A L Marks

Annex 1

Papers considered by the CCRC

- The Royal Military Police files;
- The Service Prosecuting Authority files;
- The Military Court Service files;
- The Defence files;
- Mr Blackman's Royal Marine personnel file;
- Mr Blackman's Navy medical file;
- Mr Blackman's civilian medical file;
- Transcripts of Court Martial evidence;
- Transcripts of the Summing-up and sentencing remarks
- The Court Martial Court of Appeal files, judgment and other papers relating to the appeal;
- Papers provided by the Ministry of Defence;
- Naval Service Internal Review report (the Telemeter Report);
- Mr Blackman's seven volume application to the CCRC;
- Investigating Officer's report;
- Dr.Philip Joseph's report;

Note

1. The CCRC has a legal duty to disclose any material it has obtained during its review which would help the applicant make their best case for a reference to the appeal court. The CCRC may, in its discretion, provide other material where it considers it appropriate.
2. The material may be sent to the applicant in its original form, or as an extract or it may be summarised.
3. A list of material enclosed with this Statement of Reasons and which has been sent to the Court of Appeal, the Service Prosecuting Authority and Mr Blackman's legal representatives is at Annex 3.

Annex 2

Summary of the CCRC's powers to refer

The CCRC may refer a **conviction** to the court if:

1. there is a **real** possibility that the conviction would be overturned if it were referred; and
2. this real possibility arises from evidence or argument which was **not put forward at trial or appeal** (or there are exceptional circumstances⁵⁶); and
3. the applicant has already appealed or applied for leave to appeal against conviction (or there are **exceptional circumstances**⁵⁷).

The CCRC may refer a **sentence** to the court if:

1. there is a **real** possibility that the sentence would be reduced if it were referred; and
2. this real possibility arises from information or argument on a point of law which was **not put forward at trial or appeal**; and
3. the applicant has already appealed or applied for leave to appeal against sentence (or there are **exceptional circumstances**).

⁵⁶ "Exceptional circumstances" to allow us to refer a case without something 'new' are extremely rare.

⁵⁷ "Exceptional circumstances" to allow us to refer a case where there has not been an earlier appeal are very rare. There has to be a good reason why there has been no appeal and why there cannot be an appeal now without the CCRC's help.

Annex 3

Documents enclosed with this Statement of Reasons

Tab	Document
1	Transcript of Mr Blackman's evidence at trial
2	Summing-up
3	Glossary of terms used in the Summing-up
4	Notice of Application for Permission to Appeal
5	Judgment of the Court Martial Court of Appeal 22 May 2014
6	Psychiatric report of Dr Orr dated 27 November 2013
7	Psychiatric report of Professor Greenberg dated 15 November 2015
8	Psychiatric report of Dr Orr dated 4 December 2015
9	Psychiatric report of Dr Joseph dated 3 November 2016
10	Witness statement of Dr Fegan-Earl dated 29 November 2015
11	Letter, dated 13 September 2015, from Mr Blackman's CCRC legal representatives to his Court Martial legal representatives asking for their explanations and comments on various matters
12	Letter of Mr Blackman's Court Martial legal representatives, dated 2 October 2015, responding to the letter of 13 September 2015
13	Letter, dated 19 October 2015, from Mr Blackman's CCRC legal representatives to his Court Martial legal representatives seeking further explanations and comments
14	Letter of Mr Blackman's Court Martial legal representatives, dated 9 November 2015, responding to the letter of 19 October 2015
15	Witness statement of Mr Blackman dated 20 November 2015
16	Witness statement of Major Cox dated 1 December 2015
17	Witness statement of Mrs Warner-Blackman dated 4 December 2015
18	Interview with Mrs Hogg on 24 May 2016
19	Witness statement of Mr Glenser dated 26 August 2016,

	junior defence counsel at trial
20	Witness statement of Mr Berry QC dated 18 August 2016, leading defence counsel at trial
21	Two notes of a conference on 10 June 2013, extracted from the defence files provided to the CCRC, between Mr Blackman and his legal representatives
22	Additional attendance/conference notes extracted from the defence files provided to the CCRC
23	Witness statement of retired Colonel Oliver Lee dated 26 November 2015
24	Witness statement of retired Regimental Sergeant Major Stephen Moran dated 19 November 2015
25	Operation Telemeter report and covering statement

Annex 4

Matters considered by the CCRC which do not contribute to the real possibility

Manslaughter – Loss of Control

1. At the time of the victim's death, the relevant law relating to loss of control was contained in sections 54 and 55 CJA. Replacing the previous law of 'provocation', sections 54 and 55 state:

"54. Partial defence to Murder: loss of control

(1) Where a person ("D") kills or is party to the killing of another ("V"), D is not to be convicted of murder if -

- (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
- (b) the loss of self-control had a qualifying trigger, and
- (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control as sudden.

(3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55. Meaning of 'qualifying trigger'

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger

–
(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to 'D' and 'V' are to be construed in accordance with section 54."

2. It is submitted on Mr Blackman's behalf that the evidence at trial was sufficient for the JAG to have left to the Board the option of returning a verdict of guilty to manslaughter on the basis of loss of control and that, having failed to do so, a material irregularity in the trial process arose. Alternatively, new evidence now identified is sufficient on which to conclude that the JAG would have so directed the Board had it been available at the time of trial.

3. In *R v Dawes*⁵⁸ the Lord Chief Justice stated:

"49. When a person kills or is a party to the killing of another person, unless he has acted in a considered desire for revenge, he is not to be convicted of murder, but of manslaughter, if each of three distinct ingredients which comprise the defence may be present. If evidence sufficient to raise an issue in relation to all three ingredients is adduced, the prosecution must disprove the defence. But the evidence is not sufficient for this purpose unless, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. If so the defence must be left to the jury and the prosecution to disprove it. This judgment proceeds on the basis that the fundamental principles relating to the burden of proof are unchanged.

⁵⁸ [2013] EWCA Crim 322

50. Whether the issue of loss of control arises because the defendant has positively advanced it for consideration, or because the judge is contemplating whether to leave the defence to the jury when for forensic reasons it has not been advanced, the approach to the decision must be identical. In *Clinton*⁵⁹ at paragraphs 45 and 46 the court summarised the task of the judge:

‘This requires a common sense judgment based on an analysis of all the evidence. To the extent that the evidence may be in dispute, the judge has to recognise that the jury may accept evidence which is most favourable to the defendant, and reject that which is most favourable to the prosecution, and so tailor the ruling accordingly. That is merely another way of saying that in discharging this responsibility the judge should not reject disputed evidence which the jury might choose to believe.’”

4. The judgment in *Dawes* continued:

“52...As in any appeal to this court, the challenge will not succeed unless we decide, bearing in mind the advantages that the judge will have had from having heard the evidence, that the defence should have been left to the jury. If so, and it was not, the judgment was wrong, and the defence should have been left to the jury, the defendant was deprived of his entitlement to the jury’s verdict. The conviction would be quashed and in most cases of this kind, a new trial would almost certainly be ordered.

53. Provided the evidence is sufficient for the purposes of s.54(6) it must be left to the jury, whatever forensic tactical decisions may have been made by or on behalf of the defendant...Similarly, however, whether the prosecution has raised the question or not, at the end of the evidence the judge should examine and decide whether, indeed, sufficient evidence relating to all the ingredients of the defence has been raised.”

5. In *R v Gulpinar*⁶⁰, at paragraph 15, it was held:

“...If, at the conclusion of the evidence, there is a possibility that the judge should leave the issue to the jury when it is not part of the defence case, the judge must receive written submissions from the advocates so that he can carefully consider whether the evidence is such that the statutory test is met.”

6. The “three ingredients” referred to, being those requirements stated at section 54(1) CJA, should be considered individually and sequentially by the trial judge in deciding whether it was appropriate to leave loss of control to the jury. If the trial judge does not consider,

⁵⁹ [2012] EWCA Crim 2; [2012] 1 Cr.App.R. 26

⁶⁰ [2015] EWCA Crim 178; [2015] 1 Cr.App.R. 31

on analysis, that sufficient evidence of a loss of self-control can be identified, there would be no requirement for the judge to go on to consider the subsequent ingredients of the defence. Section 54(4) CJA excludes from the defence any action arising from a considered desire for revenge.

7. In Mr Blackman's case, it is submitted that during his evidence, he at several points referred to having momentarily lost his self-control and related matters.⁶¹ Mr Blackman's second prepared statement, repeated at paragraph 68 of the main Statement of Reasons, above, also makes reference to the issue. The JAG did not obtain written submissions from counsel regarding the possibility of leaving loss of control to the Board as an option and did not make an official pronouncement regarding it.
8. In his witness statement dated 18 August 2016 Mr Berry QC discussed the circumstances in which the possibility of 'manslaughter defences' had been discussed with Mr Blackman during more than 20 hours spent in conference prior to trial. He stated:

"35. I am sure that during the course of these lengthy deliberations questions concerning alternative defences were aired although I have no particular recollection of what was actually said in respect of loss of control manslaughter (replacing so-called 'provocation' as a defence). I did not believe that there was any circumstance in the case which would have provided a 'qualifying trigger' within the meaning of the legislation even if Mr Blackman were admitting that he had killed following a loss of self-control. In fact Mr Blackman never told me that he had killed the insurgent following a loss of self-control. His case was to the opposite effect; that he would not at any stage have fired to kill the insurgent whilst he was alive. Nor did Mr Blackman ever say that he feared serious violence from the insurgent or that anything was done or said which constituted circumstances of an extremely grave character that caused Mr Blackman to have a justifiable sense of being seriously wronged. On the evidence it was clear that the insurgent was in no position to threaten Mr Blackman and nothing was done or said that might have caused Mr Blackman to feel seriously wronged. In the absence of instructions that would have provided a plausible basis for asserting the defence of loss of self-control, the defence simply did not arise and could not have been the subject of prolonged discussion.

36. I wish to make one further point about the allegation that there was a 'loss of control' defence that could have been run in tandem with the defence that Mr Blackman instructed me to run; that he believed the Afghan was dead when he discharged his weapon. I simply do not accept that it was practicable in these circumstances, to run this

⁶¹ For example, see paragraph 70 of the main Statement of Reasons, above

'alternative' defence. It would have been viewed as extremely cynical for Mr Blackman to run a defence that he believed the Afghan was dead when he pulled the trigger, but to say that if this was not accepted then he in fact lost control and should be convicted on manslaughter only. Such a tactic would, in my view, have done more to convince the Board that Mr Blackman knew full well what he was doing when he pulled the trigger and led to a conviction of murder and a longer minimum term."

9. In the context of the references to loss of control (presumably in a non-legal sense) made by Mr Blackman during his evidence at trial and his admission that it was conceivable that he had been wrong about the victim having been dead at the crucial time, it is arguable that the possible relevance of manslaughter should have been revisited by the defence during trial.
10. During its review of Mr Blackman's conviction the CCRC met with His Honour Judge Blackett, JAG at Mr Blackman's trial, on 16 June 2016. One of the issues discussed was the potential relevance, at trial, of loss of control. The JAG advised:
 - When he was considering the content of his Summing-up he had considered the potential relevance of loss of control;
 - In the context of all the evidence – and in particular the recorded footage available – the JAG could not conclude that there was any evidence indicative of a loss of control. Clip 5 depicted a "benign" situation;
 - Neither, for the same reason, could any qualifying trigger proximate to the event be identified from the footage. In his view, the longer the time span between any identified trigger and the event in question, the more likely it would seem that revenge had been involved as a motivating factor;
 - Although the battlefield was a stressful setting, that alone could not have been considered relevant else it could have potentially absolved all such crimes. Nothing about Mr Blackman's conduct as depicted in the video clips suggested that he had been acting irrationally or through anger or stress;
 - It was a factor in the JAG's consideration of its relevance that neither the Prosecution nor the defence had suggested loss of control might have operated.
11. The CCRC notes that in *Gurpinar* the incident that resulted in the victim's death had been captured on film also.⁶² At paragraph 55 the Court stated:

⁶² The recorded footage in *Gurpinar* was one source of evidence among several identified in the judgment. The CCRC does not intend to distort the picture painted from the evidence in

"55. However, we have had the benefit of seeing and studying the video and considering the evidence. In the result we have concluded that the judge was right not to leave the defence to the jury. Our reasons are as follows:

...
iii) although there was some evidence that Gurpinar was angry at some stage, it is plainly evident from the video and the Facebook messages that there was no evidential basis on which he could be said to have lost his self-control to any degree. The Facebook and other messages sent by Gurpinar, making due allowance for his immaturity and semi-literacy, made clear that he intended to use a knife if one was available. The video made it clear that Gurpinar delivered one thrusting blow with the knife which was plainly aimed at the deceased's chest. There was no sufficient evidential basis of any loss of self-control."

12. The footage depicted in Clip 5 was, the CCRC considers, of particular significance. The acts depicted therein do not appear, to the lay observer, to suggest any degree of loss of self-control. Similarly, the words uttered by Mr Blackman appear calculated and, arguably, suggest revenge⁶³ had been a motivating factor. In the context of the footage available, Mr Blackman's bare assertion that he had suffered an episode of poor judgment and lack of self-control would not appear to have raised the possibility of the defence applying to a degree sufficient for the JAG to consider that it potentially operated.

13. The CCRC notes, in addition, the following exchange during Mr Blackman's cross-examination:

"Q: A moment ago when you were answering questions put to you on behalf of Marine C you said that this was a sudden spur of the moment decision to shoot.

A: Yes.

Q: Why did you ask Marine B where the Apache helicopter was?

A: I hadn't – I didn't know where it was.

Q: Yes. That gives us some indication of the fact that you were ignorant of its location but why did you want to know where it was?

A: Obviously, going through the thought process of what I was about to do in that spur of the moment, I was aware it was still wrong and I didn't want to be seen doing it."⁶⁴

14. Mr Blackman's answers to these questions potentially indicated that he had retained self-control in the seconds before his decision to

Gurpinar; merely, that the Court of Appeal regarded the recorded footage as of significance on the facts of the case in assessing loss of self-control

⁶³ Per section 54(4) CJA

⁶⁴ Transcript of Proceedings, 30 October 2013, at 63A

discharge his sidearm. Irrespective of whether Mr Blackman's thoughts, at that time, had related to the shooting of what he believed to have been a dead body or a living person, the answers suggest a controlled sequence of events and considered thought. That does not appear consistent with a "spur of the moment decision" and does not sit comfortably with the suggestion that Mr Blackman had lost his self-control.

15. At paragraph 24 of *R v Jewell*⁶⁵ the Court of Appeal held:

"Loss of control is considered by the authors of Smith and Hogan 13th Edition to mean a loss of the ability to act in accordance with considered judgement or a loss of normal powers of reasoning. The judge readily accepted that definition and so do we."

16. In the context of the JAG's comments and the evidence at trial⁶⁶ the CCRC cannot conclude that there is any real possibility that the Court of Appeal would accept that Mr Blackman's trial was unfair because of a failure to leave manslaughter on the grounds of loss of control to the Board. Although no 'formal' process took place by which written submissions on relevance were considered by the JAG, it is clear that he cast his mind to it. No suggestion of inappropriate factors having influenced the decision has been identified by the CCRC.

17. In the absence of identifiable loss of self-control⁶⁷ sufficient to raise the defence, the CCRC has not deemed it necessary to consider the position regarding any qualifying trigger or degree of tolerance, insofar as the question is relevant to the evidence at the time of trial.

18. In terms of whether, now, additional evidence might be cited with which to justify a submission that loss of control would have been a viable defence, the CCRC has approached the question from the standpoint of:

- i. Considering whether there is evidence newly identified indicative of a loss of self-control having arisen from so-called 'slow-burn' or an accumulation of factors;
- ii. Considering what relevance, if any, Mr Blackman's psychiatric condition might have to the issues.

19. New evidence identified at this stage to be considered in the context of an argued loss of self-control includes:

⁶⁵ [2014] EWCA Crim 414

⁶⁶ And in this regard the CCRC has noted carefully those submissions made for Mr Blackman at paragraphs 160 – 197 of Mr Goldberg QC's Report in Support of the Application dated 15 December 2015

⁶⁷ Per section 54(1)(a) CJA

- i. The 'enlightened' knowledge of Mr Blackman's circumstances during his tour on *Herrick 14*;
 - ii. The Telemeter Report and the witness statements of Retired Colonel Oliver Lee and Retired Regimental Sergeant Major Moran;
 - iii. The consensus of medical opinion indicating that Mr Blackman had been suffering from the effects of an adjustment disorder at the time of the events in question.
20. The greater knowledge now available relating to the pressures that had been acting on Mr Blackman and the failings which arguably were present in the support of him from higher in the chain of command are factors, the CCRC considers, probably of more relevance to the development of Mr Blackman's mental illness rather than loss of self-control.⁶⁸
21. Even if – which the CCRC does not conclude – the new evidence identified at paragraphs 19.i. and 19.ii. above, was considered sufficient to support an argument that Mr Blackman's loss of self-control was of the 'slow-burn' type, the evidence would not, in the CCRC's opinion, be capable of amounting to a qualifying trigger within the definition at section 55(4)(b) CJA. To amount to a qualifying trigger the loss of self-control must be attributable to:
- “...things done or said (or both) which:
 (a) constituted circumstances of an extremely grave character, and
 (b) caused to have a justifiable sense of being seriously wronged.”
22. The CCRC concludes, in light of the comments in *Jewell* and the matters referred to at paragraphs 12-15, above, that the new evidence referred to at paragraphs 19.i. and 19.ii. is not sufficient to raise a real possibility that the Court of Appeal would consider that loss of control should have been left to the Board as an alternative finding. The JAG's comments, summarised at paragraph 10, above, remain unaffected.
23. The significance of Mr Blackman's adjustment disorder in relation to the partial defence of loss of control was contained within paragraph 38 of Dr Joseph's report, repeated above at paragraph 156 of the main Statement of Reasons.

⁶⁸ Paragraph 75 of the judgment of the Court of Appeal, repeated at paragraph 37 of the main Statement of Reasons, above, considered

24. Although it was Dr Joseph's opinion that Mr Blackman had suffered a loss of self-control⁶⁹, that opinion would fall for these purposes to be considered in the context of all the evidence available and the legal framework. Even with the knowledge of Mr Blackman's adjustment disorder, the events depicted in Clip 5 do not suggest, to the lay observer, any degree of loss of self-control.
25. It is, in addition, unclear that the operation of a mental illness is a factor legitimately capable of consideration in assessing whether the partial defence of loss of control might apply. Section 54(1)(c) CJA imposes an objective test in assessing the 'reasonableness' of the defendant's loss of self-control to the qualifying trigger. Section 54(3) CJA, however, excludes from the circumstances considered, "those [circumstances] whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint".
26. Section 54(3) CJA would appear to operate so as to exclude from consideration any mental illness the effect of which goes purely to a defendant's capacity for tolerance or self-restraint. It is arguable whether or not Mr Blackman's adjustment disorder was so limited by those terms – bearing in mind the psychiatric experts' views that it impacted also on his diligence and competence in assessing the victim's status – but on the face of it, consideration of the adjustment disorder should be excluded.
27. In *R v McGrory*⁷⁰ it was held, at paragraph 26:
- "Reading together section 54(1)(c) and (3) it is clear, in our view, as indeed it was [to] Spencer J, that the applicant's reduced tolerance and self-restraint due to his depression, assuming for the moment that there was such a reduction, cannot have been relevant to the defence of loss of control and that the judge was therefore correct not to refer to Dr Hopley's evidence when dealing with that defence."
28. The CCRC has considered whether the exclusion from consideration of a recognised medical condition in considering loss of self-control acts so as to penalise a defendant for a legitimate 'relevant circumstance' for the purpose of section 54(3) CJA.⁷¹ The CCRC concludes, however, that in the particular circumstances of Mr Blackman's case, there is no real possibility that the Court of Appeal would accept that Mr Blackman's conviction is unsafe on this basis.

⁶⁹ Paragraph 44 of his report

⁷⁰ [2013] EWCA Crim 2336

⁷¹ Articles 6 and 14 European Convention on Human Rights considered

Manslaughter – Gross Negligence

29. It has been submitted to the CCRC, also, that a finding of gross negligence manslaughter would have been a legitimate verdict, had the Board the option so to find in light of all the evidence now available.
30. In *R v Adomako*⁷² Lord Mackay identified what remains the essential criteria:

“...in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred...

...The essence of the matter which is supremely a jury question is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.” (CCRC’s emphasis)

31. In *R v Misra*⁷³ Judge LJ stated:

“...the law is clear. The ingredients of the offence have been clearly defined, and the principles decided in the House of Lords in *Adomako*. They involve no uncertainty. The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross. A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it, would constitute manslaughter.” (CCRC’s emphasis)

32. The CCRC has considered Mr Blackman’s submissions but has not been able to conclude that such a finding would have been appropriate. Although it might be argued that Mr Blackman breached his duty of care to the victim through his failure to ensure that he was, in fact, dead, the omission did not itself result in death. As both *Adomako* and *Misra* make clear, there must be a causal link between breach of the duty and the death of the victim.

⁷² [1995] 1 AC 171, at 187

⁷³ [2005] 1 Cr.App.R. 328

33. The act that resulted in the victim's death (assuming for these purposes that he had been alive at the relevant time) was the deliberate firing by Mr Blackman of his sidearm into the victim's chest. The act was independent of the duty of care.

Improper Cross-examination

34. It has been submitted on Mr Blackman's behalf that his conviction is unsafe because of a particular line of questioning adopted at trial relating to Marine C's journal, which contained an account of the incident. Cross-examination of Mr Blackman as to the contents of the journal was improper, it is submitted, as it was not evidence admissible against him.⁷⁴ For Prosecuting Counsel to repeatedly ask Mr Blackman to confirm the accuracy of extracts from the journal read to him was prejudicial.
35. When challenged about the legitimacy of the line of questioning adopted by Prosecution counsel, Mr Blackman's trial counsel, Mr Berry QC, responded to Mr Blackman's current legal representatives in the following terms:

"You suggest that Mr Perry's cross-examination was 'inadmissible and improper'. We disagree. At the stage he was being asked about it, the contents of [Marine C's] diary were not yet in evidence in the case against Sgt Blackman. However, that did not mean that he could not be asked for his comments in cross-examination. In any event, we do not believe that, on balance, the passage in question is harmful to Sgt Blackman."⁷⁵

36. The CCRC has considered the submissions relating to this matter and also the form of the questioning that took place. It is not apparent to the CCRC that any significant prejudice was caused to Mr Blackman through the procedure complained of. No objection was made to the procedure by Mr Blackman's legal representative at trial, or the JAG, and no relevant ground of appeal was identified.
37. There are examples in the extracts quoted from Marine C's journal which potentially were of assistance to Mr Blackman in any event. For example, Marine C's confirmation that Mr Blackman assessed the insurgent's wounds, that he prevented Marine C from killing him and that Marine C deemed the victim's wounds to have been extremely severe and that death had been inevitable.

⁷⁴ *R v Windass* [1989] 89 Cr.App.R. 258 is cited in support

⁷⁵ Mr Berry QC's letter to Mr Goldberg QC dated 9 November 2015

38. From the form of the questioning undertaken it is apparent that the Prosecution put Marine C's journal to Mr Blackman not as a record of truth, but to ask Mr Blackman whether he adopted it as a record of truth. It was Mr Blackman's responses to the questions that constituted the relevant evidence, not the journal extracts themselves. Prosecution counsel stated the position correctly, in his closing speech⁷⁶ and an appropriate direction was given by the trial judge:

"Can I talk a little bit about the statements and evidence of the three co-defendants. Each of the defendants were interviewed a number of times under caution, and what each of them said is evidence only in his own case. You may not have regard to what was said by each within interview when considering the case against the other two defendants, even though they have each made references to each other in those interviews. The reason for that is that each defendant was interviewed separately, and during each interview, the other co-defendants were not present to make any comment on their own on what was said. This also applies to Marine C's journal. It is evidence in C's case, but you may not have regard to it when considering the case against A and B."⁷⁷

39. Discussion at trial of points solely arising as a result of the journal (as distinct from the incident narrative itself, which was ascertainable from other sources) was insignificant in the context of the evidence overall. There is no real possibility that the Court of Appeal would accept that the line of questioning adopted was prejudicial such that the fairness of the trial process was affected and Mr Blackman's conviction rendered unsafe as a result.

The President's Phone Call

40. During its investigation the CCRC learned that on 8 November 2013, during the Board's retirement, the President of the Board had made a telephone call whilst at the rear of the court building. That telephone call was witnessed by Mr Meeke QC, who had acted at trial for Marine B, and took place at about 11:15 am, about three hours before the Board returned its verdicts. The matter was brought to the attention of the JAG:

"Mr Meeke: Your Honour, about three-quarters of an hour ago now, I was outside the building making a phone call. On my phone I cannot get reception in the building.

Judge Advocate: Yes, indeed.

⁷⁶ Transcript of Proceedings, 4 November 2013, at 6E

⁷⁷ Transcript of Proceedings, 6 November 2013, at 43H

Mr Meeke: Standing perhaps as far as I am from your Honour was, I believe, the President also making a phone call. We acknowledged each other with a nod. I could not hear what he was saying and I am quite sure he could not hear what I was saying; it is of no consequence. I was surprised to see him separate from the Board and I mentioned it to my learned friends. I do not suppose – we do not suppose – for one moment there was anything untoward in what he was doing. I am bound to say he looked rather anxious, perhaps some personal domestic matter. I simply do not know. Having mentioned it first to my learned friends for Marines A and C, we discussed it. We then mentioned it to my learned friends for the Crown. We have, for the defendants, each taken instructions and wish the trial to proceed without anything being said to the Board, so what I say to your Honour is by way of information and not complaint. We are bound, it seems to us, to indicate what has happened to the Court, but we state our position so far as Marine B is concerned against events in the future.⁷⁸

41. The CCRC has made some, limited, inquiries to investigate the circumstances of that telephone call. Those inquiries have not been completed at this time, however, and, in consequence of finding that a real possibility has now arisen because of other factors, will not be pursued further because of the desire to expedite Mr Blackman's referral to the Court of Appeal.
42. The CCRC has borne in mind, also, that the matter was known about at the time, was brought to the attention of the JAG and was discussed with all counsel. Agreement was obtained at that time that no action should be taken.

⁷⁸ Transcript of Proceedings, 8 November 2013, at 10A