

IN THE BAHAMOUS PUBLIC INQUIRY

OPENING ON BEHALF OF EX-CORPORAL DONALD PAYNE

1. INTRODUCTION

1.1 We are grateful for the invitation to make this opening statement on behalf of our client.

1.2 We propose to divide the opening into two parts. In the first will shall deal with the Court martial, our intention being to highlight some of the more significant aspects of it from Donald Payne's point of view. Our purpose in doing so is in order to present a context or a backdrop to the second part of the opening which will endeavour to give an indication of how we propose to approach the conduct of this Inquiry on our client's behalf. Within that second section we shall put forward for consideration a number of questions that the Inquiry might think it appropriate to consider.

2. THE COURT MARTIAL

2.1 On Tuesday 19th September 2006 Donald Payne pleaded guilty to an allegation that he, between 13th and 16th September 2003, inhumanly treated Iraqi civilians arrested as a result of Operation Salerno.

- 2.2 At that moment Donald Payne became certainly the first British soldier and probably the first British born citizen of the United Kingdom ever to be convicted of a war crime.
- 2.3 The count alleging inhuman treatment required proof of the inflicting of severe physical pain or suffering on persons protected under the 1949 Geneva Conventions. A low level of pain does not constitute the offence so a judgment must be made as to whether or not a line had been crossed. The judgment that was made on Mr Payne's behalf clearly was that he had crossed that line.
- 2.4 By September 2006 Donald Payne had been a soldier for some 18 years having enlisted in June 1988 as a 17 year old.
- 2.5 So it was that he stood alone on day 94 of the court martial, the only man to be singled out for punishment. The Probation Officer reporting to the court in a pre-sentence report put it this way:-

“He was the only soldier prepared to take any responsibility for his actions.”

- 2.6 The sentencing process of the court martial, took place in three stages. The first was the presentation of a written basis of plea, responses thereto and submissions thereon, followed by a presentation of submissions in mitigation on Mr Payne's behalf followed by the sentencing process itself. We propose to look briefly at the essentials of those three stages hoping as we do so that it will fulfil our purpose in providing a context and a backdrop to the second part of our opening.

The Basis of Plea and Submissions thereon

- 2.7 It was accepted on his behalf that by his plea of guilty he admitted having done the following:-

- Put some (but not all) of the detainees in stress positions.

- Hooded and handcuffed them.
- Used force to enforce what he was ordered to do, but did not use gratuitous violence as alleged by some.
- That in order to maintain the stress positions he accepted that he used kicks, punches, slaps and the forceful lifting of heads on the Sunday and at times on the Monday.
- That in relation to the “choir” he accepted the accounts of Betteridge and Riley but not Hughes and thereby accepted that he would have punched, prodded, kicked or slapped to keep the detainees awake in order to fulfil the orders he had received in particular from those in charge of TQ-ing. The audible responses from the detainees became, he accepted, a sick joke known to some, but not he insisted to him, as “the choir”.
- That he had lied in his interviews with the SIB borne of his belief that he was being unfairly singled out for blame and responsibility.
- That to be guilty of the crime to which he had pleaded guilty he was accepting that the force he used to maintain the stress positions etc added to the length of time over which they were imposed in rapidly deteriorating and squalid conditions inevitably must have caused those detained, or at least some of them, severe pain and suffering.

Findings as to the Basis of Plea and the Submissions thereon

2.8 The Judge Advocate’s finding as to the basis of plea and the submissions made thereon were essentially as follows:-

- That the basis of plea itself had to have added to it matters arising principally from the evidence of Hughes which the Court Martial broadly accepted.
- That Payne had used excessive force from time to time
- That although he could to some extent rely on a principle of superior orders as mitigation he could not do so where excessive violence was found to have been used.

- That he was to be treated on the basis of having committed isolated acts of unnecessary violence rather than a prolonged pattern of unlawful and extreme violence.
- That although it was found that he had indeed treated Baha Mousa with some violence it was impossible for the Court to say on all the evidence it had heard and seen what the true extent of that violence was.
- That specific and gross acts of gratuitous violence such as eye-gouging or the use of martial arts techniques were not found proved.
- That it was also not found proved to the appropriate standard that the blame for the imposition of conditioning post the conclusion of TQ-ing could be placed at Payne's door.

Submissions in Mitigation

2.9 The central thrust of the submissions made on Payne's behalf were as follows:-

- That he was not responsible for the creation of the regime but rather for its implementation.
- That it was plainly the case the prolonged use of stress positions etc would inevitably cause severe pain and discomfort and that the only way you could persuade someone to maintain such a position in such conditions as existed was by the use of force or the threats of force.
- That it was his case that Provost staff were under orders to impose the techniques for the purposes of maintaining the so-called shock of capture.
- That he had been required to discharge his duties in a way that would inevitably have resulted in him placing himself in serious breach of international humanitarian law.
- That one of the difficulties that had been found but not overcome by the court martial process was that the task of investigating these appalling events have been made the harder by what was described as "the closing of ranks".
- That up to then he had had a good and decent military career.
- That he had not been found to have been criminally responsible for the death of Baha Mousa.

- That he was the only soldier described by any detainee as having acted on one occasion at least “with kindness”.
- That he had been a Corporal from 30th June 2000.
- That he had received the following by way of decorations and awards:-
 - The General Service Medal with Northern Ireland Clasp
 - The NATO Medal with Former Yugoslavia Clasp
 - The Accumulated Campaign Service Medal
 - The Queen’s Jubilee Medal
- That dismissal from the Army after 22 years of service would result in a financial loss to him of just under £300,000.

The Sentence of the Court

2.10 We summarise the Judge Advocate’s sentencing remarks by highlighting the following:-

- That Payne had given a lead by example to some of the junior ranks.
- That he had used excessive violence.
- That he would not have committed the offence but for his being placed in the exceptional position of being required to condition detainees.
- That his plea was a brave one and his attitude in the sentencing exercise itself characterised as helpful.
- That he was properly described as a good and decent soldier.
- That the real mitigation was found to lie in the fact, as the Judge Advocate put it:-

“Proper systems were not in place to supervise and check that this crime did not take place... There was a serious failing in the chain of command.”

2.11 Thus it was that just before 5pm on 30th April 2007 on day 94 of the court martial, Donald Payne was:-

- Dismissed from the service
- Reduced to the ranks
- Sentenced to 12 months imprisonment.

2.12 At a much earlier stage of the court martial proceedings it was submitted on Mr Payne's behalf that he had been singled out to face allegations of inflicting inhuman treatment whereas others of more senior rank who knew and approved of the conditioning process that he was ordered to implement and enforce had avoided any such allegation. That assertion was characterised by Counsel then appearing as "unattractive and deeply unfair". Whether that was a well made and justifiable comment and whether it will be one appropriately made at the end of this Inquiry will be for assessment in due course.

2.13 In the end result, as everyone now knows, Donald Payne found himself standing alone to receive what was a life-changing punishment.

As Mr Elias has already said, nothing that occurred over those 94 days at the court martial binds this Inquiry but as an exercise in establishing a context we hope that that review of some key parts of the proceedings regarding Donald Payne are of assistance in fulfilling our intended purpose of presenting a context to what follows.

When the time comes,as it inevitably will for the Inquiry to consider the credibility of Donald Payne,we suggest that with the important but explained exception of his SIB Interviews a broadly consistent account emerges,now echoed in his Rule 9 Statement to this Inquiry.

3. **THIS INQUIRY**

What follows are some observations which are intended in a general sense to indicate the manner in which we propose to approach this Inquiry on our client's behalf and further to suggest some questions for future consideration.

3.1 We deal firstly with the "closing of ranks" issue:-

- (a) This was a factor referred to by the Judge Advocate as being, to that Court at least, “more or less obvious”.
- (b) As a phenomenon the closing of ranks is well known to be a continuing difficulty when it comes to examining or indeed exposing wrongdoing within a closed institution such as the Army.
- (c) Three quotations:-
- **“Happy are those who died without having to ask themselves: ‘If they tear out my fingernails, will I talk? But even happier are others... Who have not had to ask themselves that other question: ‘If my friends, fellow soldiers, and leaders tear out an enemy’s fingernails in my presence, what will I do?’”. Jean-Paul Sartre.**
 - **“The evidence from the cases of deliberate abuse with which this report is concerned suggests that there was a failure to live up to those values and standards by some of those involved – not just the accused, but also some of the other individuals involved on the periphery of the investigation; and not just the soldiers, but some of their commanders as well. A particular example of this failing was the lack of cooperation experienced by the Service Police in conducting investigations, and what the Judge in the Baha Mousa case referred to as “The Wall of Silence” from some of those who gave evidence. The challenge is to educate our people to understand that lying to the Police Service, or having selective memory loss in court, in order to protect other members of their Unit, are not forms of loyalty but rather a lack of integrity. Respect for others means respecting all others – and that includes people who may be your enemies. Courage includes having the moral courage to challenge unacceptable behaviour whenever it is encountered.” The Aitken Report.**

- **“It follows from all that I have said that the internees must have been the subject of significant unlawful assault by others who have thus far remained silent.” Donald Payne.**

The authors are respectively **Jean-Paul Sarte** (The Preface in *La Question*, 1958), **Brigadier Aitken** in the Aitken Report of 2008 being “An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004”, the quotation appearing at paragraph 42 under the heading of “The Army’s Core Values” and finally **Donald Payne** himself at paragraph 124 of his Rule 9 Statement to this Inquiry.

3.2 “We now know how Baha Mousa died but we do not yet know who was responsible.” So said General Sir Richard Dannatt following the court martial. It is Donald Payne’s hope, expectation and intention to do all he can to assist this Inquiry in ensuring that that is not something that will be able to be said at the conclusion of it. He has for too long in his view been the only soldier to have taken any responsibility for what occurred.

3.3 May we say this, on the question of possible collusion between witnesses and also the possibility of witness contamination, it might be considered appropriate that the Inquiry should ask itself some or all of the following questions:-

- To what extent, if at all, did Donald Payne seek to initiate a cover-up story?
- If any cover-up occurred or was attempted, who was involved?
- To what extent, if any, were others involved in a deliberate attempt to implicate and/or blame Donald Payne?
- Was the methodology adopted by SIB investigators sufficiently rigorous to ensure that there was no collusion as between witnesses?
- Is there any evidence that there was any collusion between witnesses?

3.4 Might we suggest that in general terms the following questions arise for consideration with regard to Donald Payne:-

- What training and / or briefing did he receive in prisoner handling specifically?
- What training or briefing did he receive relating to detainee handling prior to Operation Salerno?
- What was the nature and extent of the handover that he received from the outgoing battalion once lodged in Basrah?
- How had he handled and treated detainees prior to Operation Salerno?
- What did he understand to be his chain of command in fulfilling this function?
- What in reality did he receive by way of supervision and oversight in the performance of this function?
- What other functions was he required to perform at the time of Operation Salerno?
- To what extent did his other duties necessitate absences from the TDF while detainees were being held following Operation Salerno?
- What specific acts of misconduct committed by him are established by all of the evidence?

We have little doubt that these questions are by no means exhaustive. If nothing else they are designed to assist and to demonstrate Mr Payne's willingness to go wherever the evidence may lead.

- 3.5 Clearly Mr Payne has an important contribution to make to Module 2. Having regard to some of what was said by Mr Elias in opening that also applies at least to some important aspects of Module 3.
- 3.6 That then will be our approach. The reason for it is straightforward. Having taken the position that he did at the court martial in accepting at least some of the responsibility Donald Payne lost a career, a reputation and a standing in his community. In reading, listening to and watching some of the media coverage following the court martial, he and others might have been forgiven for thinking that it was being said that he and he alone –

- woke up on the morning of 15th September 2003 and invented the five techniques;
- that he and he alone inflicted every one of the 93 injuries on Baha Mousa,
- that he and he alone manhandled, mistreated and assaulted the defenceless detainees for the best part of 48 hours.

3.7 In encouraging frankness and truth telling for all who appear before it, it is Donald Payne's hope that a clearer and truer picture will emerge.

3.8 It is well understood by him and by us that this Inquiry does not have within its terms of reference a remit to consider the rehabilitation of the character of Donald Payne. If, in going where the evidence leads it, that evidence shows or tends to show a somewhat different picture from the one that has so far emerged and prevailed in relation to both Donald Payne the man and Donald Payne the soldier then that will be of value both to him and, we suggest, to the process of this Inquiry.

3.9 May we conclude with the words of Thomas Paine, from his First Principles of Government.

“He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself”.

Donald Payne has accepted and does accept that he violated his duty to these detainees. For that, through us and without hesitation he wishes to publicly apologise to each of them and in particular to the family of Baha Mousa. He was not alone. We will do all we can to assist the Inquiry in discovering who else should share in that burden of responsibility. Acting on his behalf, it is the least that we can do.

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