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Full Court of the Federal Court of Australia

New South Wales Registry

General Division

On appeal from the Federal Court of Australia

No. NSD 689, 690 and 691 of 2023

**BEN ROBERTS-SMITH**

Appellant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD ACN 003 357 720 and Ors**

Respondents

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## **SECTION I: INTRODUCTION**

### **A. Overview**

1. The judgment under appeal is the extraordinary product of extraordinary circumstances. The experienced trial judge presided over a trial unusual for its length, subject matter, and complexity. Over the course of the trial which unfolded over 14 months, and the years of case management and interlocutory disputes leading up to it, the trial judge became intimately acquainted with the contours and minutiae of the factual disputes between Mr Roberts-Smith and the Respondents. Those factual disputes were numerous and inextricably interconnected. His Honour observed first-hand dozens of witnesses as they gave evidence across the 110-day hearing. Those witnesses were connected by a complex web of relationships and the testimony of each was generally relevant to a mosaic of issues.
2. His Honour then spent most of a year considering and crafting a long, careful, and clear judgment outlining his reasons for his ultimate decision. His Honour correctly identified and applied the relevant principles. He paid close attention to the serious nature of the allegations and the standard of proof. He carefully analysed each piece of evidence then wove it together into a vast and intricate tapestry of evidence, law, credit and competing case theories – each item in its uniquely correct place – then stood back and assessed the whole. The case was resolved in the Respondents’ favour. It was resolved almost entirely on factual questions.
3. Mr Roberts-Smith now seeks to overturn the trial judge’s orders. To do so, he must overturn numerous findings of fact. In order to uphold any of Mr Roberts-Smith’s grounds of appeal, this Court would have to be satisfied that the trial judge’s findings were reached in error. In considering whether that is so, this Court must make generous allowances for the unique advantages of the trial judge. Those advantages include that of seeing and hearing the oral evidence. They also include the subtler advantage of seeing the trial unfold and weighing the evidence as it did. The bar for Mr Roberts-Smith in this appeal is high.
4. Mr Roberts-Smith does not dispute that the trial judge identified the correct approach to fact-finding. His Honour was bound to consider whether matters were proved on the balance of probabilities, bearing in mind the seriousness of the allegations against Mr Roberts-Smith. The onus of proof was on the Respondents. On the matters now in dispute, his Honour found that burden discharged. These principles bind this Court as it performs its review of the evidence to identify any error. Mr Roberts-Smith contends that, having set out these matters correctly, the trial judge then failed to apply them correctly. Mr Roberts-Smith cannot establish error. Why that is so is explained further below.
5. None of the matters raised on appeal are new. Each one was raised at trial. None of them, individually or collectively, comes even close to raising a doubt as to the correctness of the trial judge’s overall findings that the Respondents established their case on the balance of probabilities. In every instance, even taking the most favourable view of the various matters

raised by Mr Roberts-Smith, the overall weight of the evidence still establishes comfortably that it is more probable than not that each of the four murders occurred.

**B. The framing of Mr Roberts-Smith's appeal**

6. A significant feature of Mr Roberts-Smith's appeal is that he does not challenge the trial judge's rejection of his own account and makes limited challenges to the credit findings of his own witnesses. He repeatedly submits that it is "not necessary for this Court to come to a view on [his] version of events".<sup>1</sup> Instead, Mr Roberts-Smith invites the Full Court to focus exclusively on alleged "improbabilities and inconsistencies" in the Respondents' case, as well as the "general effect" of the contemporaneous military documents.
7. Mr Roberts-Smith's submission that the Full Court need not form a view on (and indeed can leave out of account) his discredited case is wrong.<sup>2</sup> It is contrary to the fundamental obligation of this Court, as much as it was the obligation of the trial judge, to have regard to the evidence as a whole. It is understandable why he does not wish the Full Court to look at the dishonest, implausible, intimidatory and collusive case he ran at trial. But that failed case belies, and its spectre haunts, his appeal. Despite not appealing the trial judge's rejection of his account, he maintains implicit reliance on it as an alternative hypothesis to the Respondents' case and it regularly resurfaces in ways that are incompatible with the invitation not to form a view on his version of events.
8. In addition to being inconsistent with the obligation to consider all of the evidence in context, there are at least four further difficulties with the suggested approach.
9. *First*, some aspects of Mr Roberts-Smith's appeal are exclusively or predominantly directed at supporting the alternative positive hypothesis that he advanced at trial. In *Whiskey 108 (W108)*, the suggestion that the two "EKIA" ("enemies killed in action") were or may have been killed in a legitimate engagement outside the compound surfaces regularly. So too with *Darwan*: the Respondents' case is regularly juxtaposed against an alternative hypothesis that Ali Jan was a Taliban spotter killed legitimately in the cornfield.
10. *Second*, the contemporaneous military records contained a false account of the four murders under appeal. In *W108*, the false account came from Person 5. In *Darwan*, the false account came from Mr Roberts-Smith. In *Chinartu*, the author of the false account is unknown but the lie is blatant on its face. In each instance, the records contain a prior false statement of the wrongdoers. The records have no greater credibility than Person 5 or Mr Roberts-Smith's accounts at trial, which the trial judge rejected and which are not the subject of appeal. An assertion that it is implausible that a false account could have been included in a contemporaneous report necessarily invites attention to the question of whether the account could in fact be true. So, by seeking to rely on the contemporaneous documents, Mr Roberts-

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<sup>1</sup> See, for example, BRS [20.6]. See also, to a similar effect, e.g., BRS [1.5] and [1.13].

<sup>2</sup> See *R v Hillier* (2007) 228 CLR 618 at [49]-[52], per Gummow, Hayne and Crennan JJ.

Smith has put the veracity of his and Person 5's own discredited accounts back in play.

11. *Third*, the rejection of Mr Roberts-Smith's positive case inevitably bore upon the trial judge's fact-finding process. By giving a positive account, Mr Roberts-Smith materially narrowed the range of hypotheses that were reasonably available on the evidence.<sup>3</sup> Of course, the rejection of Mr Roberts-Smith's case did not oblige the trial judge to accept the Respondents' case: his Honour still needed to be satisfied that it was more likely than not. But in assessing the probabilities, the trial judge was entitled to consider the existence of alternative hypotheses, and the probability of them being correct. Once Mr Roberts-Smith and his witnesses gave positive accounts, the state of the evidence was such that there was no mysterious third possibility for these killings (or, at best, that the probability of any such third account was infinitesimally low). The rejection of one of the two competing hypotheses had consequences for the fact-finding process.<sup>4</sup> Those same consequences apply on appeal.
12. *Fourth*, the credit findings about each witness are intrinsically linked to the case put to them at trial (which was premised on Mr Roberts-Smith's own account). In W108, a central theme was that no Afghan men were found in the tunnel. In Darwan, there was a strikingly similar theme: there were no Afghan men in the end compound. In Chinartu, the Afghan commander, Person 12, was dishonestly said not to have been present. The trial judge addressed those primary challenges and found that, having regard to the evidence as a whole, they were not made out. Now Mr Roberts-Smith has elevated a disparate set of subsidiary issues as standalone particulars of appeal, divorced from the primary challenges that the trial judge determined, and which are not challenged on appeal. The consequence is that Mr Roberts-Smith now asks this Court to assess credit on a materially different and acontextual basis compared to the trial judge.
13. For these reasons, it is inevitable that the Full Court will need to engage with Mr Roberts-Smith's positive case on W108, Darwan and Chinartu. The Court will also need to have regard to Mr Roberts-Smith's dishonesty, intimidation, collusion and attempts to withhold relevant evidence. Those matters are inexorably intertwined with the fact-finding process and the credit findings on each witness.
14. Even assuming, however, that it was permissible for this Court not to "form a view" about Mr Roberts-Smith's rejected case, it is still necessary to have regard to *all* of the evidence relevant to assessing the significance of the discrete matters upon which Mr Roberts-Smith's submissions have fastened.<sup>5</sup> As noted above, none of those matters, individually or collectively, raises any doubt about the correctness of the trial judge's decision.

### **C. The murders at W108, Darwan and Chinartu**

15. Mr Roberts-Smith was deployed to Afghanistan six times with the Special Air Service Regiment

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<sup>3</sup> *The Queen v Baden-Clay* (2016) 258 CLR 308 at [53]-[54].

<sup>4</sup> *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 694, per Gibbs J. See also *Lee v Russell* [1961] WAR 103 at 109 and *McLennan v Nominal Defendant* [2014] NSWCA 332 at [87], per Emmett JA.

<sup>5</sup> Again, see *R v Hillier* (2007) 228 CLR 618 at [49]-[52], per Gummow, Hayne and Crennan JJ.



(SASR): in 2006, 2007, 2009, 2010 and 2012. In 2009 and 2010 Mr Roberts-Smith was the second in command (2IC) of a five-person patrol codenamed “Gothic 5”. In 2012 Mr Roberts-Smith was a patrol commander of the four-person “Gothic 2” patrol.

**12 April 2009: the double-murder at W108**

16. In 2009, Mr Roberts-Smith was the 2IC of Person 5’s “Gothic 5” patrol. The patrol “rookie” was Person 4. Person 5 and Mr Roberts-Smith immediately set their sights on “blooding the rookie” and getting Person 4 his first kill. Their chance came on 12 April 2009 when the troop assaulted and cleared a Taliban-held compound, W108.
17. The trial judge found that after W108 was cleared and declared secure, two Afghan males were found hiding in a tunnel in a semi-external courtyard: an old man (EKIA 56) and a man with a prosthetic leg named “Ahmadullah” (EKIA 57). They were placed under control (or PUC’d) by Australian soldiers and handed to Mr Roberts-Smith’s patrol. After most other soldiers had dispersed from the courtyard, Mr Roberts-Smith directed Person 4 to shoot EKIA 56, which he did. EKIA 56 was killed with a single shot to the head from close range. Mr Roberts-Smith then dragged EKIA 57 outside, threw him to the ground and machine-gunned him in the back in front of three stunned witnesses: Persons 14, 24 and 41.
18. The Respondents’ case was based on the evidence of eight powerful witnesses (Persons 4, 18, 14, 24, 40, 41, 42 and 43) and supported by compelling contemporaneous documentary evidence which is not mentioned in Mr Roberts-Smith’s written submissions. Person 4 – who shot EKIA 56 – successfully objected to giving evidence on the grounds that he may incriminate himself under s 268.70 of the Commonwealth Criminal Code (the war crime of murder).<sup>6</sup> Five of the eight witnesses only became known to the Respondents through material produced by the Brereton Inquiry.<sup>7</sup> The consistency of their evidence, and the corroboration it received from the contemporaneous records, could *only* be explained by the fact that it is true. The records corroborating the Respondents’ witnesses include unanswerable photographic and other evidence concerning the location of the body of EKIA 56, which is fatal to Mr Roberts-Smith’s case. That material is not mentioned in Mr Roberts-Smith’s submissions. It is just one example of the failure to even attempt a presentation on appeal of the relevant evidence as a whole.
19. Mr Roberts-Smith’s account, in contrast, was found to be “highly improbable”.<sup>8</sup> The highly improbable nature of Mr Roberts-Smith’s own account was compounded by the fact that his witnesses (Persons 5, 29, 35 and 38) gave materially inconsistent accounts.<sup>9</sup> Those difficulties were further compounded when two other witnesses called by Mr Roberts-Smith – Person 81 and another who is identified in our closed court submissions – gave evidence that was inconsistent with Mr Roberts-Smith’s account, and which supported the Respondents’ case. By

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<sup>6</sup> J [245]; T.2643/27-31; T.2707/10-12 (P4).

<sup>7</sup> See *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465.

<sup>8</sup> J [872].

<sup>9</sup> J [875]-[880].

the time of closing submissions, Mr Roberts-Smith had seemingly eschewed reliance on his own account of the deaths of EKIA 56 and EKIA 57 and changed his case theory on multiple key aspects of the case. A new case theory (the so-called “hive of activity” in the tunnel courtyard) emerged for the very first time in closing submissions. That new case theory is maintained on appeal (Particular 1, BRS [11.2]).

20. The trial judge’s findings on W108 are compelling. His Honour carefully and correctly analysed the whole of evidence in intricate detail. He repeatedly and correctly directed himself that rejection of Mr Roberts-Smith’s case did not equate to acceptance of the Respondents’ case. He set out at length why he preferred the evidence of the Respondents’ witnesses; and why he found the evidence (when assessed as a whole) to be an honest and reliable account that EKIA 56 and EKIA 57 were executed. No error in that reasoning has been shown.

### ***11 September 2012: the murder of Ali Jan***

21. On 11 September 2012, Mr Roberts-Smith (by now a patrol commander) participated in a mission to the village of Darwan, Uruzgan Province, looking for a person called Hekmatullah who had killed three Australian soldiers earlier in the month.<sup>10</sup> His patrol consisted of Person 4 (who by now was 2IC) and Persons 11, 56 and 47 (a military working dog handler).<sup>11</sup> At key moments, contrary to the denials of Mr Roberts-Smith and Person 11, he had an interpreter with him to assist in the interrogation of local nationals.
22. The trial judge found that shortly after 0930DE (Afghan local time), Gothic 2 reached the last compound at the southern end of Darwan, perched on the edge of a cliff above a dry riverbed. There, they found Afghan civilian males including Mangul Rahmi (**Mangul**), Mohammed Hanifa (**Hanifa**) and Ali Jan. For over an hour these men were handcuffed, beaten, and interrogated through the interpreter about Hekmatullah and whether they had links to the Taliban. At one point, Mangul was bitten by the military working dog.
23. At about 1115DE, shortly before the troop extracted, Ali Jan was taken outside the compound and positioned with his back to the cliff, his handcuffed hands behind him. As Person 11 held Ali Jan by the shoulder, Mr Roberts-Smith kicked Ali Jan in the chest, and he catapulted backwards off the cliff. Person 4 and Person 11 then dragged the badly injured Ali Jan across the dry riverbed and into the cornfield. After conferring briefly with Mr Roberts-Smith, Person 11 shot Ali Jan. One of Mr Roberts-Smith and Person 11 then removed Ali Jan’s handcuffs, placed an ICOM radio on his body, and took photographs.<sup>12</sup>
24. Mr Roberts-Smith immediately disseminated a false story that Ali Jan was a spotter who his patrol found in a cornfield while walking to a helicopter landing zone (**HLZ**) for extraction at the end of the mission. But the truth of the murder soon spread. Person 56 gave unchallenged

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<sup>10</sup> J [955].

<sup>11</sup> J [996].

<sup>12</sup> J [1368].

evidence that he was told about the murder the very same day. The Court received other unchallenged accounts from multiple witnesses who heard about the murder directly or indirectly from Person 4, including Persons 18, 7, and 31, and the Hon Andrew Hastie MP.

25. The Respondents' case at trial centred around five key witnesses: Person 4, Person 56, Mangul, Hanifa and Shahzada Fatih (**Shahzada**). Their evidence was corroborated by contemporaneous documents and other witnesses including Persons 1, 7, 18, 31 and Mr Hastie.
26. Mr Roberts-Smith's case was that Person 4 and Person 56 were mistaken, or in the case of Person 4, innocently "delusional". Mangul, Hanifa and Shahzada, in contrast, were accused of lying. Mr Roberts-Smith's case was that they were not in Darwan that day *at all* and their claims of seeing an interpreter and a military working dog were false. But the interpreter was there. The military working dog was there. They gave detailed evidence about the combinations and movements of helicopters and soldiers that could only have been given if they were there. Perhaps most distinctively, they gave evidence that one foreign soldier was tall and wet from the waist down. Multiple SASR witnesses gave evidence that Mr Roberts-Smith swam across the Helmand River that morning and was soaking wet. Hanifa and Mangul cannot have fabricated such a peculiar detail.
27. A particularly compelling feature of the Respondents' evidence was the absence of any evidence of collusion, or contamination, or even a connection between these two groups of witnesses from vastly different backgrounds and from opposite sides of the world, whose lives only ever intersected on this one fleeting occasion. Against that backdrop, Mr Roberts-Smith's claim that Person 4 and Person 56 held an honest yet mistaken belief that somehow matched a dishonest fabrication by three illiterate villagers on the other side of the world in rural Darwan was correctly rejected. The explanation for the consistent accounts was simple. They were telling the truth. The trial judge made no error in finding that to be so.
28. Mr Roberts-Smith's case at trial relied on his own evidence and that of Person 11. His case was that: (1) there were no Afghan males in the last compound; (2) the military working dog, the interpreter, Person 56 and Person 47 never came to the last compound; (3) the Afghan killed in the cornfield was a spotter; (4) Hanifa, Mangul and Shahzada were dishonest; and (5) Person 4 and Person 56 were not dishonest but mistaken. Mr Roberts-Smith also offered a positive explanation for the otherwise highly inconvenient fact that other operators were discussing the "cliff kick" soon after the mission. He said he had another engagement on the day, and he "pushed" or "kicked" that body with his foot. That, it was suggested, might have had a "knock-on effect" to "perceptions" of other events that day.
29. The trial judge correctly rejected Mr Roberts-Smith's case.<sup>13</sup> His Honour found that Mr Roberts-Smith's account was beset with improbabilities and deliberate lies<sup>14</sup> and had timing and

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<sup>13</sup> J [1231], [1283].

<sup>14</sup> J [1233]-[1234].

sequence problems.<sup>15</sup> The suggestion of “pushing” or “kicking” another insurgent’s body as the basis of the “cliff kick” story was found to be a deliberate lie.<sup>16</sup> The trial judge took into account adverse credit findings made against Mr Roberts-Smith in other parts of the case, although his Honour said he would have rejected the account in any event.<sup>17</sup> The trial judge also found that Mr Roberts-Smith had discussed his evidence at length with Person 11.<sup>18</sup> As to Person 11, the trial judge found that he was neither honest nor reliable.<sup>19</sup>

30. The trial judge analysed the competing evidence in detail. He addressed the challenges made to each witness.<sup>20</sup> He repeatedly and correctly reminded himself that the onus of proof was on the respondents, and that it was not enough for them to show no more than that Mr Roberts-Smith’s case ought to be rejected.<sup>21</sup> As with W108, he correctly emphasised the importance of analysing each piece of evidence having regard to the whole sequence of events of which it formed a part.<sup>22</sup> His Honour also emphasised, correctly, that a witness may be correct as to one matter and mistaken as to another, or truthful in respect of one matter and dishonest in respect of another.<sup>23</sup> His Honour correctly concluded that, based on a careful assessment of the evidence as a whole, Ali Jan was murdered by Mr Roberts-Smith and Person 11. No error in that reasoning has been shown.

### ***12 October 2012: the murder of an Afghan male at Chinartu***

31. On 12 October 2012, Mr Roberts-Smith’s patrol was again on mission. On this trip, the patrol was supplemented by Persons 14 and 27. Late in the mission, Mr Roberts-Smith was questioning a PUC when a cache was found nearby. Mr Roberts-Smith ordered the Afghan partner force commander, Person 12, to shoot the PUC. After some discussion, an Afghan partner force soldier stepped forward and shot the PUC. Person 14 was an eyewitness to the killing. Shortly afterwards, the estimated number of PUCs to be brought back to Tarin Kowt – which had already been radioed in – was reduced from an estimate of 3-4, down to 2.
32. Three deliberate falsehoods were then put in place to conceal this murder.
33. The first occurred soon after the soldiers returned to Tarin Kowt, where a false report of the killing, by the Afghan partner force, was included in the OPSUM. The timing was shifted by an hour and a half, from 15:39DE to 14:05DE, to give the (false) impression that it occurred during the initial compound clearances.<sup>24</sup> But there was unchallenged evidence that the Afghan partner force had no engagements during the initial clearances. Nor could the real timing be erased from the records altogether. It remained unaltered in another document – the “Sametime chat record”

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<sup>15</sup> J [1237].

<sup>16</sup> J [1234].

<sup>17</sup> J [1236].

<sup>18</sup> J [1235].

<sup>19</sup> J [1283].

<sup>20</sup> J [1089]-[1292].

<sup>21</sup> J [941]; [1089].

<sup>22</sup> J [224], [943].

<sup>23</sup> J [948].

<sup>24</sup> See [678]-[690]

– which recorded a killing just minutes before extraction, just as Person 14 described.

34. The second falsehood occurred at or about the same time. An AK 47 found in an unrelated cache earlier that afternoon was attributed to the dead Afghan in the official reporting (giving the false impression that he was armed with the weapon at the time of his death). The lie is immediately apparent on scrutiny of the photographs. The muzzle of the weapon was covered and tied off with a plastic bag; consistent with having been hidden in a cache. More importantly, the AK-47 was photographed at 1526DE,<sup>25</sup> in the middle of a sequence of photographs of the cache, and some 13 minutes *before* the PUC was shot and the killing reported in the Sametime chat record at 15.39DE. In other words, the gun the Afghan male was supposedly carrying at the time he was shot was *already* in Australian hands.
35. The third falsehood occurred in the proceedings below. The trial judge found that Mr Roberts-Smith and four witnesses colluded to give false evidence that Person 12 was removed from the rotation months earlier and therefore could not have been present at Chinartu.<sup>26</sup> The false evidence was intended to deliver a knockout blow to the Chinartu allegation.<sup>27</sup> Its falsity was exposed by material produced by the Department of Defence under subpoena, but not before all five witnesses committed the falsehood to writing in five separate outlines of evidence, and not before Mr Roberts-Smith repeated it in sworn answers to interrogatories.
36. Mr Roberts-Smith does not challenge the trial judge's findings on the Person 12 lie. Instead, as with his failed cases on W108 and Darwan, he asks the Full Court to put it to one side. But Mr Roberts-Smith cannot walk away from his outrageous attempt to perpetrate a deliberate fraud on the Court in an effort to defeat the Respondents' case for financial reward. The deliberate and dishonest scheme involving five witnesses had serious ramifications for his credit at trial and for the credit of those witnesses involved in the collusion. Those findings were plainly correct. This serious and deliberate misconduct should be at the forefront of the Full Court's mind when it considers every aspect of Mr Roberts-Smith's appeal.
37. The trial judge findings on Chinartu were plainly correct. His Honour again analysed the competing evidence in detail. He mastered the intricacies of the contemporaneous documents and explained why the timing in the Sametime chat record, rather than the OPSUM, was correct. He saw how Person 14's evidence matched the timing of the (truthful) Sametime chat record in a way that could not be fabricated. He saw the Person 12 lie unfold and then implode spectacularly, as some witnesses abandoned it but others tried to maintain it in the face of incontrovertible contemporaneous documentary proof. His Honour correctly concluded that, based on a careful assessment of all of the evidence as a whole, Mr Roberts-Smith ordered the murder of the Afghan male at Chinartu. No error has been shown.

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<sup>25</sup> DE stands for 'Delta Echo', and means the local time in Afghanistan: J [213].

<sup>26</sup> J [1509].

<sup>27</sup> J [1509].

**D. Mr Roberts-Smith's credit**

38. In May 2016, the Inspector-General of the Australian Defence Force (**IGADF**) appointed Major-General Paul Brereton to investigate whether there was any substance to persistent rumours of criminal or unlawful conduct involving SOTG deployments in Afghanistan between 2007 and 2016. The Inquiry ultimately covered the period from 2006 to 2016.
39. From about mid-2017 onwards, Mr Roberts-Smith embarked on a multi-faceted course of conduct to intimidate witnesses, undermine evidence adverse to his interests, and to enhance the probative value of evidence favourable to his interests through collusion. Initially, this conduct focused on the IGADF inquiry, but it expanded to include this case. The trial judge made significant adverse findings about the credit of Mr Roberts-Smith and his witnesses arising from this conduct. None of these findings are now challenged on appeal.
40. Mr Roberts-Smith also lied in multiple aspects of his evidence in this case: perhaps most spectacularly as an architect of the Person 12 lie in respect of Chinartu. The trial judge also made multiple findings of dishonesty in respect of his evidence on Darwan and W108. His Honour considered that Mr Roberts-Smith was "not an honest and reliable witness" in many areas.<sup>28</sup> Again, none of those findings of dishonesty are challenged on appeal.
41. While these findings are not now directly in issue, this Court must nevertheless have regard to them as it conducts its rehearing. The task of the trial judge, and now of the Full Court, is to assess the whole of the evidence in the case. The findings about Mr Roberts-Smith's lack of credit necessarily inform the assessment of his evidence on W108, Darwan and Chinartu. Mr Roberts-Smith's efforts to collude and contaminate evidence also hopelessly undermined the credibility of many of his witnesses. We therefore set out a brief roadmap of the key credibility findings below.

***Intimidation of adverse witnesses***

42. The trial judge found that in early October 2017, less than two weeks after his friend Person 11's first major interview with the IGADF, Mr Roberts-Smith used an intermediary to make an anonymous complaint about Person 6 to the Australian Federal Police (**AFP**), a member of Federal Parliament and The Australian newspaper. The complaint was dismissed by the police, but not before it was publicised in The Australian newspaper and Person 6 was investigated and his home raided by the police.
43. Mr Roberts-Smith later told his wife, in a text message that was tendered at trial, that what happened to Person 6 would "scare the others". The others, at this time, he assessed to include Persons 6, 18, 42 and 44, all of whom were at W108. The trial judge found that Mr Roberts-Smith's intention in falsely causing Person 6 to be investigated was "to silence him with respect

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<sup>28</sup> J [173].

to allegations about the applicant and his conduct in Afghanistan."<sup>29</sup>

44. On 8-10 June 2018, the Respondents published the first articles on Darwan and W108. It was now clear to Mr Roberts-Smith that both the IGADF and the media were investigating him. Unbeknownst to him, the AFP were too.<sup>30</sup> In the following days and weeks, Mr Roberts-Smith's campaign of intimidation, collusion and concealment escalated.
45. Person 18 – who was at W108 – was a particular target of Mr Roberts-Smith's threatening conduct. Shortly after Mr Roberts-Smith learned that Person 18 had been interviewed by the IGADF, Mr Roberts-Smith sent two anonymous threatening letters to Person 18 at SASR headquarters.<sup>31</sup> The trial judge found that this conduct had a similar purpose to the attempt to "scare" Person 6, but with the added purpose of seeking to make Person 18 "correct" information he was thought to have given to the IGADF Inquiry.<sup>32</sup> His Honour said that the attempt to intimidate Person 18 "clearly" reflected adversely on Mr Roberts-Smith's credit.<sup>33</sup>
46. Person 40, who was also at W108, was another target. In 2021, Person 29, a close friend of Mr Roberts-Smith,<sup>34</sup> was working closely with Person 40 as his superior in the SASR at the time. The trial judge found that Mr Roberts-Smith and Person 29 spoke to each other before Person 29 approached Person 40 and said, "RS knows that you're going to be a witness for this defamation case. You don't — you don't have to be a witness. You know, if you speak to RS's lawyers, they will get you to sign some sort of a piece of paper, and you won't have to act as a witness ... If you don't, he will see you in court".<sup>35</sup> His Honour considered that the conversation was inappropriate coming as it did from a superior and involving a threatening undertone.<sup>36</sup>

### ***Collusion with friendly witnesses***

47. Mr Roberts-Smith did not stop at intimidating adverse witnesses; he was even more active in colluding with witnesses whose interests he perceived were aligned with his. For example:
  - (a) Mr Roberts-Smith met repeatedly with Person 11 before and after his interviews with the IGADF.<sup>37</sup> The trial judge rejected Mr Roberts-Smith's claim that he was providing mental health support.<sup>38</sup> The trial considered that by this point, having already taken steps to silence Person 6 and arranged threatening letters to be sent to Person 18, Mr Roberts-Smith was desperate to discover who was revealing adverse information about him to the IGADF Inquiry and to the media, and drew the inference that matters of substance were

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<sup>29</sup> J [2361].

<sup>30</sup> J [2434].

<sup>31</sup> J [2276], [2320], [2346].

<sup>32</sup> J [2319].

<sup>33</sup> J [2346].

<sup>34</sup> J [2357].

<sup>35</sup> J [2356].

<sup>36</sup> J [2359].

<sup>37</sup> J [2420].

<sup>38</sup> J [2419].

discussed between Mr Roberts-Smith and Person 11.<sup>39</sup>

- (b) Mr Roberts-Smith colluded extensively with Person 5 and Person 29 concerning their evidence on W108. They exchanged marked-up images of the compound. Person 29 and Mr Roberts-Smith also discussed W108 in person.<sup>40</sup>
- (c) Mr Roberts-Smith and Person 5 discussed the contents of Person 5's IGADF interview. Person 5 subsequently disclosed the substance of the interview in writing, in clear breach of a formal direction from the IGADF not to do so.<sup>41</sup>
- (d) After Mr Roberts-Smith's own IGADF interview, he met Person 29 and gave him a copy of his notes.<sup>42</sup> Over the next month, Mr Roberts-Smith flew around the world to visit key allies: Person 35; Person 5; Person 29 and Person 11.<sup>43</sup> The trial judge found that Mr Roberts-Smith and Persons 5, 11, 29 and 35 discussed their respective recollections of W108, Darwan, and Chinartu.<sup>44</sup> The trial judge concluded that even if they were not trying to "line-up" their stories, there is a significant risk that that would be the result.<sup>45</sup>

48. During this time, Mr Roberts-Smith communicated with his allies using encrypted apps on burner phones. The trial judge found that part of Mr Roberts-Smith's purpose in doing so was to avoid detection by law enforcement authorities. He wanted to avoid any interception of his telephone conversations whether it be by the media, the IGADF Inquiry or the AFP.<sup>46</sup>

49. A further means by which Mr Roberts-Smith sought to keep some witnesses onside was through the payment of their legal fees. A staggering revelation at trial was that Mr Roberts-Smith paid hundreds of thousands of dollars in legal expenses for Persons 5, 11 and 35's representation before the IGADF inquiry, which (to his knowledge) was inquiring into his own conduct. The fees were paid by Seven Network (Operations) Limited (**SNOL**) and then added to a loan facility he had with SNOL at the time.<sup>47</sup> The trial judge found that these arrangements were "unusual and difficult to penetrate",<sup>48</sup> but nevertheless, each witness understood it was a benefit to them arranged by Mr Roberts-Smith.<sup>49</sup> The arrangements were only unwound once exposed in cross-examination.<sup>50</sup> The trial judge said Mr Roberts-Smith was no doubt alive to the fact that the witnesses would feel less inclined to change their mind and refuse to cooperate or to change an account previously given in circumstances in which he arranged payment of their legal fees.<sup>51</sup>

50. The trial judge's findings about collusion and contamination had consequences beyond Mr

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<sup>39</sup> J [2423].

<sup>40</sup> T.1937/42-47 (ER); T.1937/45-47 (ER).

<sup>41</sup> J [2455]; [2376]; [2431].

<sup>42</sup> J [2458]-[2460].

<sup>43</sup> J [2461].

<sup>44</sup> J [2466].

<sup>45</sup> J [2466].

<sup>46</sup> J [2440].

<sup>47</sup> J [2389].

<sup>48</sup> J [2383].

<sup>49</sup> J [2407].

<sup>50</sup> J [2392]-[2395].

<sup>51</sup> J [2408].



Roberts-Smith's credit. The witnesses involved were materially impacted too. For example, Person 35 colluded with Mr Roberts-Smith to give false evidence about Person 12.<sup>52</sup> Person 32 gave false evidence about Person 12.<sup>53</sup> Person 11 colluded with Mr Roberts-Smith and gave false evidence about an aspect of those communications.<sup>54</sup> That contributed to the rejection of his evidence on Darwan.<sup>55</sup> Persons 5 and 29's evidence on W108 was contaminated to the extent they were found to have discussed what occurred at W108.<sup>56</sup> Person 39 had no proper basis for his evidence on Person 12 and his evidence was ultimately not accepted.<sup>57</sup>

### ***Deliberate disclosure failures***

51. Another relevant aspect of Mr Roberts-Smith's conduct at trial was the repeated failures to disclose relevant evidence. He buried disclosable material in a lunchbox in his backyard.<sup>58</sup> The trial judge found that Mr Roberts-Smith must have known it was relevant; he had sworn three affidavits of discovery, and each time he intentionally decided not to discover them.<sup>59</sup> He withheld numerous other relevant documents including a video of Person 17 being surreptitiously followed and filmed at his request,<sup>60</sup> Person 5's written document disclosing the contents of his IGADF interview,<sup>61</sup> and the marked up W108 documents that he shared with Persons 5 and 29. The trial judge found there was simply no satisfactory explanation for the failure to disclose the Person 5 statement or the marked-up W108 documents.<sup>62</sup>

### **E. The structure of these submissions**

52. It necessary to say something at the outset about the structure of our submissions. A central (and correct) feature of the trial judge's findings was that they were based on an assessment of the whole of the evidence and individual facts were assessed by reference to the whole sequence of which they formed a part. It is equally important for the Full Court to assess the matters raised by Mr Roberts-Smith by reference to the totality of the evidence and in their proper sequence. Accordingly, we analyse the evidence and issues for each of the murders under challenge in chronological order, consistent with the judgment, and pausing where appropriate to deal with the matters raised by Mr Roberts-Smith on appeal. We have sought to identify both the particulars in the Notice of Appeal, as well as the specific paragraphs of the written submissions filed for Mr Roberts-Smith, when we deal with individual arguments.

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<sup>52</sup> J [1509].

<sup>53</sup> J [1509].

<sup>54</sup> J [2368]-[2371].

<sup>55</sup> J [1278]-[1283].

<sup>56</sup> J [342]-[349], [879].

<sup>57</sup> J [1509].

<sup>58</sup> J [2519].

<sup>59</sup> J [2541].

<sup>60</sup> J [2214].

<sup>61</sup> J [2551].

<sup>62</sup> J [2553].

## **SECTION II: GENERAL PRINCIPLES**

### **A. The role of the appellate court**

#### ***Appeal by way of rehearing***

53. This is an appeal pursuant to s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth), which is an appeal by way of rehearing.<sup>1</sup> This Court's role is to conduct a thorough examination of the record of the proceeding below, including the trial judge's reasons, and give the judgment which in its opinion ought to have been given in the first instance.<sup>2</sup>
54. An appeal by way of rehearing is not simply a new hearing. The Court's task is the correction of error. Mr Roberts-Smith must show that the views and conclusions of the trial judge were wrong.<sup>3</sup> That means the rehearing, that is the real review of the evidence, must be performed with a view to ascertaining whether the relevant findings reveal error on the part of the trial judge.<sup>4</sup>

#### ***Appellate restraint***

55. As it performs the review, this Court must observe its natural limitations and make allowances for the advantages of the trial judge.<sup>5</sup> The degree of deference to be paid to a trial judge will depend on the context of the particular appeal and the issue in question.<sup>6</sup> The more prominently that limitations facing an appellate court proceeding on the record feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the trial judge was in error.<sup>7</sup> At one extreme are conclusions of a trial judge which are errors of law and are given no deference. At the other extreme are findings of fact depending on the credibility of witnesses.<sup>8</sup>
56. Mr Roberts-Smith's primary case in this appeal does not allege any error of law. The appeal is almost entirely directed to the trial judge's findings of fact. As will be seen, those findings of fact were made in circumstances where the trial judge enjoyed insuperable advantages over this Court. This Court will therefore be exceedingly reluctant to disturb the orders below.

#### **The advantage in seeing and hearing witnesses**

57. The trial judge's most obvious advantage is the opportunity to see and hear witnesses.<sup>9</sup> It is for this reason that an appellate court may only interfere with findings of fact likely to have been affected by the trial judge's impressions about witness credibility and reliability formed by witnessing oral testimony where those findings are "glaringly improbable" or "contrary to compelling inferences".<sup>10</sup> That includes findings of secondary fact based on a combination of

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<sup>1</sup> *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20].

<sup>2</sup> *Fox v Percy* (2003) 214 CLR 188 at [23], [25].

<sup>3</sup> *Branir* at [21]-[30]; *Allesch v Maunz* (2000) 203 CLR 172 at [22]-[23].

<sup>4</sup> *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14].

<sup>5</sup> *Fox v Percy* at [23].

<sup>6</sup> *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 4)* (2020) 278 FCR 1 at [414].

<sup>7</sup> *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [33].

<sup>8</sup> *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [45]-[46].

<sup>9</sup> *Jadwan* at [405].

<sup>10</sup> *Lee v Lee* (2019) 266 CLR 129 at [55].

impressions and other inferences from primary facts.

58. Contrary to Mr Roberts-Smith's suggestion at BRS [3.2] and [4.1]-[4.5], this principle is not limited only to those findings which are based on demeanour. The trial judge was reluctant to make findings on that basis.<sup>11</sup> But it is incontrovertible that his Honour made critical assessments of witness credibility and reliability based in part on the experience of observing those witnesses give their evidence. Those assessments were essential ingredients of the ultimate factual conclusions which Mr Roberts-Smith seeks to impugn.
59. Some 42 witnesses gave oral evidence at the trial. The trial judge evaluated the credibility of each of them. Some his Honour concluded were "honest", "straightforward", and/or "reliable".<sup>12</sup> Elsewhere, the trial judge described evidence as, for example, "evasive" (J [1280] (Person 11)) "vague" or "unconvincing" (J [843] (Mr Roberts-Smith)), "unsatisfactory" (J [879] (Person 35)), or "not frank and forthcoming" (J [2407] (Persons 5, 11 and 35)). It cannot be maintained that these findings are not informed by the judge's impressions of the witnesses, if not their demeanour.
60. One illustration of the way the trial judge's first-hand observations informed his assessment of credibility is Person 7, a critical witness on a number of topics who was called by the Respondents. The trial judge's conclusions on Person 7's credit are set out at J [1899]:

I have considered Person 7's evidence carefully. Person 7 said that he disliked the applicant, but he denied that he hated him. Person 7 feels strongly that the applicant does not deserve the Victoria Cross and has bullied Person 1 and that the allegation about the applicant kicking a PUC off a cliff needed to be investigated. As the foregoing illustrates, he has certainly been prepared to go to some lengths to have these views accepted, including, but not limited to, breaching the policy of the Department of Defence in relation to his dealings with Mr McKenzie. However, I found his answers throughout a long cross-examination to be frank and straightforward. He might be obsessive to some degree in his pursuit of what he believes to be right, but I did not detect in his answers to questions any propensity to fabricate evidence.

61. Similarly, Person 4 was a critical witness for the Respondents' case on Darwan. Mr Roberts-Smith attacked his reliability (and, to a degree, his honesty) on a number of bases. At J [1102], the trial judge observed:

...I record that Person 4 was in the witness box over a number of days and I did not detect anything in his ability to comprehend the questions he was asked and the answers he gave or any suggestion that his mental health issues, including the medication he was taking, affected his ability to recount the substance of what he saw. Nor did I detect at any time an attempt by Person 4 to give deliberately false evidence....

62. A third example is the "Person 12 lie", a false story put forward by a number of witnesses, that a Commander of the NDS-Wakunish soldiers had been removed or stood down following a shooting incident on 31 July 2012.<sup>13</sup> Mr Roberts-Smith conceded the story was false after seeing

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<sup>11</sup> See, e.g., J [171]-[173], [1142], [1198], [1283].

<sup>12</sup> See, e.g., J [1466] (Person 31), J [1681] (Person 16), [1753] (Person 69), J [1836] (Person 1).

<sup>13</sup> J [1509].

documents produced by the Department of Defence.<sup>14</sup> The trial judge concluded that Mr Roberts-Smith and Person 35 colluded to put the story forward.<sup>15</sup> It was also adopted by Persons 27, 32 and 39. The trial judge observed that Person 35 was an eyewitness to the shooting incident on 31 July 2012 (which in truth did not involve Person 12). Person 35 “did not accept the accuracy of documents produced by the Department of Defence on subpoena”.<sup>16</sup> He “claim[ed] to have a clear recollection which is plainly wrong and without a basis”. He “maintained his story in the face of strong evidence that he was wrong on a basis which lacked any substance...”.<sup>17</sup> Person 35 was a key witness for Mr Roberts-Smith on W108 and Darwan. Observing Person 35’s obstinate maintenance of the Person 12 lie clearly had the potential to inform the trial judge’s assessment of the credibility of his evidence on those other topics.<sup>18</sup>

63. Another example is in relation to Hanifa, an Afghan witness on the events in Darwan. At J [1173], the trial judge rejected Mr Roberts-Smith’s submission that Hanifa had attempted to learn and relay a story by rote, and then became confused under questioning. The trial judge considered that Hanifa was “enthusiastic in relaying his account which he had no doubt been asked to recount on many occasions.” But his Honour “did not detect any sign that he was relaying a detailed false story having learnt to repeat it by rote.”
64. A final illustration is Person 16, the Respondents’ key witness on Fasil (but who also gave evidence relevant to other issues, including Darwan). The trial judge considered him an “honest and reliable witness” who was “entirely straightforward” with “no motive to lie”.<sup>19</sup> His Honour rejected the suggestion that the trauma of his experiences in Afghanistan had affected his memory: “There was no indication of that in the evidence he gave. That is not to say that the passage of time has not affected his memory, but that is a different matter.”<sup>20</sup>
65. What these varied examples show is that there is a middle ground between an evaluation of witness credibility based on demeanour, where a trial judge considers based on a witness’ manner and presentation whether they are honest, and an evaluation based entirely on objective factors. The exercise performed by the trial judge in respect of each witness was a nuanced and complex evaluation, based on a weighing of multiple factors, such as the plausibility of their evidence, whether it was corroborated or not, its consistency or inconsistency with objective evidence or other findings, the witness’ motives, their relationships with other people, the approach of the witness to questioning, and the apparent clarity of their recollection as they gave evidence. Some of those factors were necessarily informed by the trial judge’s first-hand observations. It is incorrect to say that this Court is in as good a position as the trial judge to determine the weight to be afforded to the matters that were and were not taken into account in

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<sup>14</sup> J [1454].

<sup>15</sup> J [1509].

<sup>16</sup> J [1482].

<sup>17</sup> J [1487].

<sup>18</sup> J [879].

<sup>19</sup> J [1681].

<sup>20</sup> J [1681].

supporting the findings made: cf BRS [4.5]. This Court would have to be satisfied that the consequent findings of fact were “glaringly improbable” or “contrary to compelling inferences” before departing from them.<sup>21</sup>

### The advantage in receiving all the evidence as a trial unfolds

66. The trial judge has a further advantage in receiving all the evidence as a trial unfolds, particularly where the trial is long. That advantage was recently described by this Court as a “subtle but real” one, in “being able to assess and place all the evidence in its context as it unfolds and as witnesses (truthful, reliable, or not) deal with it”.<sup>22</sup>
67. The canonical explanation of the nature of this advantage is that of Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, at [90]:<sup>23</sup>

The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments. The trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence while the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. As it seems to me, these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge. These considerations acquire added force where, as in the present case, the trial was a very long one, the exhibits are most numerous, the issues are multiple and the oral and written submissions were detailed and protracted. In such cases, the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified.

68. In *Frigger v Trenfield (No 3)* [2023] FCAFC 49, Allsop CJ described the advantage of a particular trial judge in this way, at [144]:

During and after many days of hearing at the trial, which occurred after a background of extended pre-trial consideration of the issues and likely evidence, his Honour, with the advantage of the evidence unfolding before him, conducting a careful examination of the oral testimony, with its difficulties, against a shifting body of arguments, with a mass of documents sometimes contradictory or inconsistent, sometimes explained by the oral evidence (of varying reliability), and revealing, ultimately, in the context of all the evidence, no sure evidentiary footing. In this body of evidence, the trial judge had the advantage, over time, during and after the trial, of relating the documents and the oral evidence together, and evaluating their overall effect in the discharge of the onus of proof.

69. The analogy to the present case is obvious. But the advantage of the trial judge presiding over

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<sup>21</sup> *Lee v Lee* (2019) 266 CLR 129 at [55].

<sup>22</sup> *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [136].

<sup>23</sup> This passage has been frequently approved and cited, including in *Fox v Percy* at [23]; *Branir* at [24]; *Frigger v Trenfield* at [142].

this extraordinary trial far exceeds that of the trial judge considered by Allsop CJ. *Frigger v Trenfield* was an appeal from *Frigger v Trenfield (No 10)* [2021] FCA 1500. That judgment followed a 12-day trial with two witnesses. The issues concerned whether certain assets were property divisible amongst the creditors of certain bankrupt estates, orders relating to costs made by the Court of Appeal of Western Australia, and the conduct of the administration of a bankrupt estate. The trial judge delivered 13 judgments over the course of the matter. The Full Court sat for six days.

70. Here, the trial lasted 110 days. The final day of the trial was nearly 14 months after the first. The judge then considered and wrote his judgment over ten months. Some 42 witnesses gave oral evidence, across 87 hearing days. Sixteen witnesses were called by Mr Roberts-Smith and 26 by the Respondents. Mr Roberts-Smith himself gave oral evidence for 11 days. The evidence of other key witnesses also spanned multiple days: Person 14 gave evidence for five days, Person 4 for 4.5 days, Person 7 for 4.5 days, and Person 18 for three days. The transcript of the trial totals approximately 9000 pages. The trial judge received 544 exhibits. The proceeding was docketed to the trial judge immediately upon filing on 15 August 2018, almost five years before delivering the judgment now under appeal. His Honour held the first case management hearing on 4 September 2018. The trial judge delivered 31 judgments up to and including the judgment under appeal (another ten judgments were delivered by other judges).
71. Over the course of the trial, the cases advanced by Mr Roberts-Smith and the Respondents evolved and sometimes shifted, through pleadings, submissions, examination-in-chief and cross-examination. Witnesses addressed at length and in granular detail subjects which might superficially seem marginal, but were critical parts of the circumstantial evidence (for example, the location of the cordon outside W108). The trial judge had an intimate familiarity with the nuances of these points of contention and the relevance to each competing case, and could appreciate the significance of what each witness had to say about them.
72. The trial judge enjoyed the kind of advantage described by Kirby J in *Earthline* to an unusual, even unique, degree. Mr Roberts-Smith submits that this advantage is “simply a matter for the Court to take into account in considering the correctness of the trial judge’s findings”: BRS [5.1]. That vastly understates the position. As identified above, the deference to be afforded to the findings of a trial judge will depend on the circumstances of an appeal and the nature of the findings and issues. In these circumstances, the Court would only extremely reluctantly conclude that this trial judge, with the very great advantages his Honour enjoyed, made errors in his findings of fact.

### ***The potential advantage of the appellate court***

73. Mr Roberts-Smith suggests at BRS [5.2] that this Court enjoys a corresponding advantage over the trial judge. It is true that the appellate court has been occasionally described as being in a position of advantage over a trial judge. However, the circumstances of this case mean this Court enjoys no such privileged position.

74. The appellate court's advantage is said to consist of the capacity for synthesis and perspective, enabled by submissions of counsel who take the court to the relevant evidence, and the ability to reserve judgment and discuss and debate the evidence among the appellate court.<sup>24</sup> The existence and weight of this advantage will depend on the particular circumstances.<sup>25</sup>
75. A premise of Mr Roberts-Smith's submission at BRS [5.2] is that it is possible for the Court to direct its attention to a "more confined set of factual issues" than confronted by the trial judge. That premise is unfounded. In making findings on the Respondents' defences of substantial truth and contextual truth, the trial judge dealt with 11 broad topics. Mr Roberts-Smith's appeal centres on findings on three of those topics: W108, Darwan and Chinartu. But that does not mean that the rest of the judgment, and the underpinning evidence and submissions, may be cleaved off and ignored. To do so would be an error.
76. Even putting to one side Mr Roberts-Smith and his witnesses, the Respondents' witnesses by and large each addressed multiple allegations. For example, Person 7 was a key witness for the allegation of Mr Roberts-Smith's assault of an Afghan male in 2010, but also gave evidence about Darwan, Chinartu, a mock execution in pre-deployment training, a statement made to him by Mr Roberts-Smith in the ready room in July 2012, the bullying of Person 1, the battle of Tizak, the blue on blue incident in July 2012, and Mr Roberts-Smith's alleged assault of an unarmed Afghan in late August 2012. Person 14 gave evidence about W108, Chinartu, and a meeting with Mr Roberts-Smith at a Canberra café in October 2018. Person 18 gave evidence about events at W108, Tizak and Darwan, and threatening letters he received from Mr Roberts-Smith. In each case, the trial judge's assessment of their credibility was based on the whole of their evidence. His Honour acknowledged this at J [225] as he came to consider W108 (emphasis added):

...Some of the respondents' witnesses are also witnesses in relation to other missions and events. For example, Person 14 is the respondents' key witness in relation to events at Chinartu and Person 18 is an important witness in relation to the threatening letters. **In assessing the credit of a witness, it is necessary to have regard to the whole of their evidence while at the same time recognising that the witness may be correct as to one matter and mistaken as to another, or truthful as to one matter and dishonest as to another.** As will be seen, I accept the evidence of Persons 41, 40, 42, 43 and 18. As I will explain, there are reasons to scrutinise Person 14's evidence with care, but having done that, I accept his evidence. Person 24's evidence must be approached with considerable caution, but it does not stand alone and is supported by the evidence of Persons 14 and 41.

77. The fact that witnesses addressed multiple topics is just one dimension of the mosaic nature of the case. Even the evidence of witnesses who at first blush had little or nothing to say about a substantive allegation may have a bearing on the resolution of those allegations. For example, Mr Roberts-Smith's ex-wife, Emma Roberts, gave evidence about threatening letters sent by Mr Roberts-Smith to Person 18. His Honour found that evidence was reliable, which in turn

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<sup>24</sup> *Yarrabee Coal Company Pty Ltd v Lujans* (2009) 53 MVR 187 at [3].

<sup>25</sup> *Jadwan* at [405]; *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* [2013] NSWCA 35 at [19].

corroborated Person 18's evidence about those letters. That bolstered the credibility of Person 18's evidence about the events at W108 and Darwin, on which Ms Roberts had nothing directly to say. As will be explained, the trial judge's approach to topics not now in dispute is also relevant on this appeal as they illustrate the trial judge's approach to fact-finding in respect of the issues which *are* in dispute.

78. Very little of what Mr Roberts-Smith describes as the “distractions and complexities of a protracted trial” is not ultimately relevant to the trial judge's key findings on W108, Chinartu and Darwin. To understand the trial judge's findings in respect of the topics now in dispute, this Court's daunting task is therefore to have regard to the whole of the record.

## **B. Principles of fact-finding**

### ***Standard of proof***

79. The trial judge correctly identified that the standard of proof was the balance of probabilities. ***Evidence Act*** 1995 (Cth), s 140(1).<sup>26</sup> In deciding whether he was satisfied of matters to that standard, his Honour had to take into account at least the nature of the cause of action or defence and the subject matter, and the gravity of the matters alleged: s 140(2).
80. As to the gravity of the matters alleged, it is well established that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved.<sup>27</sup> There is no doubt that the principles articulated in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 were “clearly [and] powerfully ... engaged” (BRS [6.4]). The trial judge was exceedingly conscious of this.<sup>28</sup> His Honour identified that the allegations made by the Respondents were “extremely serious”, with “very significant” and “life changing” consequences to Mr Roberts-Smith, and that a number of the findings made against Mr Roberts-Smith were “extremely adverse”.<sup>29</sup> Ultimately, however, the trial judge was satisfied the proof was “clear and cogent”.<sup>30</sup> His Honour can be taken to have been actually persuaded of his findings, adverse and unlikely though they may have been.<sup>31</sup>
81. It is important to recall that the standard of proof was the civil standard even though the Respondents sought to establish that Mr Roberts-Smith had engaged in criminal conduct: ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** (1992) 67 ALJR 170 at 170-1. The civil standard is not to be conflated with the criminal standard of proof. As Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ observed in ***Rejfeek v McElroy*** (1965) 112 CLR 517, the difference between the criminal standard of proof and the civil standard “is no mere matter of words” but “a matter of critical substance”. The Court continued (at 521-522):

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<sup>26</sup> J [85].

<sup>27</sup> ***Qantas Airways Ltd v Gama*** (2008) 167 FCR 537 at [139].

<sup>28</sup> J [96]-[115].

<sup>29</sup> J [111]-[112], [115].

<sup>30</sup> J [115].

<sup>31</sup> J [103], [109], [110], [115].



No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ...

82. Contrary to this clear principle, Mr Roberts-Smith's submissions appear in places to suggest that the trial judge had to be satisfied of matters beyond a reasonable doubt. For example, he contends that the totality of the evidence "raised doubts" as to the allegations of murder (BRS [1.2]) and that belief in the Respondents' witnesses cannot be used as a basis for finding murder where there is other "doubt raised" (BRS [1.5]). He submits also that Mr Roberts-Smith was entitled to the presumption of innocence and that it is only within the contours of s 80 of the Constitution, with all the rigours and protections of the criminal justice system, that a finding of guilt in relation to war crimes can be made: BRS [1.2]. That, and the standard of beyond reasonable doubt, were not relevant to the exercise performed by the trial judge. The trial judge found that Mr Roberts-Smith had engaged in criminal conduct, as part of a consideration of defences of substantial and contextual truth in a defamation trial. It must be steadily borne in mind that to do so, his Honour had only to be satisfied on the balance of probabilities.
83. In considering the strength of the evidence that would be required to persuade him on the balance of probabilities, the trial judge took into account the consequences of the Respondents' allegations being made out.<sup>32</sup> They included "life changing" reputational harm.<sup>33</sup>
84. While acknowledging the gravity of the trial judge's findings, it is important that the consequences of those findings not be overstated. They do not involve a deprivation of liberty, a declaration of contravention of any law, civil penalty, other penalty, or order for damages. Mr Roberts-Smith hints at a submission made below that the trial judge had to take into account that a serious consequence of findings adverse to him was that they would make it more likely that Mr Roberts-Smith would be charged with war crimes.<sup>34</sup> His Honour accepted that "at a general level it is inherent in the finding of criminal conduct that that may increase the likelihood of the alleged actor being charged" and took that matter into account "at a general level": J [113]. However, the trial judge correctly identified that there was no evidence in this particular case bearing on the extent of that likelihood. Mr Roberts-Smith now describes the potential effect of the findings on "any future criminal investigations" as "self-evident", without articulating what that effect may be: BRS [6.4]. He also asserts that the findings risk prejudice "to any criminal investigation or prosecution": BRS [1.4]. Those matters are not self-evident, nor was there any evidence establishing such risk. It would be inappropriate to take those possible consequences into consideration at any more than a most general level, given how speculative they are.
85. Similarly, Mr Roberts-Smith suggests the trial judge's findings could "undermin[e] Mr Roberts-Smith's presumption of innocence": BRS [1.4]. How that is so is not explained. The trial judge

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<sup>32</sup> J [112]-[113].

<sup>33</sup> J [112].

<sup>34</sup> J [113]; BRS [6.4].

acknowledged, correctly, that the presumption of innocence was a matter to be taken into account: J [114], citing *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at [752] and *Neat Holdings* at 450. The presumption of innocence reflects the general principle, articulated in *Briginshaw* and *Neat Holdings*, that members of our society do not ordinarily engage in criminal conduct. The presumption may be displaced. *Briginshaw* is not authority for the proposition that the undermining of the presumption of innocence is a consequence outside of proceedings which must be taken into account. Rather, the taking into account of the presumption of innocence is part and parcel of the standard *Briginshaw* principle.

86. Mr Roberts-Smith does not contend that the trial judge misdirected himself as to the standard of proof: BRS [6.1]. His Honour directed himself correctly not just in the introductory statement of principles governing fact-finding, but all the way through the judgment.<sup>35</sup> Mr Roberts-Smith needs to establish that somehow, despite this awareness, that the trial judge nevertheless reached the state of being actually persuaded to the requisite standard based on evidence that was not clear or cogent.

### ***The “excluded middle”***

87. Mr Roberts-Smith’s central contention on the appeal appears to be that the Respondents led the trial judge to conclude erroneously that he had a binary choice between accepting the evidence of Mr Roberts-Smith’s witnesses and believing the Respondents’ witnesses: BRS [1.2]. In accepting the Respondents’ invitation, Mr Roberts-Smith submits, the trial judge mistakenly focused on the credibility attacks on Mr Roberts-Smith and his witnesses and failed to approach with caution the totality of the evidence before the Court: BRS [1.2].

That contention is wrong.

### **The trial judge understood the principles**

88. The trial judge was acutely aware of the principles identified by Mr Roberts-Smith at BRS [7.1]-[7.5]. His Honour identified that the court was not bound to accept the case of one or other of the parties, and could reject the case of both parties, citing many of the same authorities as Mr Roberts-Smith does at BRS [7.2].<sup>36</sup> This was no mere recitation of principle, overlooked as the trial judge embarked on the actual task of fact-finding. Again and again, the trial judge reminded himself as he set out his findings that the onus lay with the Respondents and, his Honour having rejected Mr Roberts-Smith’s evidence, he was not bound to accept the Respondents’ case.<sup>37</sup>
89. Far from inviting the trial judge into error, the Respondents clearly explained these principles in closing submissions. The Respondents’ senior counsel told the Court: “a party who bears the onus, which is me, will not succeed merely by establishing that my case is more likely than the

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<sup>35</sup> See, e.g., J [1297], [1684],

<sup>36</sup> J [117]-[118].

<sup>37</sup> See, e.g., J [538], [580], [779], [789], [871] (W108); [941], [1089] (Darwan); [2220] (Person 17 allegation); [2307] (intimidation of witnesses).

other case, in other words, Mr Roberts-Smith's case. What I have to show you is that my case is more likely than not."<sup>38</sup> He continued: "disbelief of one party's version of events doesn't mean that the other party's case has been established."<sup>39</sup> Mr Roberts-Smith could have no criticism of that statement of principle.

90. In fact, the Respondents' submissions below, and the trial judge's acceptance of them, are apt to set the bar too high. In some circumstances, positive disbelief in a particular state of affairs will or may support the existence of a belief in an alternative state of affairs. In particular, that will be so if the evidence establishes that "the truth must lie between two alternative states of fact": *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 694, per Gibbs J; *McLennan v Nominal Defendant* [2014] NSWCA 332 at [87], per Emmett JA. Once it is recognised that the decision of a party to give a positive account will have the effect of narrowing the range of available hypotheses (see, e.g., *The Queen v Baden-Clay* (2016) 258 CLR 308 at [54]), then it may well be that the evidentiary contest set up between the parties does in fact constitute the "two alternative states of fact" between which the truth must lie. For reasons that will be developed in these submissions, that was the case here.
91. In any event, the trial judge was entirely cognisant of the generally correct approach that disbelief in one party's case does not necessarily establish the other party's case. Nor is there anything in his Honour's reasons to suggest that, having explicitly acknowledged that fact, he reasoned inconsistently with it. Mr Roberts-Smith simply cannot establish that, despite his explicit disavowal of a mechanistic binary approach, the trial judge nevertheless committed that error.

#### The trial judge was not entitled to ignore Mr Roberts-Smith's case

92. Mr Roberts-Smith's submissions involve a critical fallacy. That is that the trial judge, having rejected the evidence of Mr Roberts-Smith and his witnesses as lacking credibility and therefore rejecting the case put by Mr Roberts-Smith, ought to have simply disregarded Mr Roberts-Smith's case entirely. That would itself have been an error.
93. The trial judge was required to consider the entirety of the evidence. For each key allegation, that evidence included the Respondents' case and a positive alternative case propounded by Mr Roberts-Smith, entirely irreconcilable with the Respondents' case. In addition, the positive alternative case propounded by Mr Roberts-Smith was inconsistent with a range of other hypotheses that may otherwise have been open on the evidence if he and his witnesses had not entered the witness box: cf. *The Queen v Baden-Clay* (2016) 258 CLR 308 at [54]. In the circumstances of each allegation accepted by the trial judge, there was no reasonable third alternative on the evidence. Nor was there an inexplicable absence of evidence. Nor was there a limited evidentiary basis which might cause the trial judge to consider he lacked a proper evidentiary foundation upon which to make a finding.

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<sup>38</sup> T.6322/27-30 (Respondents' closing submissions).

<sup>39</sup> T.6322/37-38 (Respondents' closing submissions).

94. It is proper for a judge to assess which of several competing hypotheses is to be preferred provided the court always keep in mind upon whom the onus lies.<sup>40</sup> In considering whether a party has discharged its onus, it will often be appropriate, or even necessary, for the judge to determine whether the alternative version of events put forward by the opposing party is to be accepted. If it were accepted, then the party that bore the onus would not have discharged it.<sup>41</sup>
95. The issues now in dispute were not ones where the trial judge, having eliminated one story, was left with an “extremely improbable” account put forward by one party (or both), and a universe of other possible explanations: cf *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, 955-6; *McLennan v Nominal Defendant* [2014] NSWCA 332 at [87]. The universe of possible explanations (once Mr Roberts-Smith chose to propound a positive version) was put forward by the parties. The trial judge was not required to conjure up a speculative third possibility (whatever that might even look like in the present context) to explain each of the four deaths and then deploy that to reject the credible version offered by the respondents. (In any event, in the context of decision-making on the civil standard, it must needs be borne in mind that the ultimate question is always whether the case of the party bearing the burden of proof has been shown to be more likely than not.)
96. In each case, the elimination of Mr Roberts-Smith’s hypothesis made the Respondents’ hypothesis more credible. Take, for example, the mission to Darwan. It was not in dispute that Mr Roberts-Smith was involved in the death of an Afghan male on the mission, whose body lay in the cornfield. The trial judge was told by the Respondents that Mr Roberts-Smith and Person 11 were responsible for kicking the man off a cliff and then dragging him to the edge of the cornfield and shooting him. Mr Roberts-Smith told the Court that the man was a spotter who had been hiding in the cornfield, and that Mr Roberts-Smith shot him as he returned to the HLZ. If not by one of those two means, how else did the body of an Afghan male who had been shot end up in the cornfield at Darwan on that day? There is not an endless list of possibilities that could explain it. Nor is it a mystery that nobody could explain, unlike the sinking of the ship in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948. Clearly, someone knew what had happened. It was accepted by all sides that Mr Roberts-Smith and Person 11 witnessed the shooting death of the man. In these circumstances, Mr Roberts-Smith’s suggestion that the rejection of his version of events had absolutely no bearing on the credibility of the Respondents’ case does not withstand scrutiny.
97. None of the foregoing is to deny that the Respondents bore the onus of proof, that the standard was the balance of probabilities informed by the seriousness of the allegations, and that the mere rejection of Mr Roberts-Smiths’ case was not enough to establish the Respondents’ case.

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<sup>40</sup> *Eumeralla Estate Pty Ltd v Chen* [2022] VSCA 78 at [54], citing *Melbourne Orthopaedic Group Pty Limited v Stamford Aus-Trade & Press Pty Ltd* [2015] VSCA 150 at [109].

<sup>41</sup> *Eumeralla* at [54].

### How the trial judge engaged in fact-finding

98. For each allegation, the trial judge carefully examined the Respondents' case, including the credibility of the witnesses supporting it and the relationship of the oral evidence to the objective documentary evidence, building in the unlikelihood of grave crimes being committed. Having rejected Mr Roberts-Smith's account, the trial judge did not mechanically find the Respondents' account established.
99. The sincerity of the trial judge in adopting these principles is aptly illustrated by the trial judge's findings in relation to the accusation of murder at Fasil and the accusations of domestic violence in respect of Person 17. In those instances, the trial judge demonstrated that he was willing to reject Mr Roberts-Smith's case, and to find that the Respondents' witnesses were credible. Nevertheless, he found that the Respondents had not discharged their burden of proof.

### Fasil

100. The Respondents' case in relation to Fasil was that, on 5 November 2012, Mr Roberts-Smith shot a young Afghan male in the head after he had been PUC'd. The Respondents' principal witness was Person 16, but the Respondents did not call an eyewitness to the alleged murder.<sup>42</sup> Person 16 gave evidence that he and Person 34 stopped a Toyota HiLux and handcuffed two of the occupants, and then he handed over the young male to Mr Roberts-Smith and Person 11.<sup>43</sup> Later, he heard a call over the radio by Mr Roberts-Smith saying "two EKIA": J [1558]. He identified a dead Afghan male in photographs as the male he detained from the Toyota HiLux.<sup>44</sup> And he said that a day or two later, he asked Mr Roberts-Smith what happened to the "young fellow that was shaking like a leaf".<sup>45</sup> Mr Roberts-Smith's response was said to be: "I shot that cunt in the head ... blew his brains out, and it was the most beautiful thing I've ever seen."
101. Mr Roberts-Smith denied murdering an Afghan adolescent. He said he did not take custody of PUCs from the HiLux. He denied having the conversation with Person 16.<sup>46</sup> He said he or his patrol legitimately engaged two insurgents on the mission.<sup>47</sup> The same young male was suggested (by the Respondents) to be the Afghan adolescent, and (by Mr Roberts-Smith) to be one of the two EKIA. The trial judge was thus offered two irreconcilable accounts.
102. The trial judge found that Person 16 was an honest and reliable witness, entirely straightforward, with no motive to lie, whose recollection was not affected by trauma in Afghanistan.<sup>48</sup> He accepted that Person 16 handed two PUCs to Mr Roberts-Smith and Person 11.<sup>49</sup> The trial judge

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<sup>42</sup> J [1547].

<sup>43</sup> J [1556].

<sup>44</sup> J [1561].

<sup>45</sup> J [1563].

<sup>46</sup> J [1613].

<sup>47</sup> J [1616].

<sup>48</sup> J [1681].

<sup>49</sup> J [1682].

appeared to accept that Person 16 had the conversation he described with Mr Roberts-Smith.<sup>50</sup>

103. On the other hand, his Honour rejected the evidence of Mr Roberts-Smith as to the mission at Fasil, including that no PUCs were passed onto him during the mission.<sup>51</sup> His Honour found it would be “unusual” if the young Afghan male were released, as the OPSUM relied upon by Mr Roberts-Smith stated, without being photographed.<sup>52</sup> He also identified the reporting of the EKIA throughout the day as “unusual”, a matter relied on by the Respondents.<sup>53</sup>
104. However, the trial judge considered it an essential ingredient of the Respondents’ case that the Court be clearly satisfied that the deceased Afghan male shown in Ex R-105 was the young Afghan male detained by Person 16, having regard to all the evidence, including the absence of an eyewitness to the alleged execution, and the nature of the allegations.<sup>54</sup> While Person 16 was honest in his identification evidence,<sup>55</sup> the trial judge did not consider it to be “sufficiently clear and cogent” to support such a finding.<sup>56</sup> The Respondents’ case on Fasil was accordingly not made out.
105. In these circumstances, it is impossible for Mr Roberts-Smith to maintain that the trial judge erroneously focused on the credibility attacks on Mr Roberts-Smith and his witnesses, contributing to a failure to approach with caution the totality of the evidence. His Honour disbelieved Mr Roberts-Smith and accepted most of Person 16’s evidence, finding him to be a witness of credibility. And yet his Honour was not satisfied that the Respondents’ case had been proved on the balance of probabilities.

### The Person 17 allegations

106. A further illustration that the trial judge did not err in the manner described by Mr Roberts-Smith is in his Honour’s treatment of the allegation of Mr Roberts-Smith’s domestic violence towards Person 17, dealt with at length at J [1968]-[2227].
107. The Respondents’ case was that on the evening of 28 March 2018 Mr Roberts-Smith punched Person 17, a woman with whom he was having an affair, in her left eye.<sup>57</sup> Person 17 was the principal witness for this allegation.<sup>58</sup> The principal witness for Mr Roberts-Smith in relation to the allegation was Mr Roberts-Smith himself.<sup>59</sup>
108. The trial judge generally preferred the evidence of Person 17 to that of Mr Roberts-Smith.<sup>60</sup> His Honour accepted key aspects of Person 17’s evidence.<sup>61</sup> He accepted that Mr Roberts-Smith

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<sup>50</sup> J [1683].

<sup>51</sup> J [1684].

<sup>52</sup> J [1685].

<sup>53</sup> J [1676], [1685].

<sup>54</sup> J [1686].

<sup>55</sup> J [1688].

<sup>56</sup> J [1692].

<sup>57</sup> J [1969].

<sup>58</sup> J [1974].

<sup>59</sup> J [1976].

<sup>60</sup> J [2208].

<sup>61</sup> J [2209].

told Person 17 in a room at the Milton Hotel on 6 March 2018 that he knew she had taken a different flight and that he had access to the Virgin flight manifest. Mr Roberts-Smith had a pregnancy test and asked Person 17 to perform the test in front of him. When it did not work, he took her to a shopping centre to purchase another test. She performed the test in front of him and it returned a positive result. Mr Roberts-Smith said that he would get the CCTV from Townsville after Person 17 said she had a termination performed in Townsville.<sup>62</sup> His Honour accepted that Mr Roberts-Smith told Person 17 on 5 April 2018 that as long as they were on the same page, she had nothing to worry about, that he threatened to burn her house down, and showed her photographs of her diary and notebook.<sup>63</sup> He accepted Person 17's evidence that on the night the assault was alleged to have happened, Mr Roberts-Smith was very angry and critical of her.<sup>64</sup> The trial judge was satisfied that Mr Roberts-Smith took photographs of Person 17 naked with her bed clothes removed, and showed them to her the following morning and asked her whether he needed to keep them.<sup>65</sup> All of this was based only on the evidence of Person 17, and was denied by Mr Roberts-Smith.

109. The trial judge rejected Mr Roberts-Smith's denials of engaging in intimidatory, threatening and controlling conduct.<sup>66</sup> His Honour found that Mr Roberts-Smith had failed to disclose a video he had taken of Person 17 without her knowledge as he knew it would reflected poorly on him.<sup>67</sup> He had difficulty accepting Mr Roberts-Smith's evidence on any disputed issue.<sup>68</sup> But, the trial judge found:<sup>69</sup>

Even if his account is rejected on grounds other than acceptance of Person 17's evidence that the assault occurred, that does not establish the respondents' case. They bear the onus of proof and I must be satisfied that the assault occurred.

110. Although the trial judge accepted Person 17's evidence on a number of matters, other matters required "close examination".<sup>70</sup>

111. His Honour concluded:<sup>71</sup>

... I do not accept the applicant's evidence. Nevertheless, I must be satisfied on the balance of probabilities having regard to the criminal conduct alleged, that Person 17's evidence is reliable and should be accepted. For the reasons I have given, I am not satisfied that Person 17's evidence is sufficiently reliable to form the basis of a finding that the assault occurred and Imputations 7 and 8 are substantially true.

112. These examples demonstrate irrefutably that that the trial judge did not consider his role was to "choose between the parties' cases": cf BRS [7.2]. He was willing to reject Mr Roberts-Smith's

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<sup>62</sup> J [2209].

<sup>63</sup> J [2211].

<sup>64</sup> J [2216].

<sup>65</sup> J [2216].

<sup>66</sup> J [2212]-[2213].

<sup>67</sup> J [2214].

<sup>68</sup> J [2220].

<sup>69</sup> J [2220].

<sup>70</sup> J [2221]-[2225].

<sup>71</sup> J [2226].

case but find that the burden of proof was unsatisfied. That he did not do so in respect of W108, Darwan and Chinartu is because he was properly satisfied the burden of proof had been met.

### Witness reliability

113. Mr Roberts-Smith claims that “objective deficiencies” of the Respondents’ witnesses’ evidence mean that it was incapable of meeting the standard of proof: BRS [7.4]. To the extent that this amounts to a submission that oral evidence of eyewitnesses can never be sufficient to establish serious allegations that occurred some years in the past, that clearly cannot stand as a general proposition. This kind of broad-brush statement about the Respondents’ witnesses as a whole does not advance anything. The trial judge considered the credibility of each witness carefully and individually. This Court must consider any challenge to his conclusions in the same way.

### Duty of disclosure

114. Mr Roberts-Smith complains at BRS [7.5] that the Respondents did not have a duty of disclosure which would exist in criminal proceedings dealing with allegations of murder, and that the trial judge failed to have regard to “numerous instances” where the Respondents did not disclose versions of events which contradicted the evidence of their witnesses. Mr Roberts-Smith does not develop that submission further. That is presumably because it is utterly without basis. The Respondents complied with all of their disclosure obligations – unlike Mr Roberts-Smith<sup>72</sup> – and the suggestion to the contrary should be withdrawn.

## **C. Adequacy of reasons**

115. In the alternative to Mr Roberts-Smith’s global argument that the Respondents did not discharge their burden of proof, Mr Roberts-Smith submit that the trial judge’s reasons for his findings on certain issues were inadequate: BRS [8.1]-[8.6].

116. There can be no doubt that there is a duty on a judge to give reasons in a matter like this.<sup>73</sup> Those reasons must of course be adequate.<sup>74</sup> The content of that duty will depend on the context of the case and the particular matter for which reasons are to be given. The extent to which a court must go in giving reasons has recently been said by this Court to be “incapable of precise definition and ... context specific”.<sup>75</sup>

117. Clearly enough, a challenge to the adequacy of the trial judge’s reasons can only be made and addressed in relation to specific findings and the reasons given for them. However, generally, it can be observed that the trial judge’s public judgment totals 2618 paragraphs. His Honour published further reasons in closed Court. The judgment is exceptionally careful, thorough and clear. No criticism is made that the trial judge overlooked any significant piece of evidence or

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<sup>72</sup> See paragraph 51 above.

<sup>73</sup> *Wainohu v New South Wales* (2011) 243 CLR 181 at [54].

<sup>74</sup> *DL v The Queen* (2018) 266 CLR 1 at [32].

<sup>75</sup> *Kitchen v Director* [2023] FCAFC 160, citing *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 381; *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728.



submission advanced by either party, nor could there be. Rather, criticism is made of the trial judge for indicating that he took certain matters “into account” without further elaboration.

118. A determination of what constitutes adequate reasons in this context must take account of the length of the trial, the proliferation of issues, and the length of the reasons which were given. In the passage from *Earthline* excerpted above, Kirby J said of “very long” trials with multiple issues and detailed submissions (at [90]):

... the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified.

119. Reasons will not be inadequate merely because they fail to undertake “a minute explanation of every step in the reasoning process that leads to the judge’s conclusion”.<sup>76</sup>
120. In deciding the ultimate issues in the case, the trial judge was called upon to make findings on a lengthy list of intermediate questions of fact, which in turn depended on findings about the integrity and meaning of documentary evidence and the credibility and reliability of witness evidence. In making those findings, the trial judge was required to perform an evaluative exercise that took into account many different factors. It would simply be impossible, not to mention impracticable, for the trial judge to expose in writing the entire cognitive process undergone in synthesising those matters and forming a conclusion, for each finding.
121. This criticism will otherwise be addressed in relation to the specific findings for which it is made.

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<sup>76</sup> *DL v The Queen* (2018) 266 CLR 1 at [33]; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259.

## **SECTION III: THE MURDER OF TWO AFGHAN MEN AT WHISKEY 108 ON 12 APRIL 2009**

### **A. Introduction**

122. Mr Roberts-Smith's appeal on W108 should be dismissed. Each of the alleged "inconsistencies" and "implausibilities" identified by Mr Roberts-Smith has been taken out of context and then either misconstrued or overstated. Nor has Mr Roberts-Smith identified error in the trial judge's approach to assessing inconsistencies in the evidence. The trial judge correctly assessed the effect of any apparent inconsistencies in the context of the evidence as a whole.<sup>1</sup>
123. Mr Roberts-Smith's case also wrongly affords no deference to the advantages of the trial judge, as explained at paragraphs 70 – 72 above. That is particular so in circumstances where the judge's findings involve a detailed analysis of the credit of 13 witnesses. These considerations are complex. For some witnesses – such as Mr Roberts-Smith – the findings on credit took account of matters beyond the W108 mission. Even for those witnesses whose evidence was exclusively about W108, the credit analysis is multifaceted. A feature of the trial judge's credit analysis on W108 is that his Honour returned repeatedly to analyse the credit of individual witnesses as he moved sequentially through the events on the day. For example, Person 41's credit was considered at several distinct points in relation to the timing of events in the tunnel courtyard, the death of EKIA 56, and the death of EKIA 57. It was only once the trial judge had analysed the whole of the evidence, and the many interlocking events of the day, that he drew final conclusions about the evidence of individual witnesses and made final factual findings.<sup>2</sup> The advantages of the trial judge in conducting a complex multi-staged credit analysis in an intricate evidentiary matrix are impossible to replicate on appeal and warrant significant deference.
124. We make one final point by way of introduction. The notice of appeal contains 19 particulars referable to W108. Only some are addressed in Mr Roberts-Smith's written submissions. Particulars 1, 4, 6, 7, 8, 9(a), 9(b), 10, 11, 12, 13, 14, 16, 17 and 19 are addressed at BRS [9.1] to [19.2]. Particulars 2, 3, 5, 15 and 18 are not addressed in writing (particular 5 is referred to in a heading with particular 4 but no submissions are advanced on particular 5). Particulars 2, 3, 5, 15, and 18 may therefore be taken to have been abandoned.

### **B. "Blooding the rookie" (Notice of Appeal particulars 14, 16 and 17)**

125. An analysis of W108 starts in the weeks leading up to the mission, when the trial judge found that Person 5 (the commander of Mr Roberts-Smith's patrol) was heard to say to different people that he was going to "blood the rookie".<sup>3</sup> On the 2009 rotation, the rookie in Person 5's patrol was Person 4.<sup>4</sup> At J [275] to [286], the trial judge found that immediately after the W108 mission,

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<sup>1</sup> See, e.g., *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632 at [134] and the authorities cited therein.

<sup>2</sup> See J [863]-[883].

<sup>3</sup> J [227]-[275].

<sup>4</sup> J [249].

on the same night, both Person 5 and Mr Roberts-Smith said words to the effect of “we’ve blooded the rookie”. That was a reference to the fact that earlier in the day, Person 4 had executed EKIA 56 at W108 on the direction of Mr Roberts-Smith.

126. Mr Roberts-Smith challenges these findings at particulars 14, 16 and 17 of his Notice of Appeal and BRS [17.1] to [17.3]. To answer these submissions, it is necessary to look first at the trial judge’s findings at J [227] to [286] and the evidence underpinning them.

***Person 4 was known as “the rookie”***

127. Person 4 was the newest member of Person 5’s patrol in 2009. It was his first deployment as an SASR trooper on a Special Operations Task Group deployment.<sup>5</sup> Three witnesses gave evidence that Person 4 was the “rookie” on the 2009 rotation.

128. Person 18 was a member of Person 4’s patrol (along with Person 5 and Mr Roberts-Smith) in 2009 and 2010. Person 18 gave evidence at trial that Person 4 was regularly called the “rookie fuck” as a joke from the movie “Super Troopers”.<sup>6</sup> There was no challenge to that evidence and the trial judge accepted it.<sup>7</sup> Person 18 also gave unchallenged evidence – elicited by senior counsel for Mr Roberts-Smith in cross-examination – that in a meeting in 2013, the Regimental Sergeant Major (**RSM**) Person 102 asked directly about the bleeding of rookies at W108.<sup>8</sup> The trial judge accepted Person 18’s evidence on this point too.<sup>9</sup>

129. Person 14 was a member of a different patrol on the 2009 rotation. Person 14 gave unchallenged evidence that the term “rookie” was used in the SASR and meant a “junior trooper that is very new to the squadron/troop, if not on their first deployment”.<sup>10</sup> The trial judge accepted Person 14’s evidence that he understood the term “rookie” in 2009 to refer to Person 4.<sup>11</sup>

130. Person 24 gave evidence that he too understood the term “rookie” to refer to Person 4 in 2009.<sup>12</sup> The trial judge said he approached Person 24’s evidence with considerable caution (for reasons that are discussed in the closed court reasons), but he nevertheless accepted Person 24’s evidence on this point.<sup>13</sup>

131. Mr Roberts-Smith said he did not challenge the evidence of Persons 14, 18 and 24 because their evidence was limited to their understanding.<sup>14</sup> That submission is wrong. Person 18 gave direct, unchallenged evidence that Person 4 was called “rookie fuck” and that he was asked by Person 102 about the bleeding of rookies at W108. Persons 14 and 24 also gave direct evidence that Person 4 was called the “rookie” by Person 5 and Mr Roberts-Smith. We will turn to this

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<sup>5</sup> J [232]; T.2605/22-35; 2761/3-18 (P4).

<sup>6</sup> J [234]; T.3020/36-42 (P18).

<sup>7</sup> J [234]; T.3102/34-35 (P18).

<sup>8</sup> T.3085/9-33 (P18).

<sup>9</sup> J [235].

<sup>10</sup> J [233]; T.1389/1-17 (P14).

<sup>11</sup> J [233]; T.1395/30, T.1517/23-44 (P14).

<sup>12</sup> T.3443/46-3444/1, T.3483/6-21 (P24).

<sup>13</sup> J [236].

<sup>14</sup> J [237].

evidence next.

132. The witness evidence concerning the 2009 rotation was corroborated by evidence from the 2010 rotation. In 2010, Person 8 was the newest member of Person 5's patrol (Mr Roberts-Smith and Persons 5, 18 and 4 all remained in the patrol). Ex R-210 is a photo of a sign on the door to Person 5's patrol room in 2010.<sup>15</sup> The names of all members are listed on the sign except for Person 8's name, which is replaced with the words "rookie fuck". The trial judge found there was a strong body of evidence that the junior member of Person 5's patrol was known as "rookie" or "rookie fuck" and more generally and widely than just by Persons 14, 18 and 24.<sup>16</sup>
133. The term was still in use in 2012. The trial judge accepted Person 19's evidence that when he joined the SASR in 2012, the term "rookie" was both used and understood.<sup>17</sup>
134. Despite there being no challenge to the Respondents' witnesses on this point, various witnesses called in Mr Roberts-Smith's case (Persons 5, 27, 29, 35 and 38) did not accept that Person 4 was known as the "rookie". Those witnesses denied not just using the term "rookie" to describe Person 4 themselves or hearing him referred to as such by others; they denied hearing *any* member of the SAS ever referred to in those terms.<sup>18</sup> The trial judge rejected that evidence.<sup>19</sup> Perhaps most powerfully, it was inconsistent with Ex R-210. Person 5 and Mr Roberts-Smith would have seen the "rookie fuck" sign on the door of their patrol room every time they entered their patrol room in 2010. They cannot possibly have been ignorant of the use of the term "rookie" to refer to the most junior member of their own patrol.
135. For all these reasons, the trial judge concluded that in 2009, Person 4 was referred to as the "rookie" or the "rookie fuck" within Person 5's patrol and by other members of the troop.<sup>20</sup>

### ***Talk of "bleeding the rookie" before the mission to W108***

136. At some point before the W108 mission, Person 14 heard Person 5 say "I'm going to blood the rookie" in the troop briefing room in Tarin Kowt.<sup>21</sup> The cross examination did not challenge Person 14's evidence that Person 5 said those words. Rather, the challenge to his evidence was that "bleeding" could mean a lawful killing. Person 14 accepted that proposition.<sup>22</sup> The trial judge accepted Person 14's evidence and rejected Person 5's denial of this conversation.<sup>23</sup>
137. The trial judge also accepted Person 24's evidence that around a week before the mission to W108, Person 5 came to the doorway of his patrol room and said "We're going to blood the

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<sup>15</sup> CCT 22.4.22 T.2/9-3/24 (P5); T.5241/21-31; 5244/13-27 (P35); T.5405/29-31 (P27); T.5553/17-32 (P29); T.6009/14-43 (P38). See also Ex R-200 (a closed court exhibit).

<sup>16</sup> J [239].

<sup>17</sup> J [241]. See, e.g., T.2321/17-20, T.2360/18-24 (P19).

<sup>18</sup> See, e.g., T.4954/16-26, T.5000/11-19, T.5001/7-23 (P5). T.5386/28, 5394/33-5395/8 (P27). 5464/33-5465/6, 5553/7-15 (P29). T.5168/8, T.5241/14 (P35). T.6008/40-6009/5 (P38).

<sup>19</sup> J [243].

<sup>20</sup> J [249].

<sup>21</sup> J [265]; T.1394/41-1395/23, T.1516/9-1517/24, T.1580/9-1584/20 (P14).

<sup>22</sup> J [252].

<sup>23</sup> J [254]-[257].

rookie”.<sup>24</sup> Person 24 said that, at that point in time, he understood that bleeding meant “to facilitate or put Person 4 in a position where he could get a kill under his name”.<sup>25</sup> The cross-examination on this topic was confused. Part of the cross-examination assumed that the conversation occurred, but that “bleeding” referred to a lawful kill; but it was also put that the conversation did not occur at all.<sup>26</sup> The trial judge rejected all those challenges.<sup>27</sup>

138. The trial judge found that Persons 14 and 24’s evidence was supported by two matters. First, the evidence of Person 19 (who heard Person 5 use the term “bleeding” on another occasion).<sup>28</sup> Second, evidence from Persons 14 and 18 that Person 5 made similar statements in the immediate aftermath of the mission to W108.<sup>29</sup> While it is out of sequence, we turn to deal with the post mission statements now.

### ***Confirmation that the rookie had been blooded after the mission to W108***

139. On return to the vehicle drop-off point (**VDOP**) after the mission to W108, Person 18 heard Mr Roberts-Smith and Person 5 saying “that they’ve blooded the rookie”.<sup>30</sup> Person 14 also said that he heard Person 5 say “I finally blooded the rookie”.<sup>31</sup> Neither of those witnesses were challenged about this evidence, and it was accepted by the trial judge.<sup>32</sup>

### ***There was no error in the trial judge’s findings***

140. On appeal, Mr Roberts-Smith challenges the trial judge’s findings concerning the various “bleeding the rookie” comments on four bases. All four should be dismissed.

141. *First*, at BRS [17.1], Mr Roberts-Smith said that the trial judge erred in accepting uncorroborated evidence from Person 14 and 24 on the pre-W108 statements described above at paragraphs 136 and 137. However, while the evidence of the individual conversations was uncorroborated (in the sense that no other individual gave evidence of the precise same conversation), there was no error in the judge’s conclusion having regard to the whole of the evidence. His Honour found that Person 4 was called the rookie; he had regard to the evidence of Person 19 that the term “bleeding” was used; he had regard to Ex R-210 from the 2010 rotation; and he had regard to Person 18’s unchallenged evidence that both Person 5 and Mr Roberts-Smith discussed having “blooded the rookie” immediately after the W108 mission. It was also important that Person 14 was not challenged on his evidence that these statements were made; as outlined above, the challenge in cross-examination was limited to the suggestion that “bleeding” could mean a lawful killing. Collectively, all of these matters provided powerful support for his Honour’s

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<sup>24</sup> J [265]; T.3443/28-3444/7; 3480/33-46 (P24).

<sup>25</sup> T.3444/5-7 (P24).

<sup>26</sup> J [259]

<sup>27</sup> J [259]-[263].

<sup>28</sup> J [264].

<sup>29</sup> J [265].

<sup>30</sup> J [277]; T.3020/25-34 (P18).

<sup>31</sup> J [288]; T.1424/38-46 (P14).

<sup>32</sup> J [282]-[283].

conclusion.

142. *Second*, at BRS [17.2(a)], Mr Roberts-Smith submits that the trial judge erred in finding that Person 5 and Mr Roberts-Smith said after the W108 mission that they had “blooded the rookie” because Person 4 had already had an engagement on a prior mission to kill or capture Objective Depth Charger.<sup>33</sup> Mr Roberts-Smith made the same flawed submission at trial and the trial judge rejected it at J [266] to [275]. To understand why, it is necessary to pause and consider the evidence concerning the death of Objective Depth Charger.
143. Shortly before the W108 mission, there was an operation in the Mirabad Valley during which a high-value target known as Objective Depth Charger was killed. Two teams of SASR operators ambushed Objective Depth Charger while he was riding a motorbike with another person. One team was up on a wall (including Persons 14 and 18) and one team was on the ground (including Persons 6, 5 and 4).<sup>34</sup> Persons 4, 5, and 18 all gave evidence about the engagement.
144. Person 4 said he was third in the order of march *after* Person 6 and Person 5, and all three of them rushed out and engaged the target.<sup>35</sup> The trial judge accepted this evidence.<sup>36</sup> Thus, Person 4 did not claim credit for killing Objective Depth Charger: at its highest, his evidence was that three operators engaged the target, and he was the third to do so.
145. Person 18 was located up on a wall with Person 14. He said that in addition to operators on the ground (whom he believed to be Persons 6 and 73), he and Person 14 engaged the objective. He said that if anyone else engaged “they would have been engaging dead bodies”.<sup>37</sup> He said that whilst he did not see Person 6 engage, he heard an M14 shoot which was the weapon he believed Person 6 was carrying.<sup>38</sup> Person 18 was not challenged on his evidence that both he and Person 14 engaged the target. It follows that there was unchallenged evidence from Person 18 that, at best, Person 4 engaged Objective Depth Charger along with several other operators both on the wall and on the ground.
146. Person 5’s account of the engagement changed multiple times.<sup>39</sup> Initially, Person 5 said he ran out of the gate with Person 4 and others, and said, “the first rounds that went in him [the Objective] were from myself and Person 4”.<sup>40</sup> On that evidence, Person 4 could not take sole credit for the kill. Person 5 evidently realised this difficulty and changed his evidence in cross-examination. At that point, Person 5 said that he was *not* shooting at Objective Depth Charger at all, rather he was shooting at a second person on the back of the motorbike.<sup>41</sup> The evident purpose of Person 5’s shift was to leave Person 4 as the sole killer. When pressed on the topic,

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<sup>33</sup> J [274]-[276].

<sup>34</sup> J [270]-[271].

<sup>35</sup> T.2766/11-2768/2 (P4). As to the meaning of the word “engagement”, see T.2999/18-21 (P18).

<sup>36</sup> J [274].

<sup>37</sup> T.3029/15-3030/14 (P18).

<sup>38</sup> T.3093/10-18; 31-35; 3094/19-30; 3096/15-17 (P18).

<sup>39</sup> J [273].

<sup>40</sup> T.4846/40-45 (P5).

<sup>41</sup> T.5029/1-3 (P5).

he then changed his evidence again, and said that he “fired at both of them” and was “aiming at the men on the bike”.<sup>42</sup> Person 5’s evidence was thus not only internally inconsistent but was also inconsistent with the unchallenged evidence of Person 4 that Person 6 was out first, and Person 18’s unchallenged evidence that he was on a wall and engaged from there.<sup>43</sup> The trial judge found Person 5’s account was “unsatisfactory” and preferred Person 4 and 18’s accounts.

147. When viewed as a whole, the clear weight of the evidence was that Person 4 shot at Objective Depth Charger *after* numerous other SAS operators had already engaged and killed him, or, at the very least, that Person 4 engaged the objective simultaneously with other operators such that responsibility for the kill could not be securely attributed to him (or him alone). In these circumstances, the trial judge made no error in finding at J [275] that Person 4 was involved in the engagement but the perception at the time was not that he was responsible for killing Objective Depth Charger. Rather, the trial judge correctly found that the perception at the time was that Person 6, 14 or 18 had fired the fatal shots.<sup>44</sup> In those circumstances, Person 5’s perceived need to “blood” Person 4 remained unfulfilled.
148. *Third*, at BRS [17.2(b)], Mr Roberts-Smith submits that the trial judge erred in declining to draw an adverse inference against the Respondents for not asking Person 4 whether he was called “the rookie”, in circumstances where Person 4 was willing to answer questions about the operation to kill Objective Depth Charger. This submission also requires a brief explanation as to precisely what unfolded at trial.
149. At T.2643/27-34, senior counsel for the Respondents asked the following question of Person 4: “Now, I’m now going to turn to 2009 – and just reflect before you answer the question if you wish to make an objection – but can you please tell me what you recall happened on a mission to a compound called Whiskey 108 on or about Easter Sunday in 2009?” Person 4 objected to answering the question “on the grounds that I may incriminate myself.”<sup>45</sup> Counsel for Person 4 identified s 268.70 of the Commonwealth Criminal Code (the war crime of murder) as the basis of the objection.<sup>46</sup> Person 4 said he was unwilling to answer the question even with the benefit of a certificate under s 128(3) of the *Evidence Act*. After considering the matters in s 128(4) of the *Evidence Act*, the trial judge ruled that he would not require Person 4 to answer the question.<sup>47</sup> In circumstances where Person 4 had declined to provide *any* information about W108 in response to questioning by the Respondents, there was no error in the trial judge declining to draw an adverse inference against the Respondents for not asking a more specific question going to the same topic.
150. Person 4’s willingness to answer *some* questions in cross-examination about Objective Depth Charger does not alter the position that he was unwilling to give evidence on the question of

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<sup>42</sup> T.5125/20-31 (P5).

<sup>43</sup> See e.g., T.5029/21-22 where Person 5 appears to accept that Person 18 was on the wall.

<sup>44</sup> J [275].

<sup>45</sup> J [245]; T.2643/27-31 (P4).

<sup>46</sup> J [245]; T.2644/11-13 (Mr Kremer).

<sup>47</sup> J [245]; T.2692/40-43 (Besanko J).

whether he still needed to be “blooded” at the time of the W108 mission. In cross-examination, Person 4 gave evidence that he rushed out, together with Persons 6 and 5, and “engaged” Objective Depth Charger.<sup>48</sup> However, it became clear that Person 4 drew an important distinction between *engaging* versus *killing* a target.

151. At T.2840/4-6, Person 4 was asked the more specific question of whether he (with Persons 5 and 6) had *killed* Objective Depth Charger. Person 4 successfully objected to answering that more specific question on the grounds of self-incrimination.<sup>49</sup> The basis of the objection put by counsel for Person 4 was that the evidence was “setting the foundation up for ‘was there bleeding’ [at W108]”?<sup>50</sup> Senior counsel for Mr Roberts-Smith asked the trial judge to compel Person 4 to answer the question, over his objection, and the trial judge declined to do so.<sup>51</sup> Person 4 refused to answer a similar question about how many lawful ‘kills’ he had during the 2009 rotation even with the benefit of a s 128 certificate.<sup>52</sup>
152. The short point is this. Person 4 was unwilling to answer questions about W108 or other missions that bore directly on the question of whether he was a “rookie” who did not yet have a kill at the time of the W108 mission. In those circumstances, the trial judge made no error in declining to draw an adverse inference against the Respondents for not asking Person 4 whether Person 5 called him “rookie” in 2009. That question goes to the very heart of issues about which Person 4 was unwilling to give evidence and about which the judge was not willing to compel him.
153. Ultimately, the point goes nowhere in any event. As the trial judge rightly observed at J [248], an adverse inference could go no further than that Person 4’s evidence would not have assisted the Respondents’ case. Thus, even if the trial judge had drawn that inference, it does not follow that the judge was required to reject the *other* evidence from other witnesses (Persons 14, 18 and 24) who gave evidence that Person 4 was known as the rookie in 2009.
154. At BRS [17.3], Mr Roberts-Smith submits that Person 18’s evidence that he heard Mr Roberts-Smith and Person 5 saying “that they’ve blooded the rookie” after the W108 mission was “unreliable” in the face of the “above matters” and ought not to be accepted. The “above matters” which are said to warrant the rejection of Person 18’s evidence are unclear. Person 18’s evidence about what he heard at the VDOP was unchallenged. Person 18’s evidence about the killing of Objective Depth Charger was unchallenged. Person 14’s account that he heard Person 5 say “I finally blooded the rookie” at the VDOP was also unchallenged. Having regard to the unchallenged nature of that evidence, viewed in the context of the whole of the evidence, the trial judge made no error in accepting it.
155. One final point should be made in response to BRS [17.3]. There, it is put that Person 5’s repeated references to “bleeding the rookie” provide the “rather faint suggestion of a motive” for

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<sup>48</sup> T.2768/1-2; 2808/1-8 (P4).

<sup>49</sup> J [247(3)]; [248]; T.2840/4-2843/43 (P4).

<sup>50</sup> T.2842/12-13 (Mr Kremer).

<sup>51</sup> T.2843/18-41 (Mr Moses SC).

<sup>52</sup> T.2761.25-40 (P4).



the killing of EKIA 56, and that there was no apparent motive at all for the killing of EKIA 57. There was nothing remotely “faint” about Person 5’s desire to “blood” Person 4 in advance of the W108 mission. The trial judge found that Person 5 called Person 4 into the tunnel courtyard where Mr Roberts-Smith directed Person 4 to execute EKIA 56.<sup>53</sup> The two patrol leaders – Person 5 as commander and Mr Roberts-Smith as 2IC – subsequently spoke about how they had “blooded the rookie” immediately after the mission.<sup>54</sup> Thus, the “blooding” of Person 4, far from being no more than a “faint suggestion of a motive”, was in fact front of mind for both Person 5 and Mr Roberts-Smith at the time.

156. But even if that were not the case, the absence of motive is relevant but not decisive as the trial judge rightly observed at J [286]. An absence of motive (or perhaps more accurately, absence of evidence of motive) does not displace the otherwise compelling body of evidence that EKIA 56 and EKIA 57 were executed personally or on the direction of Mr Roberts-Smith.

157. For these reasons, particulars 14, 16 and 17 of the Notice of Appeal should be rejected.

### **C. The mission to W108 on 12 April 2009**

158. We turn next to the mission itself on 12 April 2009. We set out below a short summary of uncontroversial findings concerning the movements of G Troop on the morning of the mission, the makeup of the individual patrols, and the approach to W108. We then address an issue that does not feature in Mr Roberts-Smith’s submissions but was an area of significant contest at trial and which had major consequences for the credit of Mr Roberts-Smith’s case and the ultimate success of the Respondents’ case: the location of the Gothic 4 patrol (of which Persons 14 and 24 were members) in the cordon around the external perimeter of the W108 compound.

#### ***The morning of 12 April 2009***

159. On the morning of 12 April 2009, G Troop established an overwatch position on the western side of the Deh Rafshan river.<sup>55</sup> On the eastern side, the 7<sup>th</sup> Battalion of the Royal Australian Regiment (which was part of the broader Mentoring and Reconstruction Taskforce (**MRTF**)), was being engaged by insurgents. Those insurgents appeared to be operating out of several compounds, including two on the western side of the river designated W108 and W109.<sup>56</sup>

160. During the morning, from the overwatch position, G-Troop observed numerous insurgents manoeuvring against the MRTF and engaged some with sniper fire.<sup>57</sup> Those insurgent movements included three individuals entering W108.<sup>58</sup> G-Troop was also provided with intelligence from a Scan Eagle drone, which identified insurgents in W108.<sup>59</sup>

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<sup>53</sup> J [546].

<sup>54</sup> See paragraph 139 above.

<sup>55</sup> J [289]; Ex R-192 (Tab 1), at [5(b)]; T.5465/28-38 (P29); T.3293/14-15 (P40).

<sup>56</sup> J [290]; T.6154/8-18 (P81); T.1396/30-46 (P14); T.2115/18-28 (P42); T.5170/29-36 (P35).

<sup>57</sup> J [290]; T.5466/7-20 (P29); T.5171/1-5 (P35).

<sup>58</sup> J [290]; Ex R-192 (Tab 1, at [5(d)]). See also T.6155/46-6156/1 (P81).

<sup>59</sup> J [290]; T.6155/41-44 (P81).

161. As a result of the observed insurgent activity at W108, a 500-pound bomb was dropped on the compound at 1221DE, which caused extensive damage to the northern half of the compound (as depicted in Ex R-208).<sup>60</sup> A decision was then made that G-Troop would clear W108 and W109, and the Troop Commander gave orders to that effect to the patrol commanders.<sup>61</sup> The entire Troop participated in the mission, comprised of five patrols codenamed Gothic 1 to Gothic 5, plus a headquarters element.<sup>62</sup> We set out the members of each patrol below and their position (“PC” means patrol commander). The names highlighted in blue were called as witnesses for the Respondents. The names in red were called by Mr Roberts-Smith.

- (a) **Headquarters:** Person **81** (troop commander), Person 82, and an interpreter.
- (b) **Gothic 1:** Person 44 (PC), Person 45 (2IC), Persons **27**, 46, 47, and 48.
- (c) **Gothic 2:** Person **29** (PC), Person **40** (2IC), Persons **35**, **38**, **41** and **42**.
- (d) **Gothic 3:** Person **43** (PC), Person 72 (2IC), Persons 3, 98, 108, and 109.
- (e) **Gothic 4:** Person 6 (PC); Person 73 (2IC), Persons **14**, **24**, 68 and 80.
- (f) **Gothic 5:** Person **5** (PC); **Mr Roberts-Smith** (2IC), Persons **4**, **18** and 52.

162. The mission orders assigned different roles to each of the patrols. Gothic 2 and Gothic 5 were designated as the primary assault patrols, with responsibility for conducting the clearance of the compound.<sup>63</sup> Gothic 4 was tasked with leading the approach to W108, and then providing cordon and external security during the clearance.<sup>64</sup> Gothic 1 and Gothic 3 were also responsible for providing cordon and external security during the clearance.<sup>65</sup>

163. At about 1500DE, G-Troop stepped off from the VDOP.<sup>66</sup> On the approach to W108, Gothic 4, as the lead patrol, engaged three insurgents, resulting in three EKIAs.<sup>67</sup> The last of those EKIAs was shot by Person 14 very close to the north-west corner of the W108 compound.<sup>68</sup>

#### ***The location of Gothic 4 in the cordon***

164. At trial, there was broad agreement that the patrols approached W108 from a southerly direction. There was no such agreement, however, in relation to the place at which the two assault patrols made entry to the compound or where Gothic 4 was positioned in the external cordon. The latter point was an important issue because two members of Gothic 4 – Persons 14 and 24 – gave

<sup>60</sup> J [291]; T.169/21-30 (BRS); T.2116/1-4 (P42); Ex R-208; Ex R-192(Tab 1, at [5(d)]).

<sup>61</sup> J [287], [294]; T.6154/33-6155/11 (P81).

<sup>62</sup> J [287].

<sup>63</sup> J [296]; T.169/12-13; 170/1-9; 421/3-5 (BRS); T.1399/33-45 (P14); T.2094/1-9 (P42); T.2998/16-18 (P18); T.3258/26-30 (P40).

<sup>64</sup> J [296]-[298]; T.168/40-43 (BRS); T.1399/15-19 (P14); T.2094/12-15 (P42).

<sup>65</sup> J [296]; T.2998/20-33, 3005/28-29 (P18); T.3348/11-20, 3398/8-9 (P43); T.5378/40-43, 5380/21-28, 5392/42-46 (P27).

<sup>66</sup> J [299].

<sup>67</sup> J [300].

<sup>68</sup> J [300]; T1404/5-47; 1418/18-20 (P14); T.3446/1-6 (P24). See also page 9 of Ex A-10, tab 11 (a closed court exhibit) and CCT 4/2/2022 T.3/18-37 (P14). See also Person 40's evidence at T.3258/45-3259/4 in relation to a radio call about Person 14's engagement.

evidence that they witnessed Mr Roberts-Smith shoot an Afghan man (EKIA 57) outside the north-western corner of the W108 compound. At the risk of stating the obvious, if Persons 14 and 24 had not been in a position to observe what happened outside the north-western corner of the compound, their evidence would have been inaccurate and unreliable.

165. The trial judge considered this issue at J [303] to J [355]. At J [303], his Honour observed that there “seemed to be a difference” between the parties at trial concerning the location of Gothic 4. At J [304], the trial judge noted that Mr Roberts-Smith, who gave evidence first, had placed Gothic 4 at the southern end of the compound. In contrast, the Respondents’ witnesses said Gothic 4 was in a cordon at the north-west corner of the compound (where the killing of EKIA 57 took place). For the reasons set out at J [305] to [350], the trial judge accepted the evidence of the Respondents’ witnesses that Gothic 4 was located near the north-west corner of the W108 compound<sup>69</sup> and found that their evidence was supported by several objective matters.<sup>70</sup>

166. At J [305], the trial judge recorded a late shift in Mr Roberts-Smith’s case on the location of Gothic 4 in the cordon. His Honour recorded Mr Roberts-Smith’s concession that the location of Person 6’s patrol was “not in dispute”. In making this concession, the trial judge observed Mr Roberts-Smith appeared to place no reliance on his own evidence or that of his witnesses.

167. The significance of Mr Roberts-Smith’s last-minute concession on the location of Gothic 4 cannot be overstated. For years, Mr Roberts-Smith had sought to land a knock-out blow against the Respondents’ W108 case by wrongly claiming that Gothic 4 was on the southern side of the compound. One such example occurred on 19 October 2018 when Person 14 raised the killing of EKIA 57 directly with Mr Roberts-Smith. In a file note he took of the conversation,<sup>71</sup> Mr Roberts-Smith recorded the response he gave to Person 14:

- *I was perplexed and asked what do you mean, **your team was not even with us**. Person 14 smiled and said “come on mate” as if he wanted me to acknowledge his view. He stated “you machine gunned that guy”.*
- *I again told him that his patrol was on the other side of the compound and in any case on exiting the compound I identified that particular insurgent and engaged him.*

168. That same erroneous account was foreshadowed in the outlines of evidence filed not only for Mr Roberts-Smith, but his witnesses Persons 5 and 29 as well. The trial judge accepted that Mr Roberts-Smith, Person 5 and Person 29 had all discussed this issue prior to giving evidence and their accounts were contaminated to that extent.<sup>72</sup> These witnesses even went to the lengths of exchanging marked up aerial images of W108 prior to finalising their outlines of evidence.<sup>73</sup>

169. Three important consequences flow from Mr Roberts-Smith’s belated acceptance, and the trial

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<sup>69</sup> J [306]-[350].

<sup>70</sup> J [324]-[334].

<sup>71</sup> Exhibit A-35.

<sup>72</sup> J [349].

<sup>73</sup> J [344]-[349].

judge's finding, that Gothic 4 formed a cordon off the north-west corner of the compound.

- (a) It is now common ground that Persons 14 and 24 gave honest and reliable evidence when they said they were stationed outside the north-west corner of the compound.
- (b) It is now common ground that Persons 14 and 24 were in a perfect position to observe the location where EKIA 57 was killed, just off the north-west corner of the compound.
- (c) The position of the Gothic 4 cordon off the north-west corner of the compound – with a direct line of sight to the location where EKIA 57 was engaged – rendered Mr Roberts-Smith's own account of the killings highly unlikely.

170. The position of the Gothic 4 patrol in the cordon off the north-west corner was a significant matter that the trial judge took into account when assessing the credibility of Mr Roberts-Smith's own account.<sup>74</sup> Mr Roberts-Smith's evidence was that EKIA 56 and EKIA 57 – one elderly and one with a prosthetic leg – ran around the north-west corner of the W108 compound at the precise moment Mr Roberts-Smith walked outside. He said he engaged EKIA 57 while an unknown SASR member behind him engaged EKIA 56.<sup>75</sup> However, once it is accepted that Gothic 4 was positioned in a cordon in that area, the trial judge rightly found that it was highly unlikely that not one – but two – Afghan males running around the north-west corner of the compound would have evaded detection by a cordon of elite soldiers placed there for precisely that purpose.<sup>76</sup> The true position, as the trial judge ultimately found, is that EKIA 56 and EKIA 57 never ran around the north-west corner of the compound, the Gothic 4 cordon never failed, and Mr Roberts-Smith's account of the killings was false.

#### **D. Two Afghans were found in a tunnel (Notice of Appeal particulars 9(a), 10 and 13)**

##### ***Clearance of the W108 compound and the discovery of the tunnel***

171. There was general agreement at trial (except for Mr Roberts-Smith himself) that Gothic 5 entered the compound first followed by Gothic 2.<sup>77</sup> It was uncontroversial that the southern half of the compound was cleared first. Many witnesses recalled local nationals being in the southern part.<sup>78</sup> Gothic 2 and Gothic 5 then proceeded to the northern half of the compound.
172. There was a courtyard located in the north-west corner of the compound, in which a tunnel was found.<sup>79</sup> There was a significant controversy at trial concerning who discovered the tunnel and who was present when the tunnel was found. Much of the debate centred on the question of whether the tunnel was discovered before or after the compound was declared secure and the Site Sensitive Exploitation (**SSE**) process had commenced. The reason for the controversy was

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<sup>74</sup> J [823], [872].

<sup>75</sup> T.171/41-T.172/9; T.435/32-34 (BRS).

<sup>76</sup> J [823].

<sup>77</sup> J [357]; T.170/11-17 (BRS); T.3004/17-19 (P18); T.5174/24-29, 5300/21-23 (P35); T.5469/40-41 (P29); T.5942/15-16 (P38). Cf. T.424/2-3 (BRS).

<sup>78</sup> J [356]-[361]; T.5470/34-35, T.5471/1-2 (P29); T.3301/44 (P40), Ex R-137 (marked "G"); T.2096/40-42 (P42).

<sup>79</sup> J [362].

this: if the tunnel was discovered *before* the compound was declared secure, it was more likely that SASR operators were still scattered throughout other parts of the compound conducting clearance. If, however, the tunnel was discovered *after* the compound was declared secure, it was more likely that SASR operators were present in the tunnel courtyard.

173. Each relevant witness called by the Respondents (Persons 18, 40, 41, 42 and 43) gave evidence that the tunnel was discovered *after* the compound had been declared secure and the SSE process had commenced.<sup>80</sup> The issue appeared to be uncontroversial. With only limited exceptions, those witnesses were not challenged on this aspect of their evidence.
174. No obvious controversy appeared on the face of the outlines of evidence served for Mr Roberts-Smith's witnesses either. Indeed, Persons 29 and 35's outlines expressly stated that the tunnel was discovered during the SSE process.<sup>81</sup> However, that changed once Mr Roberts-Smith's witnesses appeared in the witness box. Despite their outlines of evidence and the manner in which the Respondents' witnesses had been cross-examined, the case advanced by Mr Roberts-Smith (through Persons 5, 29, 35 and 38) was that *none* of the Respondents' witnesses were present in the tunnel courtyard at the time of the tunnel's discovery.<sup>82</sup> On this variation of Mr Roberts-Smith's case, only he and his closest friends – Persons 5, 29, 35 and 38 – were present when the tunnel was found.<sup>83</sup> It was another attempted knock-out blow to the Respondents' W108 case, akin to the abandoned attempt to place the entire Gothic 4 patrol on the southern side of the compound.
175. But another volte-face was to come. Despite having just led evidence from Persons 5, 29, 35 and 38 to the effect that they alone were present in the tunnel courtyard when the tunnel was discovered, Mr Roberts-Smith changed position again during closing submissions and accepted that Persons 40, 41, 42 and 43 *were* present.<sup>84</sup> The purpose of this last-minute about-face was to support a new case theory that copied the language of a submission made in the High Court in *Pell v The Queen* (2020) 268 CLR 123, to the effect that a "hive of activity" in the area of the tunnel made the murder of EKIA 56 near the tunnel less likely. The new "hive of activity" case theory is maintained in Mr Roberts-Smith's appeal submissions at BRS [11.2].
176. The last-minute switch to the "hive of activity" case theory had two consequences. First, it necessarily meant that Mr Roberts-Smith accepted that Persons 40, 41, 42 and 43 had given honest and reliable evidence about being present in the tunnel courtyard when the tunnel was found. Second, it necessarily meant that Mr Roberts-Smith's own evidence, and that of his close friends Persons 5, 29, 35 and 38, was either dishonest or unreliable on the question of whether

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<sup>80</sup> J [377]-[400]; T.3004/37-45, 3005/4-6, 3005/30-41, 3006/29-31, 3008/12-16, 3111/29-35, 3008/12-16 (P18); T.3260/10-28, 3260/40-45 (P40); T.1223/1-8, T.1313/18-31 (P41); T.2096/41-47 (P42); T.3348/18-20, T.3348/44-45, T.3349/1-6 (P43).

<sup>81</sup> J [366]; Ex R-270, [14]; Ex R-271, [22]; T.5301/16-31 (P35).

<sup>82</sup> J [367], [402]-[427].

<sup>83</sup> J [368].

<sup>84</sup> J [370]-[372].

Persons 40-43 were present in the tunnel courtyard when the tunnel was found.

177. The evidence given by Person 38 was especially problematic for Mr Roberts-Smith. Person 38 was one of the very last witnesses called by Mr Roberts-Smith. He gave evidence that immediately after the tunnel was discovered, he and Person 41 went to clear an orchard outside the compound (the obvious implication being that Person 41 could not have been present during either of the subsequent executions).<sup>85</sup> But there were three fatal flaws with Person 38's evidence. First, the account did not appear in his outline of evidence and had not been put to any of the Respondents' witnesses in cross-examination, including Person 41.<sup>86</sup> Next, it was inherently implausible.<sup>87</sup> Last, it was inconsistent with the evidence of his own patrol commander, Person 29.<sup>88</sup> In closing arguments, Mr Roberts-Smith sought to side-step the obviously dishonest nature of Person 38's evidence about the orchard, asking the trial judge to disregard it on the procedural basis that it had not been put to Person 41.<sup>89</sup> The trial judge rejected this procedural course and instead rejected it on the substantive basis that Person 38's account was a dishonest recent invention.<sup>90</sup> That finding is not challenged on appeal.
178. Person 38's unsubtle attempt to defuse the evidence of a highly damaging witness against Mr Roberts-Smith by simply removing Person 41 from the scene entirely had echoes of Mr Roberts-Smith's own attempt to place the Gothic 4 cordon on the opposite side of the compound to where the killings occurred. It was also similar to the collective effort by Mr Roberts-Smith and his witnesses to place Persons 40-43 outside the tunnel courtyard at the time the tunnel was found, which was his case theory until the "hive of activity" theory was belatedly conceived and the presence of Persons 40-43 *inside* the tunnel courtyard was perceived to be more helpful.
179. Mr Roberts-Smith's late concession that Persons 40-43 were in the tunnel courtyard when the tunnel was found, and the trial judge's finding to that effect, have important consequences for this appeal. It is now common ground that Persons 40, 41, 42 and 43 gave honest and reliable evidence about their presence in the tunnel courtyard when the tunnel was discovered. Thus, when the Full Court comes to consider the trial judge's findings on the next issue – whether two Afghan men came out of the tunnel – the starting point is that the Respondents' witnesses are accepted to be honest and reliable in relation to the immediately preceding events.

***Two Afghan males came out of the tunnel (Notice of Appeal particulars 9(a), 10 and 13)***

180. The question of whether two men came out of the tunnel at W108 was a pivotal issue at trial. Three of the Respondents' witnesses gave evidence that they saw one or more Afghan men come out of the tunnel: Persons 40, 42 and 43. Two more (Persons 18 and 41) saw a fighting

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<sup>85</sup> J [416]-[417].

<sup>86</sup> J [417]-[419].

<sup>87</sup> J [421]-[422].

<sup>88</sup> J [421]-[422].

<sup>89</sup> T.6618/5-44 (Mr Moses SC).

<sup>90</sup> J [427].

aged male under guard in the courtyard when they arrived soon after the tunnel's discovery.<sup>91</sup> There was additional powerful evidence that shortly after the mission it was reported that two men had been found in the tunnel and were shot.<sup>92</sup> As for Mr Roberts-Smith's witnesses, Person 81 was neutral on the point while Mr Roberts-Smith and Persons 5, 29, 35 and 38 denied that any Afghan men were found in the tunnel.<sup>93</sup> The trial judge accepted the evidence of Persons 40, 41, 42, 43, and 18 and found that two Afghan men came out of the tunnel and were taken into the custody of Australian forces.<sup>94</sup> In so doing, his Honour rejected the evidence of Mr Roberts-Smith and Persons 5, 29, 35 and 38 on this point.

181. On appeal, Mr Roberts-Smith invites this Court to disregard the comprehensive findings of dishonesty and unreliability against him and his witnesses and instead focus on one alleged inconsistency between some of the Respondents' witnesses: the number of Afghan men said to have come out of the tunnel (BRS [10.1] to [10.10]). The submission is summarised at BRS [10.8], where it is said that the trial judge "did not refer to the significance of the discrepancy". The submission is put that "if only one person, or more than two persons, had come out of that tunnel then the account of Person 41 of the executions of EKIA 56 and 57 cannot be correct".
182. Mr Roberts-Smith's contention should be rejected. The trial judge's reasoning on this issue was compelling and without error. His Honour first considered each witness's account and the specific challenges advanced in cross-examination.<sup>95</sup> His Honour then considered the collective effect of their evidence, including consistent and inconsistent aspects. Each witness had a unique perspective and involvement in the events that accounts for the differences in their accounts. Properly understood, all of the accounts readily sit together. Next, his Honour considered the evidence of Person 81 and the documentary evidence.<sup>96</sup> Finally, he considered the evidence of Mr Roberts-Smith's witnesses, individually and collectively.<sup>97</sup> In assessing that evidence, his Honour properly took account of adverse credit findings made about Mr Roberts-Smith and his witnesses in other parts of the judgment.<sup>98</sup>
183. In order to assess Mr Roberts-Smith's challenge on this point, it is necessary to set out the relevant witnesses' evidence and the precise nature and extent of the challenge to their evidence in some detail. We will also briefly identify the evidence of Mr Roberts-Smith and his witnesses. We will then return to address Mr Roberts-Smith's contention at BRS [10.1] to [10.10].

#### Person 40

184. Person 40 was the 2IC of Gothic 2. He described seeing two women in proximity of the tunnel,

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<sup>91</sup> J [435].

<sup>92</sup> J [812].

<sup>93</sup> J [435].

<sup>94</sup> J [525], [527], [529], [531], [660], [867].

<sup>95</sup> J [225], [436]-[475], [520]-[531].

<sup>96</sup> J [491]-[493].

<sup>97</sup> J [494]-[519].

<sup>98</sup> J [226].

in the spot he marked G on Ex R-137, who were “obviously concerned”.<sup>99</sup> He said the interpreter and the women were doing callouts for the insurgents to come out of the tunnel.<sup>100</sup> Person 40 said Person 35 was also calling out and was instrumental in getting the men to come out. He said “There was a lot of talk. There was a lot of yelling, shouting, assurance. ‘Come out. You will not be harmed’”.<sup>101</sup> He heard words spoken to the interpreter to the effect “Come out, you will be safe. You’re not going to be harmed. We want to talk to you.”<sup>102</sup>

185. Person 40 recalled two insurgents coming out of the tunnel and said they were “obviously very frightened”.<sup>103</sup> He described one of the men as an older sort of man with a beard, balding and no shoes.<sup>104</sup> He had a “distinctive limp” and that as he came out he was lifting his trouser, pointing to a prosthetic leg “expecting some sort of sympathy, you know, from – from the troops.”<sup>105</sup> He did not recall anything significant about the second insurgent.<sup>106</sup>
186. Person 40 said after the two men came out of the tunnel they were searched and marched off to another area by Mr Roberts-Smith and Person 35.<sup>107</sup> The man’s prosthetic leg was not taken off and searched at that point.<sup>108</sup> He said Mr Roberts-Smith and Person 35 were behind the insurgents with their hands on the shoulder or the scruff of the neck of the insurgents, controlling them. He did not see where they were taken to but marked where he last saw them with an X on Ex R-137.<sup>109</sup> Person 40 does not recall whether the men were handcuffed during the initial search but indicated that it would be standard practice for them to be.<sup>110</sup>
187. At J [444], the trial judge recorded the nature of Mr Roberts-Smith’s challenge to Person 40’s evidence. There was no suggestion that Person 40 was dishonest, motivated or affected by jealousy or ill will, suffered from a mental illness or issue that would or might affect his recollection, or was confusing W108 with another mission, or was innocently mistaken. His Honour observed, correctly, that there was no evidence of any of these matters. Instead, Mr Roberts-Smith’s sole challenge was that Person 40’s evidence had, through the passage of time, “fermented to reconstruction, which in turn has escalated into selective recollection”.
188. The trial judge rejected Mr Roberts-Smith’s submission at J [445]. There, his Honour said not only was there no reason to think that Person 40 was not an honest and reliable witness, but his evidence was supported by other witnesses who had no interest in the matter and who gave no indication that they were doing anything other than honestly and reliably recounting their respective recollections. At J [446], his Honour correctly concluded that there was no evidence

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<sup>99</sup> J [436]; T.3264/7-16 (P40).

<sup>100</sup> J [436]; T.3264/10-12; 27-29; 3275/25-40 (P40).

<sup>101</sup> J [436]; T.3279/25-46 (P40).

<sup>102</sup> J [437]; T.3302/19-21 (P40).

<sup>103</sup> J [438]; T.3264/31-33 (P40).

<sup>104</sup> J [438]; T.3264/38-44; 3313/11-19 (P40).

<sup>105</sup> J [438]; T.3264/33-36; T.3307/26-31 (P40).

<sup>106</sup> J [438].

<sup>107</sup> J [439]; T.3265/7-21 (P40).

<sup>108</sup> J [440]; T.3318/21-25 (P40).

<sup>109</sup> J [440]; T.3315/8-43 (P40).

<sup>110</sup> J [440]; T.3265/29-3266/8 (P40).



to suggest that it is possible that Person 40 has undergone a process of creating a false memory of men coming out of the tunnel. There was not a shred of evidence to suggest that was even possible, let alone plausible, in this instance.

189. At J [445]-[451], the trial judge directly addressed the central proposition put on behalf of Mr Roberts-Smith that it was the “passage of time” that led to the apparent creation of a false memory. His Honour found that Person 40 had three contemporaneous conversations about Afghan men being found in the tunnel that negated any suggestion that the “passage of time” had influenced his recollection on this point. Plainly enough, if Person 40 reported the exact same events about two Afghan men being found in the tunnel to other people *on the very same day of the mission*, his evidence at trial could not logically be the result of innocent reconstruction over time. Two of these conversations were described by others: Persons 41 and 43.<sup>111</sup> Mr Roberts-Smith did not put to either Persons 40, 41, or 43 that these conversations did not occur.<sup>112</sup> In circumstances where the trial judge received unchallenged evidence that Person 40 told Persons 41 and 43 about his observations on the same day as the mission, there was no error in the trial judge’s finding that Person 40’s evidence was not the product of a false memory that occurred due to the passage of time.
190. At J [521]-[522], the trial judge reiterated that Person 40 was an honest and reliable witness. His Honour again noted that his evidence must be considered in light of other evidence advanced by the Respondents. The trial judge expressly considered the fact that Person 43 saw one man come out of the tunnel, whereas Person 42 saw two and potentially three men come out of the tunnel. His Honour rightly concluded that there were a number of people in the area, they were in a highly tense situation attending to different tasks and they saw different things. There was no error in that conclusion. The trial judge correctly considered the evidence as a whole and concluded that none of the differences warranted the rejection of Person 40’s evidence.
191. At J [523]-[524], the trial judge also considered Person 40’s evidence having regard to subsequent events insofar as they affected his evidence. The trial judge accepted the evidence of Person 41 concerning the deaths of EKIA 56 and EKIA 57, and the corroborating evidence of Gothic 4 members Person 14s and 24 who were stationed in the cordon outside the north-west corner of the compound. Conversely, his Honour rejected the evidence of Mr Roberts-Smith and his witnesses concerning the death of EKIA 56 and EKIA 57. For all these reasons – and after considering Person 40’s evidence individually, collectively and in the full context of other events in the mission – the trial judge concluded at J [525] that Person 40 was an honest and reliable witness and accepted his evidence.

#### Person 42

192. Person 42 gave evidence that members of Gothic 2 trained their weapons on the tunnel and

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<sup>111</sup> J [448]-[449].

<sup>112</sup> J [448]-[449].

were trying to get a look down into the tunnel.<sup>113</sup> Either he or another member of the patrol started using broken Pashtun to call the individuals out.<sup>114</sup> At least two, but potentially three, individuals then freely came out of the tunnel.<sup>115</sup> He said they were compliant, “they came out unarmed. They came out freely. They came out relatively quickly once given the commands to – to come out, or hands up, or whatever the commands we gave them.”<sup>116</sup>

193. Person 42 recalled that the individuals were called out all the way to ground level and after they came out there was an initial pat down search. Person 42 searched one of the individuals but did not recall who searched the other. Whilst he does not specifically recall handcuffing the individual, he said it would be normal practice to handcuff the individual at that stage, but they may not have been because they knew there were additional people in the troop ready to receive the individuals whilst they focused on the clearance of the tunnel or the compound itself.<sup>117</sup>

194. The trial judge accepted Person 42’s evidence. His Honour said that Person 42’s evidence fell into the same category as Person 40’s: he was an “honest and reliable witness whose evidence is supported by other witnesses with no interest in the matter and like those witnesses, he gave no indication that he was doing anything other than honestly and reliably recounting his recollection”.<sup>118</sup> The trial judge considered all of the matters he considered in relation to Person 40 (including the fact that there were differences in what each witness saw, as well as the broader context of their evidence). At J [526]-[527], the trial judge concluded that Person 42 was an honest and reliable witness and accepted his evidence.

#### Person 43

195. Person 43 was the patrol commander of Gothic 3. His patrol was in the cordon on the south-western side of W108.<sup>119</sup> He was called into the compound for a commander’s rendezvous.<sup>120</sup> He saw Person 35 discover the tunnel and ran over to render assistance.<sup>121</sup> He said when he reached the tunnel, he was standing next to Person 35 on the left hand side covering down into the tunnel.<sup>122</sup> Person 43, along with other people, verbally called for an interpreter.<sup>123</sup> He was also calling out in English “Come out, come out”.<sup>124</sup> His recollection is that before the interpreter had reached them, after about 10 or 15 seconds, someone came crawling out of the tunnel.<sup>125</sup>

196. Person 43 described how the person crawled out to the bottom and then started to stand up.<sup>126</sup>

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<sup>113</sup> J [459]; T.2097/42-2098/6; 2134/3-11 (P42).

<sup>114</sup> J [459]; T.2136/27-44; 2139/42-2140/20 (P42).

<sup>115</sup> J [459]; T.2098/12-16; 36-43; 2144/45-2145/5 (P42).

<sup>116</sup> J [459]; T.2098/45-2099/4 (P42).

<sup>117</sup> J [459]; T.2099/6-37; 2100/4-11 (P42).

<sup>118</sup> J [460].

<sup>119</sup> J [461].

<sup>120</sup> J [461].

<sup>121</sup> J [461].

<sup>122</sup> J [461]; T.3352/18-29; 3366/6-7; 16-19; 3367/1-23 (P43).

<sup>123</sup> J [461]; T.3352/31-42 (P43).

<sup>124</sup> J [461]; T.3368/21-31 (P43).

<sup>125</sup> J [461]; T.3352/38-3353/2; 3368/10-14 (P43).

<sup>126</sup> J [461]; T.3369/26-28; 3369/44-3370/26 (P43).

He said that the man's hands and head were coming up out of the hole and that his hands were "out in front of him in the universal 'I give up' position".<sup>127</sup> When he was close enough for him to grab, Person 43 knelt down and grabbed the man by his upper body and pulled him out of the tunnel.<sup>128</sup> He said there were other people around and "there were other hands grabbing at the same time".<sup>129</sup> Person 43 described the person as an "elderly Afghani male with a beard and dressed in what we would refer to as local clothing". It was light coloured.<sup>130</sup> Person 43 recalled that when the man was pulled out of the hole he was placed on the ground.<sup>131</sup> Person 43 said he helped him to the ground, and by that stage there was enough people to contain him and search him, so he went back to his job of planning and commanding.<sup>132</sup> The Afghan man was searched lying down and simultaneously handcuffed.<sup>133</sup> He was then handed over to the TQ team, which was Person 5's team.<sup>134</sup> He was then walked away by people holding his upper body and assisting him to walk.<sup>135</sup>

197. Person 43's evidence was that although he only saw one PUC coming out of the tunnel, he recalled that there were in fact *two* PUCs at W108 on the day of the mission.<sup>136</sup> That, of course, is consistent with the evidence of both Persons 40 and 42.
198. The cross-examination initially focused on the quality of Person 43's memory.<sup>137</sup> He was questioned about his mental health, and the effects of medication that he was on (he denied any impact of either upon his memory).<sup>138</sup> It was put to him that it was possible to "confuse things" where missions were similar (a proposition he accepted, though denied his memory of men in the tunnel fell into that category).<sup>139</sup> It was only when it became clear that innocent memory problems could not explain Person 43's evidence that the unconvincing attack on his honesty was made. Person 43 was then accused of "making up" his evidence, of spreading rumours, and "deliberately refraining" from mentioning specific people in his evidence so his evidence could not be disputed.<sup>140</sup> The reason it was suggested he had done that was because, as he accepted, he did not like Mr Roberts-Smith, he thought Mr Roberts-Smith was a bully, and considered there to be doubt about his entitlement to his Victoria Cross. Person 43 denied, however, that any of that meant he had come to Court to give evidence to assist the Respondents.<sup>141</sup>

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<sup>127</sup> J [461]; T.3370.30-35; 3371/5-14; 3380/5-14 (P43).

<sup>128</sup> J [461]; T.3353/7-9I 3369/32-42; 3370.28-31; 3371/16-17 (P43).

<sup>129</sup> J [461]; T.3372/36-3373/5; 3380/24-27 (P43).

<sup>130</sup> J [461]; T.3353/4-5; 11; 3368/43-46; 3374/32-37 (P43).

<sup>131</sup> J [461]; T.3373/12-13 (P43).

<sup>132</sup> J [461]; T.3353/13-14; 3373/26-37 (P43).

<sup>133</sup> J [462]; T.3353/16-18; 3373/17-19; 3374/3-7; 3375/22-32; 3378/39-43; 3393/30-44 (P43).

<sup>134</sup> J [462]; T.3353/20-23 (P43).

<sup>135</sup> J [462]; T.3374/11-28 (P43).

<sup>136</sup> T.3401/22-3402/39 (P43).

<sup>137</sup> J [466].

<sup>138</sup> See, e.g., T.3390/28-46, T.3418/29-3419/18 (P43).

<sup>139</sup> See, e.g., T.3382/12-40, T.3427/1-5 (P43).

<sup>140</sup> J [463]; See, e.g., T.3427/7-25, T.3428/12-25 (P43).

<sup>141</sup> See, e.g., T.3417/1-11 (P43).

199. The trial judge accepted that Person 43 was an honest and reliable witness.<sup>142</sup> At J [528], his Honour considered the health issues raised during Person 43's cross-examination, his dislike of Mr Roberts-Smith, and the fact that Person 43 (unsurprisingly) was forthcoming and candid about the fact that he could not remember a number of details of the events at W108. At J [529], the trial judge noted that he had considered all of the matters in relation to Persons 40 and 42 (including the fact that there were differences in what each witness saw, as well as the broader context of their evidence). At J [529], the trial judge concluded that Person 43 was an honest and reliable witness and accepted his evidence.

#### Person 41

200. Person 41 gave evidence that he was standing around with Persons 29 and 35, and Person 29 started yelling down the tunnel to see if there was anybody in there that would come out.<sup>143</sup> That carried on for a short time. Person 41 then left the tunnel area to look at the two rooms he marked D in Ex R-92.<sup>144</sup> While he was searching one of those rooms, Person 41 heard some louder voices and talking, and a bit of commotion outside in the courtyard. He stepped out of the room and to his immediate left he saw Mr Roberts-Smith and Person 4. Just behind them squatting down against the wall, sort of the north-eastern wall, was an Afghan male.<sup>145</sup> He described the man as "an older male dressed in traditional Afghan loose top and clothing, either white or a very light colour. Short, cropped hair."<sup>146</sup>

201. Person 41's evidence about seeing an older Afghan male with short, cropped hair in white or light-coloured clothing in the tunnel courtyard is consistent with a host of other evidence. Most compellingly, it is consistent with the photograph of EKIA 56's dead body in the tunnel courtyard with the sign stating "NW corn tunnel" sitting on his chest.<sup>147</sup> It is also consistent with the evidence of Persons 40, 42 and 43 that Afghan men came out of the tunnel, as well as the evidence of Person 18 (described below) that he saw an Afghan male in the tunnel courtyard who matched the description of the man Person 41 saw.

202. The trial judge accepted Person 41's evidence.<sup>148</sup> His Honour noted there was no suggestion that Person 41 had any grievance against Mr Roberts-Smith or was influenced by any of Mr Roberts-Smith's enemies.<sup>149</sup> Person 41 was also asked whether he had been told by other people what they saw at W108 (presumably to test whether his account may have been infected by the accounts of others), to which he replied that he had not.<sup>150</sup>

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<sup>142</sup> J [468].

<sup>143</sup> J [452]; T.1223/24-28 (P41).

<sup>144</sup> J [452]; T.1223/17-41; 1320/29-34; 1321/23-1322/22 (P41).

<sup>145</sup> T.1236/3-8 (P41).

<sup>146</sup> T.1236/12-14 (P41).

<sup>147</sup> See Ex R-6 (page 2).

<sup>148</sup> J [523], [684], [686].

<sup>149</sup> J [453].

<sup>150</sup> See e.g., T.1272/17-34 (P41).

## Person 18

203. Person 18 was in another area of the compound (which he marked B on Ex R-132) when he heard a call on the radio that a tunnel or a tunnel entrance had been found and that a “person or people” had been pulled out of the tunnel.<sup>151</sup> Like Person 41, Person 18 did not see men come out of the tunnel himself, but when he arrived in the courtyard shortly afterwards he saw “a person in white” under the control of Australian soldiers.<sup>152</sup> The man was wearing flexicuffs on his wrists.<sup>153</sup> He said “it was just an Afghan that was found, so it was nothing out of the ordinary.”<sup>154</sup> He said he could only recall “seeing one person”, but “there may have been more”. He said it “wasn’t an eyesore to see Afghans or Australian soldiers dealing with them. I just gave it a quick glance, there was a person there with troop members, and kept going to the – to where I was needed.”<sup>155</sup>

204. The trial judge summarised the challenges to Person 18’s evidence at J [470] to [475]. It was suggested that Person 18 had heard rumours, that he did not help clear the tunnel (J [470]), and that he did not consider Mr Roberts-Smith was deserving of his Victoria Cross (J [474]). Person 18 said he heard rumours about a killing at W108 (J [475]). However, as the trial judge correctly observed, how that circumstance might have led Person 18 to invent a memory of a man with flexi cuffs on and standing in a small group of Australian soldiers was never made clear by Mr Roberts-Smith. The trial judge considered all of Person 18’s evidence – including on this issue and others – and found he was honest and reliable.<sup>156</sup>

## Mr Roberts-Smith’s witnesses

205. Mr Roberts-Smith and his close friends Person 5, 29, 35 and 38 all gave evidence that there were no Afghan men in the tunnel.<sup>157</sup> The trial judge found that these witnesses were not honest and reliable, not just on this specific issue, but on all matters concerning W108 and more broadly.<sup>158</sup> That careful, deeply analysed and interlocking adverse credit finding against Mr Roberts-Smith and each of those witnesses is unchallenged on appeal.

206. The trial judge held that Person 81’s evidence did not rule out a finding that two Afghan males were taken from the tunnel.<sup>159</sup> While Person 81 did not himself see anyone come out of the tunnel,<sup>160</sup> and was not informed that anyone was found in the tunnel,<sup>161</sup> he did recall that he saw local nationals in the compound. He said that while he couldn’t give “firm details” on the “exact

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<sup>151</sup> T.3008/12-16; 3113/21-3114/11; 3117/38-3118/5 (P18).

<sup>152</sup> J [469]; T. 3011/28-3012/24; 3120/44-3121/10 (P18).

<sup>153</sup> T.3012/23-24 (P18).

<sup>154</sup> T.3011/29-30 (P18).

<sup>155</sup> T.3012/15-19 (P18).

<sup>156</sup> J [530]-[531].

<sup>157</sup> J [496]-[518]; T.578/26-27; 32-33; 580/23-24; 39-40 (BRS); T.5005/6; 5063/8; 5067/44-5077/29 (P5); T.5475/12 (P29). See also T.5518/34-36; 5519/15-18; 5533/44-5534/23; 5535/18-46; 5537/9-10; 5537/31-36 (P29); T.5178/114-16; 5306/36-5308/4 (P35); T.5944/31-34; 5957/9-10; 5985/40-5986/29; 5991/6-9; 6000/29-31; 6003/37-6004/24 (P38).

<sup>158</sup> J [875]- [880].

<sup>159</sup> J [492].

<sup>160</sup> T.6160/43 (P81)

<sup>161</sup> T.6160/31-32 (P81).

position” of the local nationals that he saw, he said that “wherever that troop RV was is likely to [be] where I have seen ... those persons”.<sup>162</sup> He did have a positive recollection of seeing fighting aged males in the compound.<sup>163</sup> That was highly significant in circumstances where Mr Roberts-Smith’s witnesses denied the presence of *any* fighting aged males in the compound.

207. There was other important evidence before the trial judge that, shortly after the mission, it was reported that two men had been found in the tunnel who had been shot. The trial judge referred to this evidence at J [812] and at CCJ [67]. That important evidence is not the subject of any challenge on appeal.

#### There is no error in the trial judge’s finding

208. The trial judge made no error in finding that the Respondents’ evidence, viewed as a whole, was an honest and reliable account of two Afghan men being found in a tunnel at W108. It was consistent with the evidence of Person 81 and was supported by the evidence referred to at J [812]. In those circumstances, and for the reasons outlined below, Mr Roberts-Smith’s submissions at BRS [10.1] to [10.10] should be rejected.

209. *First*, Mr Roberts-Smith materially overstates the alleged “discrepancy”. None of the Respondents’ witnesses’ evidence is inconsistent or cannot sit together. Person 40 saw two Afghan men.<sup>164</sup> Person 42 said there were no fewer than two, but no more than three.<sup>165</sup> Those two accounts can readily sit together. Person 43 only recalled seeing one Afghan male but was unsure whether others came from the tunnel.<sup>166</sup> It was his recollection that two PUCs were taken by the SASR that day.<sup>167</sup> Person 43’s evidence plainly does not exclude the presence of two men in the tunnel and can readily sit with Person 40 and 42’s accounts. Person 43’s recollection is explained by the fact that he grabbed the first Afghan to come out of the tunnel and helped place him under control. It is unsurprising that with his focus on securing the first Afghan male, Person 43 was unsure whether anyone else came from the tunnel. In those circumstances, there was no error in the trial judge’s finding that there were a number of people in the area, they were in a highly tense situation attending to different tasks and they saw different things.<sup>168</sup>

210. *Second*, Mr Roberts-Smith ignores entirely the objective evidence supporting the trial judge’s finding that EKIA 56 and EKIA 57 came from the tunnel. Photographs of EKIA 56’s dead body show a sign, written and placed there by Person 18, which reads “NW Corn tunnel”.<sup>169</sup> That was a compelling piece of evidence supporting a finding that EKIA 56 was found in, and then killed next to, the tunnel.<sup>170</sup> Mr Roberts-Smith has advanced no plausible explanation for why the word

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<sup>162</sup> T.6178/40-45 (P81).

<sup>163</sup> T.6176/35-37; 6179/5-6 (P81).

<sup>164</sup> T.3264/31-33 (P40).

<sup>165</sup> T.2098/12-16; 36-43; 2144/45-2145/5 (P42).

<sup>166</sup> T.3353/31-35 (P43).

<sup>167</sup> T.3353/31-35; T.3401/22-3402/39 (P43).

<sup>168</sup> J [522].

<sup>169</sup> Ex R-18 (pages 11-13); T.3018/45-T.3019/13 (P18).

<sup>170</sup> J [572].

“tunnel” was written on the sign on EKIA 56’s body.

211. The objective evidence concerning EKIA 57 is equally compelling. Ex R-193 is a copy of identity documents located in the tunnel. Those documents relate to a man named “Ahmadullah” who was a “R leg amputee” and had a right below-knee prosthesis. The connection between EKIA 57 and those documents was expressly made, in Ex R-17 (the TSE Report prepared shortly after the mission), which recorded that “documents likely related to KIA 57 recovered from tunnel complex, in the name of ‘Ahmadullah’”.<sup>171</sup> The trial judge found that these documents “strongly suggests that [EKIA 57] used the tunnel and had been present in it”.<sup>172</sup> This finding is not challenged on appeal.
212. *Third*, the evidence that two men were found in the tunnel should not be considered in isolation. The trial judge repeatedly and correctly emphasised the importance of analysing this evidence having regard to the whole sequence of events of which it formed a part.<sup>173</sup> Specifically, the trial judge’s findings on the circumstances in which EKIA 56 and 57 were killed, and his Honour’s rejection of the accounts given by Mr Roberts-Smith and his witnesses, were correctly taken into account as sequential events that were relevant to assessing whether two Afghans were found in the tunnel.<sup>174</sup>
213. *Fourth*, the trial judge’s finding depends to a substantial degree on the trial judge’s analysis of the credibility not only of Persons 40, 41, 42, 43 and 18, but also Mr Roberts-Smith and his witnesses Persons 5, 29, 35, 38 and 81. The trial judge’s assessment of the evidence described at J [812] was also important. The trial judge had a distinct advantage of watching the evidence on this topic over the course of many months of the trial. His Honour had the opportunity to observe the cross-examinations and reflect on the evidence and to weigh it against other evidence while it was fresh in his mind. The Full Court should have no hesitation in deferring to his Honour’s reasoning in these circumstances.
214. *Fifth*, contrary to BRS [10.8(a)], Person 40’s evidence that both Afghan males were marched away from the immediate vicinity of the tunnel is not inconsistent with the evidence of Persons 41 and 18 that when they entered the tunnel courtyard, they only saw one Afghan male (who matched the description of EKIA 56). EKIA 56 was evidently returned to the vicinity of the tunnel at some point after initially being marched away to another part of the courtyard, after which he was executed, and a sign placed on his body stating “NW Corn Tunnel”. EKIA 57 in contrast was not returned to the vicinity of the tunnel; he was instead taken outside by Mr Roberts-Smith and killed some 5 metres from the north-west corner of the compound. In those circumstances, the fact that Persons 41 and 18 saw a man matching the description of EKIA 56, but not EKIA 57, when they subsequently entered the tunnel courtyard is not only unsurprising, but in fact wholly

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<sup>171</sup> At page 4. See further the document behind Tab 11 of Ex A-10 (a closed court exhibit).

<sup>172</sup> J [493].

<sup>173</sup> J [224], [523], [527], [529], [534], [866], [867].

<sup>174</sup> J [534].

consistent with the evidence.

215. *Sixth*, the submission at BRS [10.8(b)] is factually wrong when it suggests Person 40's evidence was the "only support for the proposition that EKIA 57 emerged from the tunnel". As outlined above, there is powerful objective support from the "Ahmadullah" identification documents found in the tunnel. There is also strong corroboration from Person 42 (who saw at least two men come from the tunnel) and Person 43 (who saw one but recalled two PUCs being taken that day).
216. *Seventh*, at BRS [10.8(c)], Mr Roberts-Smith highlights what is said to be an inconsistency between the evidence of Persons 43 and 41 concerning whether an Afghan male (EKIA 56) was handcuffed. There was no such inconsistency. Again, it is important to consider the totality of the evidence. Person 40 did not recall whether the men were handcuffed but indicated it would be standard practice.<sup>175</sup> Person 42's evidence was to the same effect.<sup>176</sup> Person 43 said the PUC was handcuffed;<sup>177</sup> as did Person 18.<sup>178</sup> Person 41 did not say one way or another. In short: two witnesses positively saw handcuffs; two did not recall but said it would be standard procedure; and one did not refer to handcuffs one way or the other. There is no inconsistency in any of this evidence. It can all sit together.
217. *Eighth*, contrary to BRS [10.9], there was no error in the trial judge's findings concerning Person 81. Person 81 saw fighting aged Afghan men near the location of the commanders' rendezvous, which was in the tunnel courtyard.<sup>179</sup> Person 81's evidence was consistent with the Respondents' case, and inconsistent with Mr Roberts-Smith's account. Mr Roberts-Smith's evidence – and that of his witnesses – was that there were *no* fighting aged men found in the compound. The fact that Person 81 was not told precisely *where* the Afghan men were found in no way precludes a finding – when the evidence is assessed as a whole – that those men were found in the tunnel.
218. *Ninth*, Mr Roberts-Smith wrongly suggests that the "chaotic" scenes at the tunnel "must also affect the reliability of the witness's recollection" (BRS [10.10]). That conflates two different points. The highly tense situation at the tunnel and the fact that the operators were focused on different tasks no doubt influenced which events they saw on the day. It does not follow that their *recollection* of the things they saw was any less reliable.
219. *Tenth*, the trial judge made no error in considering whether the Respondents' witnesses were motivated to lie (cf BRS [10.10]). At BRS [10.10], Mr Roberts-Smith cites the criminal case of *Palmer v The Queen* (1998) 193 CLR 1. In that case at [7], Brennan CJ, Gaudron and Gummow JJ said the accused may have no knowledge of facts which can prove a motive to lie, and therefore an absence of evidence of motive is "generally irrelevant". Heydon J made clear in *Hargraves v The Queen* (2011) 245 CLR 257 at [44] that this principle is directed at preserving

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<sup>175</sup> J [440]; T.3265/29-3266/8 (P40).

<sup>176</sup> J [459]; T.2099/6-37; 2100/4-11 (P42).

<sup>177</sup> J [462]; T.3353/16-18; 3373/17-19; 3374/3-7; 3375/22-32; 3378/39-43; 3393/30-44 (P43).

<sup>178</sup> T.3012/23-24 (P18).

<sup>179</sup> T.6178/40-45 (P81).



the trial as an accusatorial process. Thus, this principle is directed particularly at preserving an accused's rights in a criminal case. But even if it applies to this case, his Honour did not wrongly use lack of motive to lie as a matter to *boost* his findings on honesty and reliability. Rather, his Honour considered whether there was evidence of a motive to lie or collusion that might otherwise *weaken* his findings on honesty and reliability (see, for J [864] where his Honour considers motive to lie and collusion factor in a sentence dealing with "criticisms" of their evidence). There was no error in this approach.

220. For these reasons, particulars 9(a), 10 and 13 of the Notice of Appeal should be rejected.

**E. The death of EKIA 56 (Notice of Appeal particulars 1, 4, 5)**

221. The trial judge analysed the next series of events in three parts. First, his Honour considered the Respondents' evidence concerning the death of EKIA 56. Second, his Honour considered the evidence of Mr Roberts-Smith and his witnesses concerning the deaths of EKIA 56 and 57. His Honour observed that on Mr Roberts-Smith's account, EKIA 56 and 57 were killed in a single engagement off the north-west corner of the compound, thus it is not possible to analyse Mr Roberts-Smith's account of those deaths independently.<sup>180</sup> Third, his Honour considered the Respondents' evidence concerning the death of EKIA 57. It was only at the end of this analysis that his Honour made final findings about the events at W108.

222. We have adopted the same structure in the next part of our submissions. Accordingly, the next issue we turn to is the death of EKIA 56, starting with the movements and timing of the various witnesses in the tunnel courtyard.

***The timing of events in the tunnel courtyard (Notice of Appeal particular 1)***

223. Person 40 said that as the two PUCs were being marched off in the tunnel courtyard (to the point he marked X on Ex R-137), the patrol commanders and the troop commander were still in the courtyard formulating the next phase.<sup>181</sup> Person 40 left the courtyard as the two PUCs were being marched off. He said, "So pretty much I zipped around the corner of the compound to take up a – a defensive posture."<sup>182</sup> Person 40 moved out of the compound to the north-western side (he marked the location of his defensive posture as "A" on Ex R-137).<sup>183</sup> In short, Person 40 left the tunnel courtyard immediately after the two PUCs were marched away by Mr Roberts-Smith and Person 35. That is why Person 40 was not present for the subsequent execution of EKIA 56 in the tunnel courtyard.

224. Person 42 similarly left the tunnel courtyard and continued with the clearance.<sup>184</sup> Again, the precise timing is important. Person 42 said that after the Afghans came out of the tunnel and were passed onto other operators, "we continued on with our clearance. I remember clearing

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<sup>180</sup> J [536].

<sup>181</sup> T.3315/8-43 (P40).

<sup>182</sup> T.3266/35-3267/8 (P40).

<sup>183</sup> J [540].

<sup>184</sup> J [542].

down to the south of the compound ... down the southern side down closer to the river”.<sup>185</sup> As was the case with Person 40, it is clear that Person 42 left the tunnel courtyard as soon as the PUCs were handed over to other operators. That is why Person 42 was not present for the subsequent execution of EKIA 56 in the tunnel courtyard.

225. Person 43 said the process of searching and cuffing the Afghan male he helped pull from the tunnel was a “matter of minutes... I’m not sure exactly how many minutes”.<sup>186</sup> He then attended the commanders’ rendezvous, which was quick.<sup>187</sup> He said Person 81 gave a “quick set of orders of who was doing what, which I can’t recall the specifics of.”<sup>188</sup>

226. The evidence of Person 81 – the troop commander – gives further context to the timing of the commanders’ RV. Person 81 made clear that the commanders’ rendezvous was quick. He said after being informed that W108 was secure, “it was a consolidation as quickly as possible so we can move on to 109”.<sup>189</sup> Person 81 said the location of the commanders’ RV was likely to be where he saw local nationals;<sup>190</sup> which is consistent with Person 43’s evidence that the RV took place immediately after he saw a PUC being walked away in the tunnel courtyard. Person 81 was equally clear that the body of EKIA 56 was not in the vicinity of the tunnel at the time of the commanders RV or while P81 was in the courtyard.<sup>191</sup> As with Person 43, Person 81 had obviously left the tunnel courtyard by the time EKIA 56 was killed.

227. Person 18 was in another area of the compound when he heard a call on the radio that a tunnel or tunnel entrance had been found and that a “person or people” had been pulled out.<sup>192</sup> He arrived in the courtyard shortly afterwards (maybe 20-30 seconds later)<sup>193</sup> and saw “a person in white” under the control of 2 or 3 Australian soldiers.<sup>194</sup> Plainly enough, EKIA 56 was still alive at this point, but the tunnel courtyard was largely empty. The small number of Australian soldiers is consistent with the commanders RV having ended and the commanders having dispersed. He then assisted Person 35 to clear the tunnel.<sup>195</sup> When he emerged, Person 18 said in relation to the Afghan man in white: “I don’t recall him being anywhere in the vicinity, but I wasn’t looking for him”.<sup>196</sup> Person 18 then moved back to where he had previously been doing exploitation and recommenced searching that area (on the western side of the compound).<sup>197</sup>

228. At or about this time, Person 5 called Person 4 into the tunnel courtyard. Person 24 (who was stationed outside the compound in the cordon in the area he circled on Ex R-141)<sup>198</sup> heard

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<sup>185</sup> T.2100/38-2101/2 9(P42).

<sup>186</sup> T.3375/22-32 (P43).

<sup>187</sup> J [543]; T.3378/15-20 (P43).

<sup>188</sup> T.3383/15-19 (P43).

<sup>189</sup> T.6159 / 1-9 (P81).

<sup>190</sup> T.6178/40-45 (P81).

<sup>191</sup> T.6180/38-45 (P81).

<sup>192</sup> T.3008/12-16; 3113/21-3114/11; 3117/38-3118/5 (P18).

<sup>193</sup> T.3117/3 (P18).

<sup>194</sup> J [469]; T.3011/28-3012/21-24; 3120/44-3121/10(P18).

<sup>195</sup> T.3012/26-3013/3; 3122/1-26; 3128/30-3129/26 (P18). See also T.171/26-28 (BRS).

<sup>196</sup> T.3013/39-44 (P18).

<sup>197</sup> J [544].

<sup>198</sup> T.3446/43-44; 3447/21-27 (P24).

Person 5 call Person 4's name a couple of times and say, "Get in here, get here now". Person 24 heard this sometime before he observed Mr Roberts-Smith come out of the compound with an Afghan male and considered that Person 5's voice was coming from very close to the entrance he later saw Mr Roberts-Smith come from (which was the external exit to the tunnel courtyard).<sup>199</sup> Person 24 was not challenged about that evidence and the trial judge accepted it.<sup>200</sup> The fact that Person 4 was called inside the tunnel courtyard at about this time is consistent with Person 41's evidence, to which we turn next.

229. As outlined above, Person 41 left the tunnel courtyard and went to look in two rooms he marked D in Ex R-92.<sup>201</sup> Person 41 said he searched for "probably a minute or two" before hearing a bit of a commotion and returning to the courtyard where he saw Mr Roberts-Smith, Person 4, and an older Afghan male dressed in white or light clothing with close cropped hair.<sup>202</sup> In cross-examination, Person 41 was asked about the timing again and said he was in the courtyard for a total period of 10-15 minutes<sup>203</sup> but he was in the rooms marked "D" for "less than" 10 to 15 minutes.<sup>204</sup> The scene Person 41 described is materially similar to that described by Person 18. Their description of the Afghan and the number of Australian soldiers is consistent. The fact that neither recalled seeing the commanders is also consistent and powerful confirmation that the commanders' RV had ended, and the commanders had dispersed while EKIA 56 was still alive.
230. The collective evidence of Persons 40, 42, 43, 81, 18, 24 and 41, viewed as a whole, is this. As soon as the Afghan men who emerged from the tunnel were PUC'd and marched away, Persons 40 and 42 left the tunnel courtyard straightaway. The commanders' RV then took place. It was short, consisting of a quick set of orders. There were still Afghan local nationals in the tunnel courtyard at this point. The commanders' RV finished and the commanders dispersed. Shortly thereafter, Person 18 entered the courtyard where he saw 2-3 Australian soldiers with an Afghan dressed in white, then went to help Person 35 clear the tunnel. Person 18 then left and went back to the western part of the compound. At about this time, Person 5 called Person 4 into the tunnel courtyard. Shortly after that, Person 41 re-entered the tunnel courtyard where he saw Mr Roberts-Smith and Person 4 with an Afghan male in light or white clothing.
231. In closing arguments at trial, Mr Roberts-Smith focused on Person 41's evidence that he searched the two rooms for "probably a minute or two", before stepping out and seeing Mr Roberts-Smith and Person 4 with an Afghan male.<sup>205</sup> Mr Roberts-Smith's submission is set out at J [555]. In short, Mr Roberts-Smith says (1) Person 41's estimate of searching the two rooms for "probably a minute or two" is not long enough for two men to be pulled from the tunnel, the commanders' RV to take place, and most of the operators to disperse; (2) the notion that all

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<sup>199</sup> T.3451/13-32 (P24).

<sup>200</sup> J [546].

<sup>201</sup> J [452]; T.1223.17-41; 1320/29-34; 1321/23-1322/22 (P41).

<sup>202</sup> T.1236/3-14 (P41).

<sup>203</sup> T.1313/33-34 (P41).

<sup>204</sup> T.1318/37-40 (P41).

<sup>205</sup> T.1236/3-8 (P41).

those people were still present in the courtyard when the execution occurred and said nothing may be quickly ruled out; (3) therefore, the execution described by Person 41 did not take place. The submission is repeated on appeal at BRS [11.1] to [11.4]. This is the “hive of activity” case theory that emerged for the first time in closing argument.

232. The “hive of activity” case theory hangs entirely on a single slender thread: that Person 41 meant the phrase a “minute or two” literally and he was *in fact* gone from the tunnel courtyard for no more than 120 seconds. The trial judge rejected that submission. His Honour found that when the evidence is viewed as a whole, Person 41 was not using the phrase a “minute or two” literally; it was instead a figure of speech for a short time or not a very long time.<sup>206</sup> There was no error in that finding, for four reasons.
233. *First*, Person 41’s reference to a “minute or two” was not the categorical, literal statement that Mr Roberts-Smith contends for. Person 41 said the period of time was “*probably* a minute or two”. In cross-examination, he said he was in the courtyard in total for 10-15 minutes<sup>207</sup> in the rooms marked D for “less than” that 10 or 15 minute period. Both versions are consistent with the trial judge’s finding that Person 41 did not mean the words “minute or two” literally and instead meant a short period of time or not a very long time.
234. *Second*, the trial judge was correct to assess Person 41’s evidence in light of the totality of the evidence (particularly given the qualified nature of Person 41’s timing estimate). At J [556], his Honour said that “in my opinion, when all the evidence is considered, that must be the case” (that Person 41 used the phrase ‘a minute or two’ as a figure of speech). The trial judge said that was supported by the sequence of events (including the ultimate location of EKIA 56’s body in the tunnel courtyard) as well as by Person 41’s evidence of what he did in those rooms, which included locating IED componentry and three bags of opium.<sup>208</sup> The trial judge’s conclusion was plainly correct. When the evidence summarised at paragraph 230 is considered in its totality, it is clear that the *sequence* of the events in Person 41’s account aligns in other material respects with the sequence established by the balance of the Respondents’ evidence and that the words “a minute or two” ought not be taken literally.
235. *Third*, the approach taken by Mr Roberts-Smith is contrary to principle. It starts from the premise that a single fact taken in isolation is immutable (in this case, that a “minute or two” was meant literally) and then the rest of the evidence is assessed against that single fact. If the balance of the evidence is inconsistent with the immutable fact, then the balance of the evidence is said to be unreliable. That approach is contrary to the principle that the *whole* of evidence - including the alleged inconsistent fact - should be viewed from a distance and that a considered, qualitative appreciation of the *whole* must be undertaken. On a holistic approach, it is clear (as the trial judge found) that the words “probably a minute or two” ought not be taken literally.

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<sup>206</sup> J [556].

<sup>207</sup> T.1313/33-34 (P41).

<sup>208</sup> J [556]; T.1224/1-10 (P41).

236. *Fourth*, contrary to BRS [11.4(a)], there is no material inconsistency between the sequence and timing of events described by Person 41 on the one hand, and Person 40's account that it was "approximately" 20-25 minutes between the Afghans first emerging from the tunnel and the death of EKIA 57 on the other. This 20-25 minute period described by Person 40 covers the entire period that Person 41 was in the rooms marked D, the exchange of the suppressor with Person 4, the execution of EKIA 56, the exchange of the suppressor again, an indeterminate period of time when Person 41 looked at the body of EKIA 56, and then the trip outside where he saw the execution of EKIA 57.<sup>209</sup> Person 41 himself said this period covered approximately 10-15 minutes.<sup>210</sup> Person 41's evidence that he was in the tunnel courtyard for 10-15 minutes in total before exiting to the north-west, looking at the buildings marked F on Ex R-92 and then seeing the execution of EKIA, is consistent with Person 40's account that it was "approximately" 20-25 between the Afghans first emerging from the tunnel and the death of EKIA 57.
237. *Fifth*, even Person 41 did mean for his estimate of "a minute or two" to be taken literally but was wrong about the precise length of time he was away from the tunnel courtyard, the nature of the error is not such that would warrant setting aside the balance of his evidence and the evidence of Persons 40, 42, 43, 18, 14 and 24 as well. The evidence summarised at paragraphs 184 to 204 and 223 to 230 above makes clear that Person 41 was in the rooms for only a short period of time. While it may have been longer than a minute or two, there is no doubt that it was only was a short period of time or not a very long time. The evidence summarised above makes clear that events in the tunnel courtyard and the compound generally were moving at a rapid pace, consistent with Person 81's desire to complete the clearance of W108 and move on to W109 as quickly as possible.
238. For these reasons, particular 1 of the Notice of Appeal should be rejected.

### ***The execution of EKIA 56***

239. The next direct evidence of what happened next inside the tunnel courtyard came from Person 41. Given its importance and the focus Mr Roberts-Smith places on it on appeal, we set out Person 41's evidence in relation to what happened next in full:<sup>211</sup>

And what happened next?---Person 4 and RS then approached me, and using my nickname, they said, "Hey, Person 41, can we borrow your suppressor?" I thought a bit of a strange request at first, but I complied. I removed the suppressor from my M4 assault rifle and handed it to Person 4.

Can I just stop you there. Why did you think it was a strange request?---I would have thought that Person 4 would have had his on him at the time, as it was – fact that it was – well, in my patrol, at least, you either – if it wasn't on your rifle, you carried it when you left, so you had it on you at all times. So I thought initially it was a bit strange Person 4 did not have his suppressor on him. So I removed mine and handed it to Person 4, thinking he must need it because he's going to go into the tunnel and the suppressor

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<sup>209</sup> J [548]-[552].

<sup>210</sup> T.1313/33-34 (P41).

<sup>211</sup> J [548];T.1236/20-45 (P41).

would have muffled the loud noise if he had to use his rifle within that tunnel. So I handed it to Person 4. He then proceeded to turn around and commenced fitting the suppressor to his M4 rifle. They started to walk back towards where this Afghan male was squatting against the wall.

Just to be clear, who's they?---RS and Person 4. I then thought to myself, "I think I know what's about to happen here." So I just stood there for another few seconds and – watching. Person 4 stood facing where the Afghan male was towards the tunnel entrance. RS then walked down and grabbed the Afghan male by the scruff of the shirt, picked him up, marched him a couple of metres forward to – he was in front of Person 4. He then kicked him in the back of the legs behind the knees until he was kneeling down in front of Person 4. He pointed to Person 4 and said – sorry, he pointed to the Afghani and said to Person 4, "Shoot him." And as he said that and he stepped to the side, I didn't wish to witness what was about to happen and I stepped back into that room where I found those IED components.

240. Person 41 clarified in cross-examination that he believes it was Mr Roberts-Smith who asked to borrow his suppressor. This was his recollection because Mr Roberts-Smith called him by his nickname whereas Person 4 generally called him by his first name.<sup>212</sup>

241. Person 41 stepped back into the room and had been there for only a second or two when he heard a single suppressed shot, which he knew to be from an M4 rifle.<sup>213</sup> He waited in the room for about 15 or so seconds, wanting to stay out of what just happened. When he stepped back out, he saw "Person 4 was the only one there at the time and there was a dead Afghan male at his feet."<sup>214</sup> The dead Afghan was the same one he had previously seen by the wall and handled by Mr Roberts-Smith.<sup>215</sup> Person 41 then walked to Person 4. Of the interaction he said:<sup>216</sup>

I don't believe anything was said. He removed the suppressor from his rifle and he gave it back to me. When he handed it to me, it was warm, and so I knew that it had just been used to shoot that Afghan with Person 4's M4.

242. Person 41 fitted the suppressor back on to his rifle and walked over to see the dead Afghan lying on the ground in front of Person 4. Person 41 said Person 4 was just standing there and he seemed to be in a bit of shock.<sup>217</sup> Person 41 noticed that the Afghan man had been shot once in the head and there was quite a bit of blood flowing down around out from his head wound. He was lying on his back.<sup>218</sup>

243. Person 41's evidence is directly corroborated by multiple aspects of the evidence, including:

- (a) His evidence that EKIA 56 was killed in the tunnel courtyard is consistent with the objective evidence that EKIA 56's body was photographed in the tunnel courtyard and that the body had not been moved (in other words, EKIA 56 was killed in the exact same location that his body was photographed). Given the significance of this corroborating factor, we

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<sup>212</sup> J [549]; T.1304/22-34 (P41).

<sup>213</sup> J [550]; T.1237/7-13 (P41).

<sup>214</sup> J [550]; T.1237/15-21 (P41).

<sup>215</sup> J [551]; T.1237/23-24 (P41).

<sup>216</sup> J [551]; T.1237/26-35 (P41).

<sup>217</sup> J [551]; T.1238/17-19 (P41); T.4997/1-9 (P5).

<sup>218</sup> J [552]; T.1237/37-47 (P41).

consider the evidence in more detail in the next section.

- (b) His evidence that Person 4 was the shooter is corroborated by Person 24's evidence that Person 4 was called into the tunnel courtyard by Person 5 shortly before the killing. Multiple other witnesses gave evidence that they were informed shortly after the mission that Person 4 had had an engagement at W108.<sup>219</sup> Even Person 5 said that Person 4 was identified as the person responsible for an EKIA at W108.<sup>220</sup>
- (c) His evidence that Person 4 killed EKIA 56 with the knowledge and involvement of Mr Roberts-Smith is corroborated by the statements made by Mr Roberts-Smith and Person 5 after the mission that they had "blooded the rookie" (being Person 4).<sup>221</sup>
- (d) His evidence that EKIA 56 was killed by a single shot to the head is consistent with the evidence we address in our closed court submissions at A7 as well as the nature of the injury to EKIA 56's head in the photographs in Ex R-6.<sup>222</sup>
- (e) His physical description of EKIA 56 matches the appearance of EKIA 56 in the photographs in Ex R-6: he was an older Afghan male wearing white or light clothing with close cropped hair.
- (f) His evidence that EKIA 56 was under the control of Australian soldiers (namely Mr Roberts-Smith and Person 4) at the time of his death is corroborated by Person 43's evidence that the Afghan man in the photographs in Ex R-6 (EKIA 56) was the person he helped pull out of the tunnel.<sup>223</sup> Person 43 said seeing the photographs recently did not particularly refresh his memory, because he recalled the person in the photographs.<sup>224</sup>
- (g) His evidence that EKIA 56 was a PUC at the time of his death is further corroborated by post-mission reporting that two men found in the tunnel had been shot.<sup>225</sup>

244. In cross-examination, it was put to Person 41 that he *thought* he saw something that ought not to have happened, and he had feelings of guilt and shame and a "feeling that [he is] a coward because [he says that he] saw something that shouldn't have happened and didn't stop it".<sup>226</sup> In other words, it was not suggested that Person 41 was being deliberately dishonest. There was no explanation for how this innocent, but false, memory might have occurred. The trial judge correctly concluded that there was nothing in the evidence to suggest that Person 41 had a mental illness or other illness that affected his evidence. The trial judge also observed – correctly – that there was no apparent connection between feelings of guilt and shame on the one hand

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<sup>219</sup> T.5122/10-40 (P5); T.5296/15-23 (P35).

<sup>220</sup> T.5122/10-28 (P5).

<sup>221</sup> See paragraphs 125 to 157 above.

<sup>222</sup> J [552].

<sup>223</sup> T.3354/26-39 (P43).

<sup>224</sup> T.3426/1-31 (P43).

<sup>225</sup> J [812]; closed Court reasons at [67]; CCT 31.522, T.10/16-39 (P27).

<sup>226</sup> T.1295/7-17 (P41).

and concocting a false story about an Afghan man squatting next to the tunnel.<sup>227</sup>

245. It is wholly implausible that Person 41 invented an innocent yet false memory that EKIA 56 was executed by Person 4 in the tunnel courtyard, which somehow managed to contain multiple factual elements that match the objective evidence including the identity of the shooter, the number of shots fired (one), the precise location of the injury on the deceased Afghan (the head), the location of the killing (the tunnel courtyard), the colour of the clothing worn by the deceased Afghan (light or white) and even his hairstyle (close cropped). It is even more implausible that he invented an innocent yet false memory that somehow matched Person 43's recollection (with no evidence of any discussion between them on the topic), as well as the post-mission report that two men were pulled from the tunnel and killed.
246. The only rational explanation for the coherence between Person 41's account, the significant body of objective contemporaneous evidence, and Person 43's account, was that Person 41 was present in the tunnel courtyard when EKIA 56 was killed by Person 4 on Mr Roberts-Smith's direction.

### ***The location of EKIA 56's body***

247. Of all the factors set out at paragraph 243 above which corroborate Person 41's account, perhaps the single most powerful factor of all concerns the location of EKIA 56's body.
248. Person 41 said the body of the man shot by Person 4 was in the tunnel courtyard at the spot he marked E on Ex R-92.<sup>228</sup> Mr Roberts-Smith's evidence, of course, was that EKIA 56 was shot by an unknown SASR operator *outside* the compound as EKIA 56 was running around the outside of the north-west corner.<sup>229</sup> Thus, the location of EKIA 56's body – inside or outside the compound – was a strong indicator of whether Person 41's evidence is correct. At trial, the Respondents submitted that it would follow almost inevitably from a finding about the location of the body of EKIA 56 that the corresponding party's case in relation to the circumstances of EKIA 56's death should be accepted.<sup>230</sup> That remains the case.
249. The trial judge concluded, after assessing the evidence as a whole, that the body of EKIA 56 was located in the tunnel courtyard. His Honour accepted the evidence of Persons 41 and 18 on this point and concluded that it was "supported by an inherently reliable piece of evidence being the markings on the SSE evidence bags on the day".<sup>231</sup> We summarise the key aspects of the evidence and the trial judge's reasoning below.
250. *First*, Person 18 gave unchallenged evidence that the body of EKIA 56 was located in the tunnel courtyard.<sup>232</sup> He had a particular reason to be aware of the location of that body because he

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<sup>227</sup> J [455]-[457].

<sup>228</sup> J [558]; T.1238/9-10; 21-28 (P41).

<sup>229</sup> J [558]; T.171/35-7 (BRS).

<sup>230</sup> J [535].

<sup>231</sup> J [868].

<sup>232</sup> J [563].



took photographs of it for the purposes of SSE.<sup>233</sup> Those are the photographs of EKIA 56 that appear in Ex R-6 (and pages 11-13 of Ex R-18).

251. The trial judge described Person 18's SSE process at J [559]. As Person 18 emerged from clearing a room on the western side of the compound, Person 18 was "directed outside to two bodies ... on the northern side of the compound".<sup>234</sup> He commenced exploitation of the "furthest body"<sup>235</sup> which had a "gunshot wound to the face".<sup>236</sup> That was the body of the Afghan male killed by Person 14 on approach to the compound. Person 18 then moved to exploit the second body which "was significant due to the prosthetic leg that [he] found during the search".<sup>237</sup> That was the body of the man known as EKIA 57. Person 18 said that the SSE bags he wrote and photographed with those bodies included the description "**NW corner**" which "signifies where this was located in relation to the compound".<sup>238</sup>
252. Person 18 then "went back inside and continued conducting exploitation" inside the compound.<sup>239</sup> He said that "inside the compound ... there was another body" of a "person in white, lying on his back ... and there was blood over the ground".<sup>240</sup> Person 18 took a photo of that body (which he identified at trial as EKIA 56) and said it was located "roughly near the tunnel entrance".<sup>241</sup> Person 18 then wrote the information on the SSE bag for that body which included the words "**NW Corn Tunnel**", which he said "signifies that it was the northwest corner in the vicinity of the tunnel".<sup>242</sup>
253. The notation on the SSE bag on the body of EKIA 56 is highly probative contemporaneous evidence that EKIA 56's body was located in the tunnel courtyard, exactly as Persons 41 and 18 said. There was no error in the trial judge's finding that this was an "inherently reliable piece of evidence".<sup>243</sup> Mr Roberts-Smith has not put forward any plausible explanation for why those words on the SSE bag do not mean exactly what they say.
254. *Second*, the trial judge found that the differing notations on the SSE bags for EKIA 56 ("NW corn tunnel"), on the one hand, and EKIA 50 and 57 on the other ("NW corner"), was evidence that those bodies were situated in different locations.<sup>244</sup> The differing notations undermined Mr Roberts-Smith's account that these two Afghans were killed in a single engagement outside the compound, while simultaneously enhancing the credibility of Person 41. The two bodies are recorded as being in the exact locations, with the identical injuries, that Person 41 described.
255. *Third*, notwithstanding a wide perspective in some of the photographs of the two bodies in Ex

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<sup>233</sup> J [561].

<sup>234</sup> J [559]; T.3014/32-34 (P18).

<sup>235</sup> J [559]; T.3014/43 (P18).

<sup>236</sup> T.3016/13 (P18).

<sup>237</sup> T.3016/13-14 (P18).

<sup>238</sup> J [560]; T.3017/26 and T.3018/6-10 (P18).

<sup>239</sup> J [561]; T.3018/14-15 (P18).

<sup>240</sup> J [561]; T.3018/24-29 (P18).

<sup>241</sup> T.3018/31-3019/2 (P18).

<sup>242</sup> J [561]; T.3019/9-10 (P18).

<sup>243</sup> J [868].

<sup>244</sup> J [565]; See, e.g., T.1599/17-18 (P14); T.3334/19-20 (P40); T.3355/44-45 (P43); T.3017/23-27; 3019/6-10 (P18).

R-6 and R-7, there is no sign the either body was proximate to the other (that is the two bodies are not visible in any one photograph, and the physical surrounds of each body is noticeably different).

256. *Fourth*, the trial judge found that Ex R-17 provides further support for the fact that EKIA 56's body was located in the tunnel courtyard.<sup>245</sup> Ex R-17 was an SASR document compiled based on "info obtained from FE TSE" and described the location of EKIA 56's body as "NE Corner W108. **In courtyard containing tunnel complex.** Photographed on target".<sup>246</sup> That is a further contemporaneous document supporting Person 41's account of an execution *inside* the tunnel courtyard, and undermining Mr Roberts-Smith's evidence of a legitimate engagement *outside* the compound.
257. *Fifth*, the trial judge found that the body of EKIA 56 was not moved after he was shot.<sup>247</sup> Nothing from the evidence suggested that EKIA 56 had been killed outside the compound and then his body moved inside the compound after he was killed.<sup>248</sup> That was an important finding because it dispelled any suggestion that EKIA might have been shot outside the compound and then moved inside the tunnel courtyard. No-one gave that evidence and Mr Roberts-Smith made no such submission, but his Honour's findings foreclose that possibility in any event. It meant that in the event the Court concluded that the body was photographed in the tunnel courtyard (which was the ultimate finding), it inevitably followed that EKIA 56 was killed in that same location.
258. *Sixth*, the trial judge considered and comprehensively rejected Mr Roberts-Smith's account of an engagement outside the north-west corner of the compound and his submissions on why EKIA 56's body was not located in the tunnel courtyard.<sup>249</sup> Despite his claim that the body of EKIA 56 lay outside the north-west corner of the compound, when the troop left W108 later that night past this location, not a single witness gave evidence of seeing the body of EKIA 56 outside the compound.<sup>250</sup> The trial judge rejected Mr Roberts-Smith's own evidence as well as his submission that the Respondents' case theory was inconsistent with the contemporaneous records. We return to these points below.
259. On appeal, it appears that Mr Roberts-Smith still clings to the discredited theory that EKIA 56's body was somewhere other than the courtyard. At BRS [12.4(b)], Mr Roberts-Smith submits that it was implausible that the body of EKIA 56 would have been left in a place (near the tunnel) where witnesses had seen EKIA 56 emerge from the tunnel earlier, which would have made EKIA 56's fate "abundantly clear". However, as outlined above, those witnesses had dispersed to other tasks. The patrol commanders had returned to their patrols, operators such as Persons 40 and 42 had dispersed to other tasks, and some of the troop was moving to W109. The "hive of activity" in the tunnel courtyard was long over. Ultimately, however, the fact that leaving EKIA

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<sup>245</sup> J [565].

<sup>246</sup> J [565]; Ex R-17 at page 4.

<sup>247</sup> J [571]-572].

<sup>248</sup> J [571]-[577].

<sup>249</sup> J [595]-[658] and J [815] to [862].

<sup>250</sup> J [811].

56's body in the tunnel courtyard might have had a brazen quality about it does not, in any way, displace the powerful objective contemporaneous evidence that that was where his body lay. The contemporaneous records that record EKIA 56's body at the "NW corn tunnel" and in the "courtyard containing tunnel complex" are a complete answer to Mr Roberts-Smith's submission on this point.

***The use of Person 41's suppressor (Notice of Appeal, particulars 4 and 5)***

260. At trial, Mr Roberts-Smith made a submission that Person 41's evidence about the borrowing of a suppressor "was not credible".<sup>251</sup> The trial judge addressed this submission at J [685] to [698]. At J [698], the trial judge noted that the evidence did not establish a reason why Person 4 or Mr Roberts-Smith would want or need to borrow a suppressor from Person 41. His Honour observed that it was a matter to be taken into account, but there was considerable force in the Respondents' submission that it was a strange detail to include in his account if the account was made up. Indeed, the oddity of the request was accepted by Person 41 himself, who said that even on the day he thought the request to be "strange". The fact that Person 41's account included a recollection of a contemporaneous recognition of the peculiarity of the request removes all force from the submission.
261. Mr Roberts-Smith repeats the same submission on appeal. At BRS [12.3], it is submitted that the judge erred by effectively finding that an improbable detail "enhanced" Person 41's account. The trial judge did no such thing. His Honour expressly found that it was a matter to be taken into account. He did not find it was a matter that *enhanced* Person 41's account.
262. At BRS [12.4], Mr Roberts-Smith then advances two submissions that he says point to the improbability of Person 41's evidence about the suppressor and which were not addressed by the trial judge. While the trial judge did not expressly address the two points raised at BRS [12.4] in his written reasons, his Honour paid close attention to the issue of the suppressor and addressed it at length in his reasons.<sup>252</sup> When the evidence is assessed as a whole, it is clear that Person 41's evidence account of providing his suppressor to Person 4 is not only plausible, but also both logical and consistent with the objective evidence.
263. *First*, there was a logical reason for fitting a suppressor to Person 4's M4 rifle. A suppressor has the sole purpose of muffling the sound of a weapon, so it is reasonably quiet when fired,<sup>253</sup> albeit that a distinct audio sound is still made.<sup>254</sup> Given that Person 4's weapon was about to discharge a single shot *inside* the tunnel courtyard, in a location where PUCs had just been taken under control and which was considered to be sufficiently secure and threat-free for the troop commander and the patrol commanders to hold their rendezvous, it is unsurprising that it was seen as desirable to muffle the sound of Person 4's weapon.

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<sup>251</sup> J [685]-[698].

<sup>252</sup> J [685]-[698].

<sup>253</sup> CCT 9.03.2022 T.5/14-6/22 (P40).

<sup>254</sup> J [736].

264. The fact that Mr Roberts-Smith subsequently discharged his Minimi machine gun loudly just *outside* the compound when killing EKIA 57 does not lessen the logic of muffling Person 4's single shot *inside* the tunnel courtyard. Indeed, the fact that Mr Roberts-Smith's Minimi was unsuppressed is an obvious explanation as to why he took EKIA 57 outside the compound and killed him there, rather than discharging the unsuppressed Minimi inside the courtyard in the very location where the PUCs had been taken into the custody of Australian soldiers and which the troop commander and patrol commanders understood to be secured. Even so, even Person 5 was concerned by the indiscreet nature of Mr Roberts-Smith's execution of EKIA 57, a matter we address further at paragraphs 308 to 315 below.
265. *Second*, no witness reported hearing a single *unsuppressed* shot from an M4 rifle from the area of the tunnel courtyard. The unchallenged evidence was that without a suppressor, an M4 rifle is as loud as a Minimi machine gun.<sup>255</sup> It was more likely to be heard by others in the vicinity. The absence of any evidence from any witness of hearing a single (very loud) unsuppressed M4 shot inside the W108 compound – at any point in the mission – is powerful corroboration for Person 41's account that a suppressor was used in the killing of EKIA 56 in the tunnel courtyard.
266. *Third*, the objective evidence was that Person 4 did not have a suppressor attached to his weapon at *other* times during the mission.<sup>256</sup> That is consistent with Person 41's own evidence that Person 4 did not have a suppressor on his M4 rifle when Person 41 first saw him in the tunnel courtyard. However, as noted above, no witness reported hearing any loud unsuppressed shots from an M4 rifle inside the compound (including the tunnel courtyard) at any point in the mission. It logically follows that Person 4 – who otherwise did not have a suppressor on his rifle – must have fitted one onto his rifle *inside* the tunnel courtyard and shortly before shooting EKIA 56, exactly as Person 41 said.
267. *Fourth*, once it is accepted that it was both logical and objectively likely that a suppressor was used in the killing of EKIA 56 (given that not a single witness heard any unsuppressed shots), there are multiple plausible explanations for why Mr Roberts-Smith found it easier to borrow Person 41's suppressor for Person 4 to use rather than Person 4 using his own. It may be that Person 4's suppressor was located somewhere on his body that made it more convenient, in circumstances where Person 41 was standing nearby with his already attached to his weapon and easily accessible, to borrow rather than dig out his own.<sup>257</sup> Mr Roberts-Smith, of course, could not lend him one himself because he was carrying a different weapon. It may be that Person 4 was a reluctant participant who was unwilling to retrieve his own suppressor from his kit, but found it harder to refuse one procured from Person 41 and handed to him. Person 41's evidence that Mr Roberts-Smith asked for the suppressor, and that Person 4 seemed to be in a

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<sup>255</sup> T.1602/25-43 (P14).

<sup>256</sup> T.4997/26-4998/14-16 (P5); See also Ex R-130 (a closed court exhibit) and the unchallenged evidence given by Person 18 at CCT 7.03.2022 T.6/5-13 and by Person 40 at CCT 9.03.2022 T.6/24-43. See also T.2997/24-29 (P18) in relation to Gothic 5's SOP in relation to the use of suppressors.

<sup>257</sup> See the cross-examination of Person 5 at T.4998/26-4999/31 (P5).

bit of shock afterwards, are both consistent with Person 4 not being an enthusiastic participant.

268. Ultimately, the trial judge's finding depends to a substantial degree on the trial judge's analysis of the credibility of Person 41 as part of assessing the evidence as a whole. His Honour's assessment was detailed and thorough and there were multiple pieces of objective evidence that support Person 41's account that EKIA 56 was executed in the tunnel courtyard. For the reasons identified above, when the evidence is assessed as a whole, Person 41's evidence is logical and consistent with the objective evidence, both on the killing of EKIA 56 in the courtyard and the specific use of his suppressor. There is no reason for the Full Court to depart from the trial judge's findings in these circumstances.

**F. Mr Roberts-Smith's account (Notice of Appeal particular 12)**

***Mr Roberts-Smith's account was improbable***

269. Particular 12 of the Notice of Appeal, and its exposition at BRS [18.1], is a particularly clear example of the fact that, contrary to the overarching framing of his appeal, Mr Roberts-Smith does challenge the trial judge's rejection of his account. Presumably the challenge to this finding reflects a recognition that, once the account of a legitimate engagement outside the compound was rejected as implausible, then the only plausible explanation for the deaths of EKIA 56 and EKIA 57 is that described by the Respondents' witnesses. No other plausible explanation has been identified by Mr Roberts-Smith in circumstances where it was an uncontroversial fact that there were no hostile enemy engagements within the compound. Once again, therefore, it may be observed that Mr Roberts-Smith's refusal to engage properly with the comprehensive rejection of his account by the trial judge is fatal to his appeal.

270. The next step in the trial judge's reasoning was to consider Mr Roberts-Smith's account of the killing of EKIA 56 and EKIA 57 and a range of challenges made to the Respondents' case. This analysis appears at J [579]- [713] and J [815]-[862]. His Honour correctly directed himself at the start of this analysis that rejecting Mr Roberts-Smith's case did not of itself mean that the Respondents' case was established. His Honour also correctly identified that he had to be satisfied to the required level that the Respondents' case was correct.<sup>258</sup>

271. At J [595]-[642] and J [815]-[862], the trial judge summarised and then analysed Mr Roberts-Smith's evidence in light of the totality of the other evidence. At [821], his Honour said there were aspects of Mr Roberts-Smith's accounts which were "improbable", they varied in significance, and it was "a matter of standing back and assessing the sequence of events as a whole".<sup>259</sup> The trial judge identified the following improbabilities in Mr Roberts-Smith's account.

272. *First*, the trial judge found that Mr Roberts-Smith's asserted reason for leaving the compound

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<sup>258</sup> J [580].

<sup>259</sup> J [821].

was difficult to accept at face value.<sup>260</sup>

273. *Second*, the trial judge said it seemed, although not impossible, improbable that two insurgents would appear at almost the precise instant that Mr Roberts-Smith exited the compound (within a matter of three seconds), in circumstances that would have involved a serious failure of the cordon.<sup>261</sup> This finding is the subject of Notice of Appeal particular 12 and the submission at BRS [18.1]. There, Mr Roberts-Smith submits that the trial judge did not have sufficient information before him to draw conclusions about the likely behaviour of the Taliban.” His Honour’s finding at J [823] is therefore said to be an error.

274. BRS [18.1] is a gross misrepresentation of the trial judge’s reasons. His Honour was not passing comment on the “likely behaviour of the Taliban”. Rather, his Honour’s finding was directed to the obvious proposition that because Gothic 4 was performing cordon duties in that every area, it was unlikely that two insurgents would appear within 3 seconds of Mr Roberts-Smith exiting the compound from the exact direction which was the threat area as far as the cordon was concerned. His Honour observed that if those two insurgents had appeared from the “threat area” being monitored by Gothic 4, that would have involved a “serious failure of the cordon” and it is reasonable to expect that such a failure would have been the subject of comment on the ground or in post-mission reporting, or both.<sup>262</sup> There is no evidence of any such comment or post-mission reporting. His Honour’s finding was correct, and obvious, and is a direct consequence of Mr Roberts-Smith’s concession that the Gothic 4 cordon was in that area.

275. *Third*, the trial judge found Mr Roberts-Smith’s claim that he did not know who killed EKIA 56 was improbable.<sup>263</sup> In the circumstances of the engagement described by Mr Roberts-Smith, the judge did not accept he would not know the identity of the soldier who apparently killed EKIA 56 in the same engagement and in so doing saved Mr Roberts-Smith’s life.<sup>264</sup> This is in circumstances where even Person 5 acknowledged that Person 4 killed EKIA 56 and everyone in the troop debrief, including Mr Roberts-Smith, knew that.<sup>265</sup>

276. *Fourth*, Mr Roberts-Smith’s claims that he shot EKIA 57 further out from the compound and then dragged the body closer to the external entrance to the tunnel courtyard were implausible.<sup>266</sup> There was no standard operating procedure require that the body be cleared immediately. The immediate danger was considerable; on Mr Roberts-Smith’s account, two insurgents had just appeared, and others might be around. He was exposing himself to danger by allegedly dragging the body, particularly when he did not drag it back to a fully protected position behind a wall. It also made little sense that Mr Roberts-Smith dragged the body of EKIA 57 first, leaving

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<sup>260</sup> J [822].

<sup>261</sup> J [823].

<sup>262</sup> J [823].

<sup>263</sup> J [824]-[827].

<sup>264</sup> J [824]-[825].

<sup>265</sup> J [826].

<sup>266</sup> J [828]-[840].

his weapon behind, then making a second trip out into the danger area to retrieve the rifle.<sup>267</sup>

277. Initially, Mr Roberts-Smith claimed that the second (unknown) operator who killed EKIA 56 also went out and dragged the body back behind the line of the compound. Mr Roberts-Smith abandoned that evidence the very next day; presumably after reflecting overnight on the photographs that make plain that EKIA 56's body was never moved.<sup>268</sup> This was devastating to Mr Roberts-Smith's credit. Not only had he materially changed his evidence; his claim that it was standard operating procedure to drag a body now made no sense if the body of EKIA 56 remained lying in the open, still with his weapon.

278. A further difficulty with Mr Roberts-Smith's account of the engagement concerned the weapons that he said were being carried by EKIA 56 and 57 at the time of the engagement. Mr Roberts-Smith identified photographs of two weapons in the Exploitation Report which he said were being held by EKIA 56 and 57 as they ran around the compound. However, Person 18 gave evidence that the two weapons in question were in fact discovered (by him) in a haystack in the compound. The description in the contemporaneous Exploitation Report supported Person 18's account and the trial judge accepted it.<sup>269</sup>

279. *Fifth*, Mr Roberts-Smith's reaction to having just had an (alleged) engagement was improbable.<sup>270</sup> Rather than remaining in a security position in a location where an engagement had just occurred, Mr Roberts-Smith (on his account) went back inside the compound and started helping with the SSE process.<sup>271</sup>

280. *Sixth*, Mr Roberts-Smith gave vague and unconvincing evidence about whether a radio call reporting the engagements was made. He also gave unclear and unconvincing evidence about when he allegedly first located the prosthetic leg on EKIA 57.<sup>272</sup> The trial judge noted there were numerous shifts in Mr Roberts-Smith's account on this topic between his examination in chief, and his cross-examination.

### ***Mr Roberts-Smith and his witnesses had multiple material inconsistencies***

281. At J [845]-[862], the trial judge said it was important to consider Mr Roberts-Smith's witnesses in assessing his account. His Honour made the following findings about those witnesses.

282. Person 5 said the engagement occurred during the commanders' RV. He said he ran outside, saw Mr Roberts-Smith and Person 4, checked that they were okay, and they said they had "just engaged two squirters".<sup>273</sup> He said he returned to the commanders' RV and reported the engagement to the other commanders. The trial judge rejected this account. His Honour found

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<sup>267</sup> J [835].

<sup>268</sup> J [829]-[831].

<sup>269</sup> J [838]-[840].

<sup>270</sup> J [841]-[842].

<sup>271</sup> J [841]-[842]; T.447/25-40 (BRS).

<sup>272</sup> J [843]-[844].

<sup>273</sup> T.5085/14-15 (P5).

it was inconsistent with the evidence of Person 81 and Person 29. It was inconsistent with an earlier statement made by Person 5 in his 15 June 2018 letter of complaint.<sup>274</sup> It was inconsistent with Mr Roberts-Smith's own evidence. And it was never put to Person 43 (who was at the commanders RV and could have confirmed or denied Person 5's account).<sup>275</sup>

283. The trial judge observed that if Person 5's account was right, then Mr Roberts-Smith's contemporaneous statement to Person 5 (that they were "squirters") was inconsistent with his evidence at trial.<sup>276</sup> Even Mr Roberts-Smith's own witnesses said a squirter is someone *leaving* an area.<sup>277</sup> The trial judge correctly found that it is "difficult to describe two armed insurgents running in an arc around a compound as squirters".<sup>278</sup> The trial judge also found that Person 5's account of Mr Roberts-Smith's movements after the alleged engagement were incompatible with Mr Roberts-Smith's own evidence on the same topic.<sup>279</sup>

284. As for Mr Roberts-Smith's other witnesses:

- (a) Person 29 said he thought the engagements occurred before the commanders' RV and he was quite sure it was not during the RV. He did not recall Person 5 leaving to investigate an engagement. The trial judge found that Person 29's account could not be reconciled with Mr Roberts-Smith's account or those of some of Mr Roberts-Smith's other witnesses.<sup>280</sup> The trial judge found that his evidence was unsatisfactory on a range of matters and that other matters reflected poorly on his credit.<sup>281</sup>
- (b) Person 81 did not recall hearing any engagement while he was inside the compound or any engagement during the commanders' RV. He did not recall any patrol leaders leaving the RV to investigate an engagement.<sup>282</sup>
- (c) Person 35's account did not provide any express support for Mr Roberts-Smith's account, beyond the proposition that there were no men in the tunnel.<sup>283</sup> The trial judge rejected Person 35's evidence, including because he gave dishonest evidence about the Darwan mission and was a key participant in the Person 12 lie.<sup>284</sup>
- (d) Person 38's evidence was inconsistent with Mr Roberts-Smith's account, and it was impossible to reconcile them. The trial judge found (correctly) that one or both of the accounts had to be wrong.<sup>285</sup> The trial judge rejected Person 38's evidence unless it was

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<sup>274</sup> CCJ [68]-[69].

<sup>275</sup> J [846]-[859].

<sup>276</sup> J [854].

<sup>277</sup> CCT 22.04.22 T.15/27-28 (P5); T.5937/17-22 (P38).

<sup>278</sup> J [852].

<sup>279</sup> J [859], [877].

<sup>280</sup> J [860].

<sup>281</sup> J [878].

<sup>282</sup> J [850].

<sup>283</sup> J [862].

<sup>284</sup> J [879].

<sup>285</sup> J [862].



corroborated by evidence that the trial judge did accept.<sup>286</sup>

**G. The death of EKIA 57 (Notice of Appeal particulars 9(b), 11 and 6)**

285. We turn now to the second execution: the death of EKIA 57. The trial judge's findings on the death of EKIA 57 are set out at J [713] to [801]. The Respondents' witnesses again provided a compelling account, from several vantage points, of the murder of EKIA 57. Two witnesses (Persons 40 and 41) were located around the animal sheds just outside the north-western wall of the compound.<sup>287</sup> Another two (Persons 14 and 24) were located in the cordon off the north-western corner of the compound.<sup>288</sup> The coherence of the account from those two groups of witnesses (especially in circumstances where there is not suggested to be any collusion between the two groups) was a central factor in the trial judge's acceptance of their evidence.

***The execution of EKIA 57***

286. To address Mr Roberts-Smith's challenge to the trial judge's findings regarding EKIA 57, it is necessary to set out the relevant witnesses' evidence in detail. We start with Person 41.

Person 41

287. The trial judge's findings picked up in the tunnel courtyard with Person 41, after he had looked at the body of EKIA 56. From there, Person 41 walked off to the exit towards the north-western side of the compound, along the dotted line he marked on Ex R-92, and stopped on a footpad on his way to the buildings he marked F.<sup>289</sup> He was trying to decide whether he should walk on the grass or the footpad when he saw Mr Roberts-Smith out of the corner of his eye. He saw Mr Roberts-Smith approximately at the point he marked G on Ex R-92. Mr Roberts-Smith was about five metres away from him.<sup>290</sup>

288. Person 41 described that Mr Roberts-Smith was holding another Afghan male, who was wearing a dark-coloured top, by the scruff of his clothing with his left arm.<sup>291</sup> Mr Roberts-Smith was holding his weapon in his right hand.<sup>292</sup> He gave evidence as follows:<sup>293</sup>

I turned to face RS to see what was happening. He then proceeded to throw the Afghan male down onto the ground. The Afghan male landed on his back. RS then reached down, grabbed him by the shoulder, flipped him over onto his stomach, and then I observed him lower his machine gun and shoot approximately three to five rounds into the back of the Afghan male. After he had done that, he looked up and saw me standing there, and he looked at me and said, "Are we all cool? Are we good?" And I just replied, "Yeah, mate, no worries." I continued to look at him. He then stood up and walked past me and went back into the exit that I had come towards the courtyard.

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<sup>286</sup> J [880].

<sup>287</sup> J [713].

<sup>288</sup> J [713].

<sup>289</sup> J [714]; T.1239/19-30 (P41); T.1240/20-30 (P41)..

<sup>290</sup> J [714]; T.1240/36-1241/15 (P41).

<sup>291</sup> J [714]; T.1241/17-26; 1359/14-22 (P41).

<sup>292</sup> J [714]; T.1359/4-10 (P41).

<sup>293</sup> J [714]; T.1241/28-40 (P41).

289. Person 41 recognised the photos of EKIA 57 as the person that he saw shot by Mr Roberts-Smith outside the compound.<sup>294</sup> Person 41 did not recall seeing anyone else around this area until he ran into Person 40 and had the conversation referred to above, although he accepted that it was possible that there were other members of the patrol there that he did not see.<sup>295</sup>
290. In cross-examination, it was put to Person 41 that his account of the execution was incorrect, but there was no challenge to his account that he was near the animal sheds at the time Mr Roberts-Smith shot EKIA 57 outside the northwest corner of W108.<sup>296</sup> A further basis on which Person 41's evidence concerning EKIA 57 was challenged was the contention that if EKIA 57 had in fact been executed by Mr Roberts-Smith, then Person 41 would not have drunk from his prosthetic leg (which he admitted he had done).<sup>297</sup> However, as the trial judge rightly found, the fact that Person 41 drank from the leg was more of an incentive for Person 41 to say that the killing was *lawful*, rather than unlawful.<sup>298</sup> The trial judge also considered Person 41's evidence as to why he had not reported the executions at the time. Person 41's explanations are extracted at J [726], [729] and [730]. The trial judge accepted these explanations, finding that "it is entirely plausible".<sup>299</sup>
291. The most powerful argument in favour of the credibility of Person 41's evidence is its consistency with the evidence of Persons 14 and 24. There was simply no explanation for how Person 41 (who was said to have innocently yet falsely created a memory of the executions) could have concocted a story that matches the evidence of other witnesses. The trial judge agreed, finding that there was no evidence of collusion between and that Person 14 and 24's evidence supported Person 41's account.<sup>300</sup>

#### Person 40

292. As noted above, after Person 40 saw two men come from the tunnel (including the man with the prosthetic leg), he left the tunnel courtyard and took up a defensive position outside the compound in the area marked A on Ex R-137.<sup>301</sup> The area he marked "A" is close to the area that Person 41 marked "F" on Ex R-92. Thus, the evidence of those two witnesses of their respective positions is on all fours with each other.
293. About 20 to 25 minutes after Person 40 saw the PUCs marched off by Mr Roberts-Smith and Person 35 in the tunnel courtyard, while he was in the position marked "A" on Ex R-137, Person 40 heard a burst of machine gun fire from a Minimi. Person 40 was facing out and the sound came from his right side, maybe about 30 metres from him.<sup>302</sup> The orientation Person 40

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<sup>294</sup> J [715]; T.1242/1-5 (P41).

<sup>295</sup> J [715]; T.1314/4-35 (P41).

<sup>296</sup> J [717].

<sup>297</sup> J [722]-[727]; T.1361/22-1362/22 (P41). See also T. 1324/38-1325/32 (P41).

<sup>298</sup> J [727].

<sup>299</sup> J [731].

<sup>300</sup> J [733].

<sup>301</sup> J [734].

<sup>302</sup> J [712]; T.3267/15-3268/11 (P40).

described (looking out and with the sound of the Minimi to his right) is wholly consistent with the location in which EKIA 57 was killed. Person 40 said there was some confusion, with radio chatter saying “What was that? Where did that come from”.<sup>303</sup>

294. That evidence, on which Person 40 was not challenged in any way, materially undercut Mr Roberts-Smith’s case. That is because Person 40 only gave evidence that he heard a burst of machine gun fire. He did not give evidence of hearing either suppressed or unsuppressed fire from an M4 (the Court will recall that on Mr Roberts-Smith’s case, a second unknown operator shot EKIA 56 in the same engagement with an M4 rifle, and if the unknown operator was Person 4, his M4 would have been unsuppressed).<sup>304</sup> But even a suppressed M4 makes a noise that is capable of being heard by those in the vicinity.<sup>305</sup> If the engagement had occurred in the manner described in Mr Roberts-Smith’s evidence, then Person 40 should have been in a position to hear that second engagement.
295. Person 40 saw something even more important later that night. As the troop was walking away from the W108 compound, Person 40 saw the body of EKIA 57 and recognised it as the body of the man he had earlier seen come out of the tunnel (an association he made on the day).<sup>306</sup> This of course was the same man - “Ahmadullah” – whose identification documents were found in the tunnel,<sup>307</sup> which the trial judge found “strongly suggests that [EKIA 57] used the tunnel and had been present in it”.<sup>308</sup> Person 40 marked the location of the body with a “B” on Ex R-137, which is consistent with the area that Mr Roberts-Smith himself, as well as Persons 41, 14 and 24 described the engagement and the body of EKIA 57.

#### Person 14

296. Person 14 was a member of Gothic 4 and was located in the cordon off the north-west corner of the compound. We describe above Mr Roberts-Smith’s determined efforts to place Gothic 4 on the other side of the compound and his belated abandonment of that argument in closing submissions. As we noted at paragraphs 169 and 170, this concession meant that Mr Roberts-Smith’s own version was highly improbable, and it is uncontroversial that Person 14 gave honest and reliable evidence of his own position in the cordon.
297. Person 14 gave evidence that:<sup>309</sup>

I was looking towards Whiskey 109 and I heard, like, noises to my right, which was similar to stomping or heavy footsteps, and a little bit of, you know, chatter, like some kind of people talking. Wasn’t clear to me. But anyway, it – it caught my attention,

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<sup>303</sup> J [712]; T.3268/20-23; 3269/18-20 (P40).

<sup>304</sup> Assuming the second shooter in Mr Roberts-Smith’s account to have been Person 4, then the evidence is that his weapon would have been unsuppressed: T.2997/13-29 (P18); CCT 9.3.22 p.2/8-3/8 (P18); See R-135 (a closed court exhibit). In any event, even if the weapon was suppressed, the evidence was that a distinct and audible noise is still made: See, e.g. T.1602/36-1603/4 (P14); T.1303/6-10 (P41); T.3094/26-28 (P18).

<sup>305</sup> J [736]; T.1303/6-10; T.1307/36-46; T.1350/34-37 (P41); T.3094/26-28 (P18).

<sup>306</sup> J [809]; T.3268/28-3270/1 (P40).

<sup>307</sup> At pages 14 and 34. See further the document behind Tab 11 of Ex A-10 (a closed court exhibit).

<sup>308</sup> J [493].

<sup>309</sup> J [738]; T.1414/20-31 (P14).

obviously, and as I turned to my right – my head, only my head to my right – there was, like, three Australian soldiers, and a black object which was, like, similar to a human was – was thrown to the ground, and there was, like, a – a thud when the – when that person hit the ground. There was a - that kind of noise, expulsion of air when someone is kind of winded, and – then a soldier raised their Minimi F89 Para and fired, like an extended burst. It was loud; it was, like [Person 14 then impersonated a machine-gun burst] one second, and I was like, “Okay.” And that person turned and walked away out of sight back into Whiskey 108, which was – walked towards – on this one, point A.

298. Person 14 marked the point he saw what looked like a human body thrown on the ground with an E on the second page of Ex R-98.<sup>310</sup> The reference to “point A” in the passage just quoted was to page one of Ex R-98.<sup>311</sup>
299. After seeing the shooting, Person 14 said he turned to his 2IC Person 73 and said “What the hell was that?” He recalled that Person 73 shrugged his shoulders and nodded his head.<sup>312</sup>
300. Later that night, he was preparing to exfil, Person 14 went over and inspected the object and saw it was a human. By this point, Person 18 had performed SSE on the body.<sup>313</sup> Person 14 described the person as laying on his back, with a shaved head, a little bit of a beard, dark Afghan robes and a white leg which was a prosthetic leg. He noticed blood generally concentrated around the upper torso / the centre of mass, and some blood coming out of the nose and the mouth.<sup>314</sup> Person 14 identified the body as the EKIA shown in Ex R-7.<sup>315</sup>

#### Person 24

301. Person 24 was also in the Gothic 4 cordon, located two to three metres away from Person 14.<sup>316</sup> He marked his position on Ex R-141 by placing a circle or oval shape on that exhibit.<sup>317</sup> The position he marked on Ex R-141 is consistent with the evidence of Person 14, albeit slightly closer to the compound than the position Person 14 marked on Ex R-98. As with Person 14, it is now common ground that Person 24 gave honest and reliable evidence that Gothic 4 was positioned in the cordon off the north-west side of the compound.
302. Person 24 saw Mr Roberts-Smith walk out of the compound at the spot he marked B on Ex R-141, carrying a man who was making a grunting noise, and carried him to the point he marked C where he shot him with about eight to ten rounds of machine gun fire.<sup>318</sup> He could tell it was Mr Roberts-Smith based on the size and shape of the man and the gait with which he walks.<sup>319</sup> Person 24 described what he observed as follows:<sup>320</sup>

At this stage, he was holding a man in his hand. It appeared that he had come off his

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<sup>310</sup> J [738]; T.1414/40-42 (P14).

<sup>311</sup> J [739]; T.1414/28-34 (P14).

<sup>312</sup> J [740]; T.1416/45-1417/2 (P14).

<sup>313</sup> J [810]; T.1417/46-47 (P14).

<sup>314</sup> J [810]; T.1417/22-41 (P14).

<sup>315</sup> J [810]; T.1418/5-16 (P14).

<sup>316</sup> J [765].

<sup>317</sup> J [765].

<sup>318</sup> J [765].T.3450/10-17; 25-37 (P24).

<sup>319</sup> J [765].T.3489/1-18 (P24).

<sup>320</sup> J [765].T.3450/18-23 (P24).

feet and he was being held parallel to the ground. He was held by the pants or the back of the shirt.<sup>321</sup> He marched approximately 15 metres directly out from that entrance, dropped the man on the ground and immediately began with a machine gun burst into his back.

303. Person 24 said Mr Roberts-Smith stopped firing because the gun had a stoppage. Mr Roberts-Smith immediately turned back towards the entrance of the building and started walking back the way he came, rectifying the stoppage as he was moving, and went back inside the compound.<sup>322</sup> Person 24 said to Person 14 “Did we just witness an execution”.<sup>323</sup> Person 24 later saw the body, and identified the person in Ex R-7 as the man shot by Mr Roberts-Smith.<sup>324</sup>
304. There were two broad themes to the challenge to Person 24’s evidence. The first theme was concerned with his mental health and its effect (with his medication) on his memory.<sup>325</sup> Person 24 accepted that for a time he had memory issues, and he has “difficulty recalling some events from [his] time in Afghanistan”.<sup>326</sup> But he said that since 2017 his memory has improved,<sup>327</sup> and in any event he said that he did not find it difficult to recall “watching an execution”.<sup>328</sup> None of those matters are the subject of Mr Roberts-Smith’s appeal.
305. The second challenge was an outright attack on the honesty and truthfulness of his evidence about seeing Mr Roberts-Smith carry a man, throw him on the ground, and shoot him.<sup>329</sup> A significant part of that attack involved a suggestion that Person 14 had, in effect, told him what to say, and that he was simply giving evidence to “back up” Person 14.<sup>330</sup> We deal with that attack in our Closed Court Submissions at A39 – A41.
306. The suggestion that Person 24 was lying was quite inconsistent with Person 24’s open expressions of support for Mr Roberts-Smith. Person 24 came to the Respondents’ attention in the manner described in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465. He told the trial judge that he did not “want to be here” and found it “extremely difficult to stomach having to give evidence against” Mr Roberts-Smith.<sup>331</sup> Person 24 referred on multiple occasions to how unfair he considered the media and other scrutiny of Mr Roberts-Smith to be.<sup>332</sup> He openly stated that he had “no qualms” about what happened to EKIA 56 and EKIA 57.<sup>333</sup> His concern was only for those Australian soldiers who he thought had been adversely affected by being blooded; and in particular Person 4.<sup>334</sup> It was thus apparent that Person 24 was giving evidence in relation to the killing of EKIA 57 (a killing in which Person 4

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<sup>321</sup> J [765]. In cross-examination he clarified that he was referring to the “lower back region”: T.3477/18-23 (P24).

<sup>322</sup> J [765]. T.3450/39-3451/1 (P24).

<sup>323</sup> J [766]. T.3451/6-7 (P24).

<sup>324</sup> J [766]. T.3452/1-25 (P24).

<sup>325</sup> See, e.g., T.3468/32-3470/16, 3494/1-12, T.3544/34-3546/2, CCT 15/3/22 T.16-20 (P24).

<sup>326</sup> J [768]; CCT 15/3/22 T.17/22-25 (P24).

<sup>327</sup> J [768]; CCT 15/3/22 T.17/27-37 (P24).

<sup>328</sup> J [769]; T.3524/36-37 (P24).

<sup>329</sup> See, e.g., T.3453/12-25, T.3475/30-3476/27, T.3479/5-15, T.3565/10-18, T.3566/38-3567/6 (P24).

<sup>330</sup> See, e.g., T.3467/40-3468/27, T.3479/5-11, T.3488/3-29, T.3534/36-43, T.3535/10-11; T.3567/8-19 (P24).

<sup>331</sup> T.3572/11-14 (P24).

<sup>332</sup> T.3460/23-26, T.3485/38-39, T.3523/28-31 (P24).

<sup>333</sup> T.3463/31-33 (P24). See also T.3516/18-20 (P24).

<sup>334</sup> T.3463/33-39 (P24).

was not involved) most reluctantly. His “support” for Person 4 thus involved nothing more than telling the truth.

307. The trial judge’s approach to assessing Person 24’s evidence was correct. His Honour rightly concluded that Person 24’s evidence must be approached with “considerable caution” given the matters raised in our Closed Court submissions. However, as his Honour observed, Person 24’s evidence does not stand alone and is supported by the evidence of Persons 41 and 14.<sup>335</sup> While his Honour did not expressly refer to it, Person 40’s evidence also provides powerful corroboration for Person 24’s account. The trial judge observed that there was no suggestion of any collusion or contamination between Person 41 on the one hand, and Persons 14 and 24 on the other.<sup>336</sup> In those circumstances, the trial judge correctly considered the evidence as a whole, including the sequence of events in which the death of EKIA 57 formed a part (including the discovery of EKIA 57’s identification documents in the tunnel and Person 40’s evidence that he came out of the tunnel) and found that Person 24’s evidence should be accepted.

***Person 5 expressed concern that the execution of EKIA 57 had been recorded***

308. The narrative now returns to Person 18. After he finished helping Person 35 clear the tunnel, Person 18 moved back to the area on the western side of the compound that he had previously been searching.<sup>337</sup> At some point after that, he was searching a room in the vicinity of the point marked “B” on Ex A-117.<sup>338</sup> Mr Roberts-Smith and Person 5 were standing right outside that room, at the point he marked “H” on Ex A-117.<sup>339</sup> Person 18 was no more than three metres away from them, and could see them side on.<sup>340</sup>

309. At that point, the Person 18 overheard the following conversation:

Person 5: “You’ve just done this – done this whilst the ISR is still flying above and may have recorded you?”.

BRS: “We need to find out if the ISR was still above us”.

310. The ISR was a reference to the “Intelligence, Surveillance and Reconnaissance Platform” that the troop had at its disposal that day: which was known as a ScanEagle drone.

311. Person 5 then had the following exchange on the troop internal chat with the JTAC (the joint terminal attack controller) who was in control of the ScanEagle drone that day:

Person 5: “Where is the ISR platform and was it recording?”

JTAC: “No, I pushed the ISR off station before we made entry and pushed it into another area that was a threat area.”<sup>341</sup>

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<sup>335</sup> J [225].

<sup>336</sup> J [733].

<sup>337</sup> J [706]; T.3014/10-11, T.3132/15-20 (P18).

<sup>338</sup> J [706]; T.3133/40-3134/30 (P18).

<sup>339</sup> J [706]; T.3133/44-46, T.3134/35-38 (P18).

<sup>340</sup> J [705(3)]; T.3136/27-36 (P18).

<sup>341</sup> J [705(3)]; T.3014/13-23; 3136/38-3137/16 (P18).

312. The trial judge accepted Person 18's evidence.<sup>342</sup> His Honour found that the conversation expressed a concern that Mr Roberts-Smith's conduct in shooting EKIA 57 outside of the compound may have been recorded. The concern Person 5 expressed was consistent with the fact that he was aware that the "Troops in Contact" (TIC) designation for the mission was still formally open, and one reason to leave the TIC open was to "get assets above you".<sup>343</sup> Person 5 said that while ScanEagle did not stay about the compound itself during a mission, it was pushed off and looked for potential threats coming in toward the compound.<sup>344</sup> He acknowledged that at least in cleared areas such as tracks, it would pick up potential threats moving towards the compound.<sup>345</sup> Given his understanding that ScanEagle may be looking for threats outside the compound, Person 5 had a serious and legitimate concern that the execution of EKIA 57 outside the compound may have been recorded.
313. Person 5 said he understood that ScanEagle was operating on the day of the W108 mission looking for threats, he had no precise knowledge of where it was, and he would need to ask the JTAC.<sup>346</sup> That evidence is entirely consistent with the conversation Person 18 overheard.
314. Person 18's evidence was further corroborated by the uncontroversial fact that unbeknownst to Person 5 on the day (at least initially), ScanEagle was not on station, and not recording, at the time. Ex R-208 states that the ISR moved off station at 1230DE and noted a "lack of post-strike images due to re-tasking of UAV" (unmanned aerial vehicle). The ISR was not back on station until 1845DE.<sup>347</sup> In other words, ScanEagle was not above or around the W108 across the period in which both executions occurred. That evidence is wholly consistent with Person 18's evidence that the JTAC told Person 5 that ScanEagle had been pushed off station and was not recording (meaning it could not have recorded the execution of EKIA 57 outside the compound).
315. This evidence formed yet another piece of powerful corroboration for the evidence of Persons 41, 40, 14 and 24, and is not the subject of any challenge on appeal.

***The consistency of Persons 41, 14 and 24 (Notice of Appeal particular 9(b))***

316. At particular 9(b) of the Notice of Appeal and BRS [13.1] to [13.6], Mr Roberts-Smith submits that the trial judge erred by accepting the evidence of Persons 41, 14 and 24 in circumstances where they saw a different number of Australian soldiers with Mr Roberts-Smith at the time of the execution. That submission should be rejected.
317. Turning first to Person 41. His evidence was that there was at least two SASR soldiers in the immediate vicinity when EKIA 57 was killed: Mr Roberts-Smith and himself. He subsequently spoke to Person 40 nearby, at the location marked "F" on Ex R-92.<sup>348</sup> That location is close to

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<sup>342</sup> J [708].

<sup>343</sup> J [709]; T.4852/6-20 (P5).

<sup>344</sup> J [709]; T.5039/12-13, T.5048/27-5049/8, T.5116/34-5117/18 (P5).

<sup>345</sup> T.5049/14-33 (P5).

<sup>346</sup> J [710].

<sup>347</sup> Ex R-209.

<sup>348</sup> T.1242/16-24 (P41).

the exit from the tunnel courtyard and close to where EKIA 57 was executed. Person 41 also said it was possible that *other* members of the patrol were present in the vicinity of the location marked F; he just did not see them.<sup>349</sup> Thus, on Person 41's account, in addition to Mr Roberts-Smith and himself, there was at least Person 40 and potentially other patrol members in the vicinity of the location marked "F" on Ex R-92.

318. Turning next to Person 14. He saw three Australian soldiers in the vicinity of the killing of EKIA 56. The first was plainly Mr Roberts-Smith, which is consistent with Person 41's evidence. While Person 14 did not recognise the soldier who fired the Minimi, he observed that in addition to carrying that distinctive weapon, he was wearing distinctive camouflage paint of grey / brown which Person 14 understood to be associated with Person 5's patrol.<sup>350</sup> There is no dispute that Mr Roberts-Smith was carrying the Minimi in Person 5's patrol on that day. Further, grey camouflage paint can be seen on Mr Roberts-Smith's face on page 25 of Ex R-18.<sup>351</sup> Most importantly, Mr Roberts-Smith says he killed EKIA 57. The only dispute was the circumstances of the death, not the identity of the shooter.
319. Person 14 did not recognise the other two soldiers who were near Mr Roberts-Smith, but one was wearing the same or similar camouflage style paint.<sup>352</sup> During cross-examination of Person 14, it was put to Person 14 that Person 29's patrol (of which Persons 41 and 40 were members) used similar camouflage paint on that mission.<sup>353</sup> Person 14 said that those two soldiers were standing there in the vicinity and "observing in that direction".<sup>354</sup>
320. Person 41 was plainly one of the other two soldiers Person 14 saw. Person 41 gave evidence that he was about five metres away from Mr Roberts-Smith and looking at him.<sup>355</sup> That is consistent with Person 14's evidence that the soldiers were in the vicinity and "observing in that direction". Person 41 was also in Person 29's patrol and therefore was using similar camouflage paint on the mission.<sup>356</sup> That is consistent with Person 14's evidence that at least one of the soldiers was using similar camouflage paint.
321. The identity of the second soldier Person 14 saw is less clear. Person 40 is one possibility. Person 40 placed himself in the area he marked A on Ex R-137.<sup>357</sup> The area he marked "A" is very close to the area that Person 41 marked "F" on Ex R-92, but a little further to the south along the field wall. Person 40 was facing outwards and the sound of the Mimimi came from his right, consistent with the location of EKIA 57's body. Person 40 did not see the execution but based on the sound of the Minimi he estimated it was "maybe 30 metres, thereabouts" from

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<sup>349</sup> T.1314/11-12; 1314/33-35 (P41).

<sup>350</sup> J [740] T.1415/5-39 (P14).

<sup>351</sup> J [740].

<sup>352</sup> J [740]; T.1416/29-31 (P14).

<sup>353</sup> T.1733/7-11 (P14).

<sup>354</sup> J [740]; T.1622/38-42 (P14).

<sup>355</sup> J [714]; T.1240/20-1241/15 (P41).

<sup>356</sup> T.1219/38-39 (P41).

<sup>357</sup> J [734].



him.<sup>358</sup> If it was not Person 40, then it was likely to be one of the other Gothic 2 patrol members who Person 41 accepted may have been in the area.<sup>359</sup>

322. Pausing there: the accounts of Persons 41 and 14 and 40 can readily sit together. Their evidence is consistent in that both Mr Roberts-Smith and Person 41 himself were close to the execution. Further, Person 41 could not exclude the presence of another patrol member in the area, which is not in any way inconsistent with Person 14 seeing a third soldier nearby.
323. Person 24 described seeing Mr Roberts-Smith shooting EKIA 57 and then walk back into the compound.<sup>360</sup> He was then asked this question and gave this answer: “Okay. Were you able to see any other SAS operators at this time? ---- No, only Person 14, who I was with”.<sup>361</sup> The question directed Person 24’s attention to the point in time when Mr Roberts-Smith had gone back inside the compound. He did not see any other operators at that point. He did not give any evidence, one way or another, about whether he saw any other operators in the vicinity at an earlier point, during the execution itself.
324. But even if Person 24’s evidence was construed to mean the *entire* period in which the execution took place, there are other rational explanations for the apparent difference in recollection. Person 24 was located closer to the compound than Person 14. That is evident when one compares Person 24’s position (which he marked with a circle on Ex R-141) with Person 14’s position (which he marked on Ex R-98). Once the animal sheds located between Gothic 4 and the compound are taken into account, it is readily apparent that a soldier located in a different position in the cordon – even a matter of a few metres – would have a materially different field of view. Thus, those differences are likely to be a product of either or both of different witnesses observing events from different perspectives, or different memories as a result of the natural tendency to focus on the most arresting event (namely, the execution of an unarmed man).
325. There was no error in the judge’s approach to the evidence of Persons 41, 14 and 24. As outlined above, Person 41 and 14’s evidence can readily sit together. His Honour did not err by positing that it was possible Person 14 may have seen Person 41 and 40; that was a rational possibility on the evidence (and indeed the only logical inference in the case of Person 41). But his Honour put it no higher than a possibility and made no such finding. Instead, his Honour correctly held that the difference in the accounts must be “carefully considered”, and his Honour did just that.<sup>362</sup> We return to this at paragraphs 328 and 329 below, but first, something must be said about the submission at BRS [13.7].
326. At BRS [13.7], Mr Roberts-Smith refers to a number of other alleged inconsistencies which are “less material but when considered with the inconsistency above”, give rise to an accumulated significance. That is the extent of the analysis. This is a highly unsatisfactory approach. Mr

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<sup>358</sup> J [712]; T.3267/15-3268/11 (P40).

<sup>359</sup> T.1314/11-12; 1314/33-35 (P41).

<sup>360</sup> T.3451/1 (P24).

<sup>361</sup> T.3451/1 (P24).

<sup>362</sup> J [793]-[800].

Roberts-Smith was granted 200 pages for his submissions. He chose to use less than half. There is no explanation for why a range of additional factors are said to be relevant to the analysis and yet are not referred to in the particulars of his Notice of Appeal and have not been developed at all in the written submissions. Nevertheless, we deal with these briefly below. None of these factors alter the analysis in any way.

327. The additional factors appear at J [792] to [799]. The trial judge correctly described these as “small differences”. They included the following:

- (a) The first was which part of EKIA 57’s body Mr Roberts-Smith was holding. Persons 41 and 24 both said he was being held by his clothing at the back. Person 14 did not say where EKIA 57 was being held. There was no inconsistency.<sup>363</sup>
- (b) The second concerned whether Mr Roberts-Smith “flipped” EKIA 57. Person 41 said EKIA 57 was thrown onto his back, then flipped and shot in the back. Person 24 said he was immediately shot in the back. Person 41 did not say one way or the other. The judge correctly held that the difference was “not significant” in a fast moving event involving a struggling man, and where the witnesses were viewing the event from different angles and distances.<sup>364</sup>
- (c) The third concerned the number of rounds fired by the Minimi. This is a weapon that fires between 700 and 1100 rounds per minute, or between 9 and 13 rounds per second.<sup>365</sup> Mr Roberts-Smith’s witness Person 5 agreed it was “very difficult” to accurately count how many rounds are fired from a Minimi, including because its maximum rate of fire is rough as well. He candidly acknowledged “it’s not exact”.<sup>366</sup> In those circumstances, the trial judge was plainly correct to find that different estimates of 10-15 rounds (Person 14), 8-10 rounds (Person 24), and 3-5 rounds (Person 41) were not significant.<sup>367</sup>
- (d) The fourth concerns whether Mr Roberts-Smith had a stoppage during the execution. Person 24 recalled he did (which was consistent with Mr Roberts-Smith’s own evidence). Person 14 did not observe a stoppage, while Persons 40 and 41 were silent on the matter. Again, the trial judge was correct to find that the difference was relatively minor and was far outweighed by the essential similarities.<sup>368</sup>
- (e) The final difference was who said what to whom in the cordon. Person 14 said he spoke to Person 73; while Person 24 said he spoke to Person 14. The trial judge correctly observed there was no inconsistency; both comments could have been made, or alternatively, there were simply different recollections. Either way, the difference was not

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<sup>363</sup> J [792].

<sup>364</sup> J [793].

<sup>365</sup> J [795].

<sup>366</sup> J [795].

<sup>367</sup> J [794]-[796].

<sup>368</sup> J [797].

a reason for rejecting their accounts generally.

328. The trial judge rightly concluded that when the evidence was considered as a whole, the similarities between the witnesses “far outweigh this difference, or indeed, all of the differences”.<sup>369</sup> The similarities his Honour described included the forcible and aggressive movement of a PUC in an area outside the north-western corner of the compound; hearing an extended burst from a machine gun; and watching a soldier fire a machine gun into the body of a human being outside the north-west corner of W108.<sup>370</sup> An important factor in his Honour’s reasoning was that Person 41 was independent of Person 14 and 24, yet both Persons 41 and 24 (with no suggestion of collaboration or collusion) identified Mr Roberts-Smith as the shooter by name, while Person 14 identified Mr Roberts-Smith by description.
329. Further compelling corroboration came from Person 40. He too was independent of Persons 41, 14 and 24. As outlined above, Person 40 saw the body of EKIA 57 in the precise location that Persons 41, 14 and 24 all say EKIA 57 was executed and he recognised it as the body of the man he had earlier seen come out of the tunnel (an association he made on the day).<sup>371</sup> The combination of the two parts of Person 40’s evidence – seeing the man with the prosthetic leg coming from the tunnel and being marched away by Mr Roberts-Smith, and then later seeing the body of the same man in the exact location where other witnesses saw Mr Roberts-Smith execute a PUC – was both devastating to Mr Roberts-Smith’s case, and powerful corroboration for the accounts of Person 41, 14 and 24.

***The reliability of Person 14 (Notice of Appeal Particular 11)***

330. It is on any view an extraordinarily difficult task for Mr Roberts-Smith to persuade this Court to reach the view, contrary to the assessment of the trial judge who had the opportunity of observing him, that “the only appropriate conclusion available was that no weight could be placed on the evidence of this witness” (BRS [14.5]). If nothing else that is so when the evidence of Person 14 aligned in every material respect with that of Person 41, a witness with whom he had had no contact or communication. None of the matters raised by Mr Roberts-Smith come even close to meeting that challenge.
331. *First*, there is no substance at all in the suggestion that the trial judge failed to consider the substance of any submission put by Mr Roberts-Smith in relation to the credit of Person 14 (BRS [14.2]). The submission concerning asserted inconsistencies between Person 14’s evidence and the highly abbreviated summary of a conversation he had with Mr Masters was anticipated by the Respondents in their written submissions, and dealt with by the trial judge at J [745]-[748]. The trial judge plainly accepted that the reference to Person 14 having “understood” that Person 4 shot a person with a prosthetic leg reflected his understanding “on the ground” that Person 4

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<sup>369</sup> J [798].

<sup>370</sup> J [800].

<sup>371</sup> J [809]; T.3268/28-3270/1 (P40).

was carrying the Minimi.

332. The premise that Person 14 had made a prior inconsistent statement was thus never established. Person 14 had consistently maintained that he observed a soldier that he could not identify shoot a person with a Minimi. He had (wrongly) assumed that Person 4 was carrying the Minimi. Later in the mission he came to learn that it was in fact Mr Roberts-Smith who had carried the Minimi. Mr Masters' notes, especially in light of their summary and incomplete nature, are consistent with that account. The trial judge was uniquely placed to assess the honesty of Person 14's response to the vigorous challenge mounted against his honesty in this respect.

333. *Second*, the submission that the trial judge erred in failing to take into account, in assessing the evidence of Person 14 in relation to W108, challenges to his credibility made in relation to his evidence concerning Chinartu (BRS [14.4]) is similarly without merit. The trial judge, at J [753], specifically referred to Mr Roberts-Smith's submissions concerning Person 14 and Chinartu, identified that he addressed those submissions in Section 5 of Part 3, and agreed that "the whole of a witness' evidence must be taken into account". In doing so he referred back to J [225] where his Honour said:

Some of the respondents' witnesses are also witnesses in relation to other missions and events. For example, Person 14 is the respondents' key witness in relation to events at Chinartu .... In assessing the credit of a witness, it is necessary to have regard to the whole of the witness' evidence while at the same time recognising that the witness may be correct as to one matter and mistaken as to another, or truthful as to one matter and dishonest as to another.

334. There is simply no basis for any suggestion that his Honour did not have regard to the whole of Person 14's evidence, and the credibility challenges made to it, in reaching the conclusion that, having "scrutinise[d] Person 14's evidence with care ... I accept his evidence" (J [225]).

335. As for the "other matters summarised by the primary judge in relation to the credibility of Person 14" (BRS [14.5]) that are relied upon as the basis for the submission that the "only appropriate conclusion" is that no weight could be placed on *any* of his evidence, it is sufficient to rely on the trial judge's careful consideration and assessment of each of those matters, and to observe that, in weighing and considering them all, it was the primary judge who had the benefit of observing Person 14 give evidence, and of seeing how he dealt with those challenges, and of placing the significance of each challenge in context in light of the unfolding of all of the evidence in the trial.

336. To take but one example of the advantage that the trial judge had, in assessing the significance of the fact that Person 14 initially gave untruthful evidence about his contact with journalists after January 2014 (see J [750]), the trial judge was able to place that dishonesty in the context of a significant amount of other evidence in the trial concerning the attitude of members of the SASR to persons who spoke to the media. It was a pervasive issue throughout the trial, and the trial judge was well-placed to assess the implications of that particular dishonesty for Person 14's honesty generally.

337. Ultimately, the most powerful indication of Person 14's reliability as a witness came from the significant corroboration his evidence received from independent witnesses (most notably Person 41), and from contemporaneous documentary evidence of which he was unaware at the time he first made allegations of murder against Mr Roberts-Smith (most notably in relation to Chinartu). There was no plausible theory advanced at all as to *how* Person 14's evidence could have been as it was if he had simply made it up. Nor was there any persuasive or coherent theory advanced as to *why* Person 14 would have invented such serious allegations against Mr Roberts-Smith. The only plausible explanation was that he was telling the truth. His honesty was reinforced by the candid limits of his observations and recollections. For example, he never pretended to have identified the person who shot EKIA 57. All he could say is that it was an Australian soldier carrying a Minimi.
338. Once the comprehensive challenge to Person 14's evidence fails, as it must, the broader challenge to the trial judge's findings concerning EKIA 57 must fail with it.

#### **H. Post-mission reporting (Notice of Appeal particulars 7 and 8)**

339. After the W108 mission, a number of reports were compiled. The first and last reports of the mission do not include any reference to the engagement of EKIA 56 and EKIA 57. See paragraphs A14 to A19 of the Respondents' Closed Court Submissions. However, an intermediate document called the "Patrol Debrief for Gothic Troop" states "2 x squirters were killed" and "upon breaching the compound and commencement of clearance INS attempted to squirt, but were engaged". The relevant parts of the Patrol Debrief are extracted at J [584]. The trial judge's analysis of these documents appears at J [582] to [593] and [665] to [674].
340. At trial<sup>372</sup> and again on appeal,<sup>373</sup> Mr Roberts-Smith submitted that if the reference to two "squirters" in the Patrol Debrief was false, it could not have been included in the document absent some form of conspiracy to conceal the truth or an unsuccessful challenge to those records by someone who knew or suspected that EKIA 56 and EKIA 57 were executed. In the absence of such evidence, Mr Roberts-Smith says that the trial judge could not be satisfied that the official records of the mission were false, and therefore could not be satisfied that Mr Roberts-Smith engaged in unlawful conduct at W108.<sup>374</sup>
341. Once again, this submission represents a departure from Mr Roberts-Smith's framing of his appeal as not challenging the trial judge's rejection of his, and his witnesses', account. The trial judge correctly rejected this submission at trial.<sup>375</sup> The submission should similarly be rejected on appeal. *First*, the description of EKIA 56 and 57 as "squirters" is uniformly inconsistent with the evidence from both parties. Thus, even putting aside questions of falsity, the statement in the Patrol Debrief is wrong and does not undermine the trial judge's findings. *Second*, the source

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<sup>372</sup> See J [672]-[673].

<sup>373</sup> Notice of Appeal Particulars 7 and 8 and BRS [16.1] to [16.10].

<sup>374</sup> BRS [16.10].

<sup>375</sup> J [674].

of the “squirters” reference in the Patrol Debrief was Person 5, whose account was expressly considered and rejected by the trial judge. That finding is not challenged on appeal. The suggestion that Person 5’s account can be comprehensively rejected at trial and the finding not challenged on appeal – yet a prior version of Person 5’s account in the Patrol Debrief somehow remains accurate – need only be stated to be rejected. *Third*, there was extensive evidence that SASR operators knew about the executions and did not report them. But Mr Roberts-Smith overstates the inevitability of a wide-spread conspiracy for Person 5’s account to appear in the patrol debrief. Person 5 gave his after-action account directly to Person 81, who (wrongly) trusted Person 5 to give accurate information and who then included the account in the Patrol Debrief on that erroneous premise. We consider each of these points in further detail below.

***The account in the Patrol Debrief is false or wrong***

342. At trial, the evidence was wholly inconsistent with the statement in the Patrol Debrief that “upon breaching the compound and commencement of clearance INS attempted to squirt but were engaged”. The evidence may be grouped into four broad categories.

343. The first category of evidence is the contemporaneous records (other than the Patrol Debrief). There are two types of contemporaneous reports, none of which supports an account that EKIA 56 and EKIA 57 were killed lawfully at W108, individually or collectively.

(a) The SSE records (namely the Exploitation Report and the photographs) are directly inconsistent with two squirts being killed in a single engagement outside W108. Not only are the bodies identified as being in two different locations (EKIA 56 being located inside the compound and EKIA 57 outside), the description of the killing of EKIA 56 is directly contradictory to someone attempting to flee or “squirt” from the compound.

(b) The first two reports of the mission do not include *any* reference to the engagement of EKIA 56 and EKIA 57. Far from supporting an account of a legitimate engagement, these two reports indicate that the killing of EKIA 56 and 57 initially were not reported *at all*. The complete absence of any reference to EKIA 56 and EKIA 57 in the first two reports supports, rather than undermines, the Respondents’ case.

344. The *second* category of evidence was that of the Respondents’ witnesses. Their accounts were inconsistent with the engagement of two squirts on commencement of clearance. As outlined above, their collective account is that EKIA 56 and EKIA 57 were found in a tunnel, then PUC’d, and then shot by Person 4 and Mr Roberts-Smith.

345. Mr Roberts-Smith’s belated acceptance that Gothic 4 was in the cordon off the north-west corner of the compound is significant in this respect. If two squirts had attempted to flee the compound “upon breach” and “commencement of clearance”, that is at a point in time when Gothic 2 and Gothic 5 patrols had just breached the compound and were commencing their clearance in the southern part of the compound. In that event, a squirts who attempted to flee the compound to

the north or northwest would likely have been engaged by the cordon, namely, Gothic 4. If the engagement had occurred as described in the Patrol Debrief, the engagement would have been with Gothic 4 (if anyone), not with Mr Roberts-Smith and Person 4 as members of Gothic 5.

346. The *third* category of evidence was Mr Roberts-Smith's own account. He did not describe EKIA 56 and EKIA 57 as squirts. Almost every witness – including Mr Roberts-Smith – described a squirts as a person *leaving* an area.<sup>376</sup> Witnesses variously put it as "trying to run away", "leaving the vicinity", "attempting to flee a target area", or "leaving an area of interest".<sup>377</sup> Person 81 (who authored the Patrol Debrief) said his understanding of the language in the Patrol Debrief was it meant that that "on approach, two people were seen departing the compound and they were engaged".<sup>378</sup> The trial judge rightly found that it was difficult to describe Mr Roberts-Smith's account of two armed insurgents running in an arc around the compound as "squirts".<sup>379</sup> That finding is not challenged on appeal.
347. The *fourth* category of evidence was the account of Person 5. As we noted at paragraphs 282 and 283, Person 5 did refer to EKIA 56 and 57 as "squirts" in his evidence. Person 5 said he ran outside the compound after hearing shots and Mr Roberts-Smith said he and Person 4 had "just engaged two squirts".<sup>380</sup> He also said that was the account Mr Roberts-Smith or Person 4 gave in the post-operational debrief.<sup>381</sup> However, Person 5's account was only as good as its source; and Mr Roberts-Smith did not back up Person 5's account. Mr Roberts-Smith gave no evidence of a conversation with Person 5 *at all*, let alone one in which he described them as squirts. Further, even if Mr Roberts-Smith *did* refer contemporaneously to EKIA 56 and 57 as squirts at some point, as we note immediately above, that is inconsistent with the evidence he gave at trial. The timing referred to in the Patrol Debrief is also inconsistent with Person 5's account. Person 5 said the engagement occurred during the commanders' RV (after the compound was declared secure), not at the "commencement of clearance" as the Patrol Debrief states. Thus, Person 5's account was inconsistent with every other account at trial, it is inconsistent with the Patrol Debrief itself, and Mr Roberts-Smith does not contend on appeal that the trial judge erred in rejecting it.
348. In summary, there was no evidence – on any version of events – that two "squirts" were engaged upon breaching the compound and commencement of clearance. It is inconsistent with the other contemporaneous documents. It is inconsistent with the Respondents' case. It is inconsistent with Mr Roberts-Smith's account. And it is inconsistent with the account described by Person 5, which placed the timing of the killings much later than "commencement of clearance" and which rested entirely on an alleged statement by Mr Roberts-Smith which Mr Roberts-Smith did not corroborate.

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<sup>376</sup> J [589].

<sup>377</sup> J [589].

<sup>378</sup> T.6173/4-6 (P81).

<sup>379</sup> J [852].

<sup>380</sup> T.5085/14-15 (P5).

<sup>381</sup> T.5097/14-5098/7 (P5).

***The account in the Patrol Debrief came from Person 5***

349. The trial judge found that Person 5 was the likely source of the information in the Patrol Debrief.<sup>382</sup> That finding was plainly correct, for two reasons.

350. *First*, Person 81 described his patrol commanders as the source of information in the Patrol Debrief. The trial judge summarised Person 81's evidence at J [669]. Person 81 said he relied on his patrol commanders to provide information to him about whether their patrols had had engagements, and to tell him the circumstances. He said he relied on his patrol commanders to give him an honest and accurate report in relation to any EKIAs. He said that whatever he learned about the circumstances of EKIAs at W108, it would only be based on what people had told him. Person 81 then explained that what the patrol commanders told him would be put into a report, and that report would have been put into an operational summary. Person 81 would then read it and "cleared it" for release. Thus, the unchallenged evidence from Mr Roberts-Smith's own witness, Person 81, was that he received information about engagements had by Person 5's patrol (that is, EKIA 56 and 57) information from Person 5 himself.

351. *Second*, Person 5's own evidence indicated that he was the source. Person 5 said there were two types of reports in 2009: a patrol-level report and a troop-level report. For a patrol report, he would consult with his team, then write it up and send it straight to the troop commander. He said he did not consult with other members of the troop in relation to such a report, "they pretty much went straight to the – the troop commander".<sup>383</sup> As for the troop report, "it was done in conjunction with the rest of the TLs [team leaders], the troop sergeant and the troop commander".<sup>384</sup> Either way, the process Person 5 described was that he would provide information directly to Person 81 in a report or in a meeting of other patrol commanders. Other witnesses gave similar evidence. Several others described a similar process called a "patrol debrief" whereby a patrol commander met with members of his patrol, then the patrol commanders in turn met with each other and the troop commander and troop sergeant.<sup>385</sup> That was the process Mr Roberts-Smith himself described.<sup>386</sup>

352. Person 5 suggested that after the W108 mission there was also larger meeting: a "troop debrief where everyone's involved" (including Mr Roberts-Smith and Person 4).<sup>387</sup> Person 5 said the engagement of squirters was raised in the debrief. He could not recall who raised it – he said it was the "general consensus on what happened" – but agreed that it could only have been Person 4 or Mr Roberts-Smith who gave that description.<sup>388</sup> This cannot have been the forum in which Person 81 heard that EKIA 56 and 57 were "squirters". Person 81's unchallenged evidence was that he received the information from Person 5. Person 5 himself made clear that

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<sup>382</sup> J [588].

<sup>383</sup> T.4844/21-23 (P5).

<sup>384</sup> T.4843/43-45 (P5).

<sup>385</sup> J [668].

<sup>386</sup> T.134/36-135/22 (BRS).

<sup>387</sup> T.5097/36-40 (P5).

<sup>388</sup> T.5097/36-40 (P5).



he did not describe the engagements at this troop-wide debrief. It follows that Person 5 must have provided the information to Person 81 at some other time, either by written report or in a patrol commander's meeting (the two methods he identified).<sup>389</sup>

353. Once Person 5 is accepted as the source of the "squirter" reference in the Patrol Debrief (as the trial judge rightly found and which is clear on the evidence in any event), any residual trace of credibility for the "squirter" reference in the Patrol Debrief disappears. Not only is the account inconsistent with all of the evidence at trial (as we noted above), but the source of the account has been expressly disbelieved. Person 5's account was rejected by the trial judge; and his claim that Mr Roberts-Smith described EKIA 56 and 57 as squirts is inconsistent with Mr Roberts-Smith's own account in any event. In these circumstances, the reference to "squirts" in the Patrol Brief can have no residual credibility or probative value as an accurate contemporaneous account of the engagements.

### ***The process by which Person 5's false report was included in the Patrol Debrief***

354. Mr Roberts-Smith's ultimate point is that the inclusion of a false account in the Patrol Debrief must have occurred with the acquiescence or over the objection of a significant part of the troop, and in the absence of such evidence, the trial judge erred in finding that the Respondents' evidence displaced the "accuracy of the contemporaneous records" (see BRS [16.10]). That submission has multiple flaws.

355. *First*, the starting premise (that the account in the Patrol Debrief is prima facie "accurate" because it appears in a contemporaneous military report) is flawed. As outlined above, the evidence comprehensively establishes that the account in the Patrol Debrief is *in fact* wrong or false on both parties' cases. In circumstances where its content is *in fact* wrong or false, the precise circumstances of its inclusion in the Patrol Debrief are immaterial. Regardless of whether it was included by acquiescence or over objection, those circumstances cannot remedy the fact that the account is now known to be (at the very least) wrong. As we identified above, it is inconsistent with all of the evidence led at trial – by both parties – as well as the fact that the source of the account (Person 5) is now thoroughly discredited.

356. *Second*, it overstates the level of knowledge in the troop of the executions. The trial judge found that Person 41 (and Mr Roberts-Smith and Person 4) knew of the execution of EKIA 56. Persons 41, 14, 24 and 40 knew of the execution of EKIA 57, while there was evidence that the Gothic 4 patrol had a discussion in their patrol room after returning to Tarin Kowt.<sup>390</sup> However, others who knew that PUCs had been taken did not necessarily know of the executions. The trial judge correctly found that Persons 40, 42 and 43 may have suspected but not known that EKIA 56 was executed. That finding is not speculative (cf BRS [16.8]). Person 43 made it plain that he did not know, one way or the other, on the day.<sup>391</sup> None of them saw the execution of EKIA 56

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<sup>389</sup> See paragraph 351 above.

<sup>390</sup> T.3474/21-40 (P24).

<sup>391</sup> T.3354/13-15 (P43).

or his body on the day. Nor is there any evidence that an eyewitness (such as Person 41) or a participant told them on the day.

357. *Third*, the submission ignores the candid evidence from multiple operators that no-one reported or spoke up about the executions at the time. Whether that should be characterised as a “conspiracy to conceal the truth”, or simply junior operators too afraid to speak out, is beside the point. The fact is that no-one reported it. Person 14 said he did not report it.<sup>392</sup> Person 24 said he reported it to Person 6 but he did not ask Person 6 to report it through the chain of command, and nor did Person 6 say that he would do so.<sup>393</sup> Person 41 similarly did not tell anyone what he saw at the time.<sup>394</sup>

358. Thus, if the junior operators had somehow become aware that Person 5 had provided a false report of the engagements to Person 81 – for example because they saw the Patrol Debrief or because Person 5 or Mr Roberts-Smith or Person 4 gave the false account in front of them at a troop debrief - the evidence is that junior operators were unwilling to report the executions to keep their jobs and through fear of the potential consequences of speaking out. That evidence is a complete explanation for how a senior patrol commander in 2009 could give a false report of an execution to the troop commander without challenge.

359. *Fourth*, Mr Roberts-Smith greatly exaggerates the number of operators who had visibility on the content of the Patrol Debrief in any event (cf BRS [16.4]). While it may be accepted that each operator had an opportunity to contribute indirectly to the content of the report (through consultation with their patrol commander, which was then reported up to Person 81), it does not follow that those operators were privy to the information that their own patrol commander (or another patrol commander) reported to the troop commander. Person 24, for example, was shown the Patrol Debrief and said he had never seen it before.<sup>395</sup> That is also consistent with Person 5’s account of how troop-level reports were compiled in 2009.<sup>396</sup> Thus, Person 5 could easily give a false account of the two engagements to Person 81 without any of the lower-level operators ever seeing or hearing it. There is no question of any of them “demurring” in Person 5’s false account in those circumstances (cf BRS [16.4]).

360. *Fifth*, the argument wrongly assumes that Person 5 must have given his false account to Person 81 in a forum where others who knew of the executions were present. Person 5’s evidence made clear that he did not provide the account at the full troop debrief.<sup>397</sup> Person 5 made clear that in 2009, his practice was to provide reports directly to the troop commander<sup>398</sup> or in a small meeting with the other patrol commanders present.<sup>399</sup> Thus, the false account was either given

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<sup>392</sup> CCT 10.2.22 T.19/36-44 (P14).

<sup>393</sup> T.3502/12-25 (P24).

<sup>394</sup> T.1264/37-1265/5; 1242/26-30; 1293/40-1294/5; 1364/19-22 (P41); see also T.1242/26-30 (P41).

<sup>395</sup> CCT (15.03.22) T.20/32-35 (P24).

<sup>396</sup> See paragraph 351 above.

<sup>397</sup> See paragraph 352 above.

<sup>398</sup> T.4844/21-23 (P5).

<sup>399</sup> T.4843/43-45 (P5).

directly to Person 81 in writing (in which case there was no opportunity for anyone to challenge it), or in front of the other patrol commanders.

361. If one assumes, for arguments' sake, that the false account was given to Person 81 in front of the other patrol commanders, that directs attention to what each of them knew at the time:

- (a) Person 44: Mr Roberts-Smith makes no submission about Person 44 (the commander of Gothic 1). Person 44's patrol was in the cordon and there was no evidence that he had any knowledge of any executions at the time.
- (b) Person 29: Mr Roberts-Smith unsurprisingly makes no submission about Person 29's conduct either. He is a close friend of Mr Roberts-Smith, he was a witness for Mr Roberts-Smith at trial, and the trial judge rejected his evidence.
- (c) Person 43: Person 43's evidence was that on the day of the mission, "I didn't know [what] had happened or not happened".<sup>400</sup> The various matters set out at BRS [16.7], which the Respondents are said not to have adduced from Person 43, are not to the point. If Person 5 gave his false report in front of Person 43, it is readily apparent why Person 43 did not say anything because he did not know, one way or another, whether it was true. At BRS [16.9(b)], Mr Roberts-Smith makes the curious submission that if Person 43 knew a PUC had been handed to Person 5's patrol for questioning, and he was subsequently told that Person 5's patrol had two engagements outside the compound, Person 43 should have "immediately realised" that Person 5's account of the two engagements was false and challenged it. Quite why Person 43 should have automatically assumed that Person 5's patrol had executed a PUC in those circumstances is not explained.
- (d) Person 6: Person 6 was the commander of Gothic 4, who Mr Roberts-Smith sought to intimidate in 2017 by anonymously reporting false allegations about him to the police.<sup>401</sup> There was some evidence that Person 6 knew of the execution of EKIA 57, either on the day or from the subsequent Gothic 4 patrol debrief. But there is no evidence, one way or another, as to what Person 6 said or did at any such meeting.
- (e) As for Person 81 himself, BRS [16.9(c)] suggests that if Person 81 had any suspicion that Person 5's patrol had executed fighting aged males, he is unlikely to have remained silent. That is not to the point. Person 81 said he relied on his patrol commanders to give him an honest and accurate report in relation to any EKIA's.<sup>402</sup>

362. The sad conclusion, as his Honour rightly recognised at J [674], is that SASR operators did know about the executions and did not report them. But it does not follow that the inclusion of Person 5's false account in the Patrol Debrief was itself the product of a widespread conspiracy. Person 5 provided his false account directly to Person 81 in writing, or in a patrol commanders' meeting.

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<sup>400</sup> T.3354/13-15 (P43).

<sup>401</sup> See Section 1, Part D. Mr Roberts-Smith's credit.

<sup>402</sup> J [669]; T.6169/21-23 (P81)

The junior operators had no visibility on that direct report. The only people who potentially did (if it was done at a patrol commander's meeting) were Mr Roberts-Smith's close friend Person 29; Person 6, whose actions are unknown; and Persons 43, 44 and 81, who did not know enough to challenge Person 5's account.

### **Conclusion**

363. The trial judge considered the whole of this evidence and correctly concluded that while there was force in the submission that a large number of SASR soldiers must have known of the executions and did not report them, "the respondents' case is too strong otherwise and sadly this is part of the conclusion".<sup>403</sup> The account of two squirters in the Patrol Debrief is at the very least wrong. It is inconsistent with both parties' cases at trial and the source of the account has been comprehensively discredited. The rejection of Person 5's account at trial necessarily means that the Patrol Debrief cannot survive as an accurate contemporaneous record. Put another way, Person 5's account recorded in the Patrol Debrief has no more probative value than that Person 5's account that was rejected at trial.

364. The inclusion of Person 5's false account in the Patrol Debrief was facilitated by multiple factors. A limited number of operators had direct knowledge of the executions. There was a culture among junior SASR operators of not reporting wrongdoing. The junior operators had little if any visibility into what information was passed on by the patrol commanders to the troop commander. And ultimately, it was caused by Person 5's betrayal of the trust that Person 81 placed in his patrol commanders to tell him the truth.

365. For these reasons, Particulars 6 and 7 of the Notice of Appeal should be dismissed.

### **I The trial judge's ultimate findings**

366. It was only at this point – after the trial judge had carefully considered all of the Respondents' evidence and Mr Roberts-Smith's evidence as a whole – that his Honour considered he was finally in a position to make definitive factual findings. These factual findings appear at J [863] to [883] and are briefly summarised below. They are the result of his Honour's extremely detailed and careful analysis of the hundreds of interlocking facts, complex credit assessments, and the advantage of seeking the evidence unfold on a daily basis.

367. The trial judge rejected Mr Roberts-Smith's case. His Honour found that Mr Roberts-Smith's account was "highly improbable" by itself, having regard to all of the matters summarised at paragraphs 269 to 280 above.<sup>404</sup> There were a series of inconsistencies between Mr Roberts-Smith's account and the respective accounts of his witnesses (summarised at paragraphs 281 to 284 above).<sup>405</sup> The trial judge also took into account adverse credit findings made against Mr Roberts-Smith in other parts of the judgments, including the anonymous threats issued to

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<sup>403</sup> J [674].

<sup>404</sup> J [872].

<sup>405</sup> J [872].

Person 18 and the anonymous attempt to intimidate Person 6. His Honour made clear, however, that he rejected Mr Roberts-Smith's case even without taking those additional credit findings into account.<sup>406</sup> The trial judge further concluded that Mr Roberts-Smith had several motives to lie: financial, reputational, and a motive to resist findings which may affect whether "further action is taken against him".<sup>407</sup>

368. Having rejected Mr Roberts-Smith's case, the trial judge then considered the Respondents' case and made three factual findings based on an assessment of the whole of the evidence.

369. *First*, the trial judge found that two Afghan males, who were later designated EKIA 56 and EKIA 57 were found in the tunnel and were placed under confinement by Australian soldiers.<sup>408</sup> The trial judge found that combined effect of the evidence of Persons 40, 41, 42 and 43 was "powerful".<sup>409</sup> They were independent, had no interest in the result, they were aware of the significance of giving evidence, they were in a position to observe the events about which they gave evidence, and there was no evidence of a motive to lie or collusion.<sup>410</sup> Their evidence was supported by that of Person 18.<sup>411</sup> When their evidence was viewed as part of the whole sequence of events on the day, nothing about the later events meant their evidence that Afghan males were found in the tunnel should not be accepted.<sup>412</sup>

370. *Second*, the trial judge found that EKIA 56 was executed by Person 4 in the tunnel courtyard at the direction of Mr Roberts-Smith.<sup>413</sup> The trial judge accepted the evidence of Person 41. He was independent, he had no interest in the result, he was aware of the significance of his evidence and was in a position to observe the events about which he gave evidence. His evidence about the location of the killing of EKIA 56 was corroborated by Person 18 and the notation on the SSE bag that read "NW corn tunnel".<sup>414</sup>

371. *Third*, the trial judge found that EKIA 57 was executed by Mr Roberts-Smith outside the north-western corner of the W108 compound.<sup>415</sup> The trial judge accepted Person 41's account. His Honour exercised appropriate caution in respect of the accounts of Persons 14 and 24, but accepted their accounts given that they were corroborated and having regard to the evidence as a whole.<sup>416</sup> While the trial judge did not expressly refer to it in his final conclusion, the evidence of Person 40 was further corroboration for this finding. Person 40 saw the man with the prosthetic leg emerge from the tunnel; then later saw his deceased body in the location where he was shot. That account is wholly consistent with Respondents' case; and utterly fatal to Mr Roberts-

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<sup>406</sup> J [873].

<sup>407</sup> J [875].

<sup>408</sup> J [881(1)].

<sup>409</sup> J [864].

<sup>410</sup> J [864].

<sup>411</sup> J [865].

<sup>412</sup> J [866]-[867].

<sup>413</sup> J [881(2)].

<sup>414</sup> J [565]; See e.g., photographs of EKIA 56 with the SSE bag in Ex R-6 (pages 2-4).

<sup>415</sup> J [881(3)].

<sup>416</sup> J [869]-[870].

Smith's.

## **J Conclusion**

372. The trial judge correctly found that Persons 40, 41, 42 and 43 gave powerful, honest, and reliable evidence at trial. They had no relevant link to each other, to other witnesses in the case, or to the parties, that gave rise to any rational question as to their honesty. None of them had made any attempt to contact the Respondents to make known their capacity to give evidence or otherwise offer assistance.<sup>417</sup> The trial judge correctly considered any alleged "inconsistencies" by reference to the evidence as a whole. His Honour made no error in accepting their accounts.
373. Person 18 was equally impressive. No credible challenge was mounted to his evidence at trial; and none is put forward on appeal. His evidence about seeing an Afghan man in white under the guard of Australian soldiers in the tunnel courtyard, and of photographing EKIA 56's body in the tunnel courtyard, stands unchallenged. His notation on EKIA 56's SSE bag that reads "**NW corn tunnel**" is one of the most significant pieces of evidence in the case. It too stands unchallenged. There was no suggestion that Person 18 and Person 41 even knew of the others' account, yet Person 41's evidence regarding the location of EKIA 56's body is consistent with where Person 18 said it was, and with the contemporaneous notation on EKIA 56's SSE bag.
374. The trial judge's advantage is most important in respect of Person 14 and Person 24. They were in a perfect position to see the killing of EKIA 57. His Honour made no error in his assessment of their credit and he correctly exercised appropriate caution in respect of their accounts. Importantly, the evidence of Persons 40, 41, 42, 43 and 18 coheres in all material respects with the evidence of Persons 14 and 24. There was no suggestion of collusion or contamination between Persons 14 and 24, on the one hand, and Persons 40 to 43 and 18 on the other. Thus, once the impressive evidence of Persons 40, 41, 42, 43 and 18 was accepted by the trial judge, it removed any reasonable suggestion that the credit attacks on the evidence of Persons 14 and 24 warranted the complete rejection of their evidence.
375. The Respondents' witnesses stand in stark contrast to the dishonest and improbable accounts given by Mr Roberts-Smith and his witnesses. They were bound by ties of close personal friendship, they had discussed their respective accounts of the mission with each other many times over, and the trial judge correctly found that their evidence was either dishonest, or unreliable, or both. Mr Roberts-Smith raises no challenge to those findings. Indeed, as has been noted above, Mr Roberts-Smith, disavows a challenge to the rejection of the accounts of himself and his witnesses. There are numerous, unprincipled, departures from that broad position that emerge throughout his submissions; but no attempt has been made to engage in any thoroughgoing way with the comprehensive and detailed rejection of his version of events. Once evidence of that version of events was adduced, however, its rejection has effectively excluded the existence of any other innocent explanation for the deaths of EKIA 56 and EKIA 57. The

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<sup>417</sup> J [863].

assessment of the evidence relied upon by the Respondents must take place as part of an assessment of *all* of the evidence, including that which was rejected as implausible.

376. For these reasons, Grounds 1 to 4 of Mr Roberts-Smith's appeal should be dismissed. The trial judge applied orthodox principles of fact-finding, he repeatedly reminded himself of these principles, and his conclusions were carefully and correctly reasoned by reference to the whole of the evidence. His Honour had the advantage of watching the evidence and arguments unfold over many months and he used that advantage properly to make detailed and well-reasoned assessments of each parties' case and the credit of their witnesses. The trial judge's findings were plainly correct and should be reaffirmed in the strongest terms.

## **SECTION IV: THE MURDER OF ALI JAN AT DARWAN ON 11 SEPTEMBER 2012**

### **A. Introduction**

377. Mr Roberts-Smith's appeal on Darwan should be dismissed. As with W108, each alleged "inconsistency" or "implausibility" has been taken out of context and then misconstrued or overstated. Again, Mr Roberts-Smith has not identified error in the trial judge's approach to assessing inconsistencies in the evidence. The trial judge correctly assessed the effect of any inconsistencies on either credit or reliability in the context of the evidence as a whole.<sup>1</sup>
378. Mr Roberts-Smith's approach wrongly affords no deference to the trial judge's advantage in seeing this evidence unfold over the course of a long trial. His Honour had the opportunity to reflect on the evidence and to weigh it against other evidence while it was fresh in his mind. His Honour's findings also involved a detailed analysis of the credit of all the witnesses. The trial judge had the advantage of seeing Persons 4, 11, 35 and 56, and Mr Roberts-Smith himself and to consider their evidence about the events in Darwan, as well as holistically. The trial judge made specific findings concerning his observations of Persons 4 and 56 in light of the extensive and deeply personal challenges put to them in cross-examination about their mental health.<sup>2</sup>
379. His Honour had a particular advantage in respect of the Afghan witnesses. His Honour observed them give oral evidence remotely (from Afghanistan) through an interpreter (who was in Canada).<sup>3</sup> His Honour could assess their credit in a way this Court cannot gauge from the transcript including the complex interaction of cultural differences, illiteracy, and the complexities of giving evidence through a remote interpreter. Almost all the inconsistencies alleged by Mr Roberts-Smith are between evidence in this trial (which was given through an interpreter) and evidence on a prior occasion (which was also given through an interpreter). The trial judge exercised great care in assessing the existence, and significance of, any inconsistencies in those circumstances. The trial judge also had the advantage of assessing their evidence in the context of a forceful positive case (that they were dishonest liars who were not present in Darwan *at all*) which is not seemingly pressed on appeal (at least directly).

### **B. Factual background**

#### ***The village of Darwan***

380. Darwan is located in Uruzgan, Afghanistan.<sup>4</sup> It sits adjacent to the Helmand River and is divided in two by a dry creek bed. The cornfield where Ali Jan was killed sits on one side of the dry creek bed. On the other side, on an elevated area, were a number of compounds.<sup>5</sup>

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<sup>1</sup> See, for example, *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; 271 FCR 632 at [134] and the authorities cited therein. The reasoning process described there applies to circumstantial cases, but it applies with equal force here.

<sup>2</sup> J [1102], [1155].

<sup>3</sup> J [958].

<sup>4</sup> J [950].

<sup>5</sup> J [950].



381. The most southerly of these compounds belonged to Mangul Rahmi.<sup>6</sup> The compound next door, immediately to the north, belonged to Shahzada Fatih.<sup>7</sup> Together, these compounds form part of a group referred to at trial as the southern compounds. They are separated from another set of compounds referred to at trial as the “middle compounds”. The southern compound set, and the middle compound set were separated by a gap or open area.<sup>8</sup> This gap is an important feature of the dispute between the cases advanced by the respective parties at trial.

***Mangul, Hanifa, Shahzada and Ali Jan***

382. Mohammed Hanifa Fatih (**Hanifa**) was born in Darwan in 1983.<sup>9</sup> His father was Shahzada.<sup>10</sup> He is a farmer who lived in Darwan until 2021.<sup>11</sup> In 2012, he lived in his father Shahzada’s house with all but three of his brothers, including one named Mohammed Shah.<sup>12</sup> Hanifa grew up with Ali Jan, who was his stepmother’s brother. He used to go to Ali Jan’s house and Ali Jan used to come to his house.<sup>13</sup> Ali Jan lived in the village of Baag (approximately 3 hours walk from Darwan) and had two or three children. For work, Ali Jan took care of animals such as his cattle, irrigated his fields, and brought wood to sell.<sup>14</sup>

383. Mangul is a farmer who also lived in Darwan.<sup>15</sup> He was 40 years old at the time of giving evidence. Prior to 2021, he had lived in Darwan his whole life and grew various crops.<sup>16</sup> He shared a guest house with Hanifa and Shahzada.<sup>17</sup> He knew Mohammed Shah.<sup>18</sup> Mangul also knew Ali Jan, who he said was from Baag. Mangul knew Ali Jan’s family. Mangul was not a relative of Ali Jan’s, but something like a “distant cousin”.<sup>19</sup>

384. Shahzada was born in Darwan and lived his whole life there.<sup>20</sup> In Darwan, Shahzada was a farmer who worked his own land. He had five daughters and 11 sons. Hanifa was the eldest.<sup>21</sup> His neighbours in Darwan were Mangul (on one side) and Amir Jan Aka (on the other).<sup>22</sup> Ali Jan was Shahzada’s brother-in-law.<sup>23</sup> Shahzada’s wife (and Hanifa’s stepmother) is Ali Jan’s sister.<sup>24</sup> Before Ali Jan died, Shahzada would see him around once a month.<sup>25</sup>

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<sup>6</sup> J [952].

<sup>7</sup> J [952].

<sup>8</sup> J [952].

<sup>9</sup> J [960]; T.920/39 (MH).

<sup>10</sup> J [961].

<sup>11</sup> J [960]; T.920/45-921/7 (MH).

<sup>12</sup> [964]T.925-28-926/6 (MH).

<sup>13</sup> J [961]-[963]; T.923/8-9 (MH).

<sup>14</sup> J [973]-[974]; T.923/19-924/3 (MH); T.1050/34-1052/11 (MR); T.1136/37-1137/19 (SF).

<sup>15</sup> T.1050/1-5 (MR).

<sup>16</sup> J [968].

<sup>17</sup> J [965]; T.928/1-8 (MH); Ex R-87 (marking “C”).

<sup>18</sup> J [971].

<sup>19</sup> J [969].

<sup>20</sup> J [973]; T.1135/27-47 (SF).

<sup>21</sup> J [973]-[974]; T.1135/29-47 (SF).

<sup>22</sup> J [973]-[974]; T.1136/7-16 (SF).

<sup>23</sup> J [973]-[974]; T.1136/24 (SF).

<sup>24</sup> T.923/1-4 (MH).

<sup>25</sup> J [973]-[974]; T.1137/40-44 (SF).

### **10 September 2012: Ali Jan travelled to Darwan**

385. Hanifa said in the days before the raid, foreign forces distributed letters which said a reward would be given for any information about Hekmatullah. Hanifa did not know Hekmatullah.<sup>26</sup>
386. On the day before the raid, Shahzada saw Ali Jan.<sup>27</sup> Ali Jan said he had come to Darwan to mill wheat.<sup>28</sup> Ali Jan told Shahzada he was going back to the mountain in the morning.<sup>29</sup> Shahzada told Ali Jan to take Hanifa with him so Hanifa could bring back his stepmother Bibi Jan.<sup>30</sup> Hanifa also saw Ali Jan that day. Ali Jan said he had brought wheat to mill, and he would go to the mountain tomorrow. Hanifa said he would go with Ali Jan to the mountain the next day “to bring woods”. He also wanted to bring his stepmother Bibi back with him.<sup>31</sup> That night, Ali Jan spent the night at Haji Wali Jan’s house.<sup>32</sup> Haji Wali Jan owned the mill.<sup>33</sup>

### **C. The mission to Darwan on 11 September 2012**

#### ***The SASR inserted into Darwan***

387. On 11 September 2012, the SASR and Commandos conducted a mission to Darwan in search of Hekmatullah. 42 Australian soldiers and 18 Partner Force members were involved in the mission.<sup>34</sup> Four Blackhawk helicopters, two Apache AH64 helicopters, two manned ISR aircraft and one ISR (a Heron drone) were used as air support.<sup>35</sup>
388. At 05:32DE, Mr Roberts-Smith's patrol departed Tarin Kowt for Darwan as part of the turn 1 insertion.<sup>36</sup> There were two insertions into Darwan, each of which used two Apache helicopters and four Blackhawk helicopters.<sup>37</sup> The SASR inserted on turn 1. The Commandos inserted on turn 2.<sup>38</sup> At 05:47DE, the turn 1 Blackhawks landed in Darwan.<sup>39</sup> The helicopter carrying Mr Roberts-Smith landed at a HLZ with the codename “Stream 2”.<sup>40</sup> Two other helicopters landed in the vicinity of “Stark 5”, “System 5” or “Stark 7”.<sup>41</sup> The overwatch team landed at the HLZ with the codename “Bottle 3”.<sup>42</sup> Bottle 3 was on a hill directly opposite Mangul’s compound, no more than 450 metres away and with a clear line of sight.<sup>43</sup>
389. Early that morning, Hanifa started his prayers then heard “honking”. He went outside and saw

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<sup>26</sup> J [975].

<sup>27</sup> J [977]; T.1138/1-7 (SF).

<sup>28</sup> J [977]; T.1138/10-15 (SF).

<sup>29</sup> J [977]; T.1138/10-15 (SF).

<sup>30</sup> J [977]; T.1138/4-21 (SF).

<sup>31</sup> J [976]; T.939/8-39 (MH).

<sup>32</sup> J [976], [978]; T.1113/1-17 (MR).

<sup>33</sup> J [966]; T.928/17-35 (MH); Ex R-87 (marking “E”).

<sup>34</sup> J [979]-[980]; Ex R-11, pages 1-2.

<sup>35</sup> J [979]-[980]; Ex R-11 page 5 (“FR MILITARY HARDWARE”); T.3609/12-13 (P7).

<sup>36</sup> J [980]-[981]; Ex R-10, page 2; Ex R-11, page 2.

<sup>37</sup> J [980]-[981]; T.3609/9-10 (P7).

<sup>38</sup> J [980]-[981]; T.3609/36-40 (P7).

<sup>39</sup> J [980]; Ex R-10, page 2; Ex R-11, page 2.

<sup>40</sup> T.3610/18 (P7).

<sup>41</sup> J [981]; T.3609/45-47 (P7).

<sup>42</sup> J [981]; T.3610/1-8 (P7).

<sup>43</sup> J [981]; See Ex R-1, which has a 1:5000 scale (i.e. each grid square is 100 metres).

two helicopters with four following. They passed by his house then three landed near Mohammed Gul's house. A fourth stayed in the air, then came back and landed somewhere else.<sup>44</sup> Hanifa's evidence that six helicopters arrived in a 2 plus 4 formation was consistent with the evidence that the SASR inserted with two Apaches and four Blackhawks.<sup>45</sup>

390. On the day of the raid, Shahzada's wife and his children, including Hanifa and another son named Mohammed Shah, were living at his house.<sup>46</sup> Early that morning, Shahzada did his prayers at Haji Amir Jan's mosque.<sup>47</sup> As he started going home, he saw "planes". Three came towards Shahzada's house and one went towards the mountain and landed there.<sup>48</sup> Shahzada then went back to his house and sat in the house there.<sup>49</sup>

391. Early that morning, Mangul did his morning prayers and then went to irrigate his fields.<sup>50</sup> On his way, Mangul saw Ali Jan and Haji Wali Jan sitting in front of Haji Wali Jan's mosque.<sup>51</sup> At that time, he heard the sound of helicopters. He observed one helicopter land on the hillside and the other helicopters passed by.<sup>52</sup> Mangul identified the "hillside" as the hill on the other side of the river from his house.<sup>53</sup> After hearing the helicopters land, Mangul decided to go home.<sup>54</sup> Mangul went back to his house. Hanifa then called Mangul to come to the guesthouse in front of Mangul's house, and they both sat down there together.<sup>55</sup>

392. Shahzada and Mangul's evidence that three helicopters passed by, and Hanifa's evidence that three helicopters passed by then landed near Haji Mohammed Gul's house (compound 31) was consistent with the evidence that the other three helicopters inserted at or around the Stream 2 HLZ<sup>56</sup>. These are both in the vicinity of compound 31.<sup>57</sup> Mangul and Shahzada's evidence that one helicopter landed on the hillside or mountain (and Hanifa's evidence that one helicopter landed in a different location to the other three) was also consistent with the evidence that the overwatch team landed at the Bottle 3 HLZ.<sup>58</sup>

393. At approximately 06:10DE, another patrol had two engagements in compound 31.<sup>59</sup> These engagements are recorded as EKIA 1 and EKIA 2 in the OPSUM<sup>60</sup> and on the storyboard.<sup>61</sup> The names of these two EKIAs were Haji Nazar Gul and Yaro Mama Faqir.<sup>62</sup>

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<sup>44</sup> J [982]; T.940/1-941/11 (MH).

<sup>45</sup> J [979]; Ex R-11 p5 ("FR MILITARY HARDWARE"); T.3609/12-13 (P7).

<sup>46</sup> J [985]; T.1136/26-1138/45 (SF).

<sup>47</sup> J [985]; T.1138/38-44 (SF).

<sup>48</sup> J [985]; T.1139/28-43 (SF).

<sup>49</sup> J [985]; T.1139/41-44 (SF).

<sup>50</sup> J [984]; T.1064/28 (MR); Ex R-88, page 4 (marking "A").

<sup>51</sup> T.1065/10-19; 1055/27-1056/6 (MR); Ex R-88 (marking "D").

<sup>52</sup> J [984]; T.1065/38-45 (MR).

<sup>53</sup> J [989]-[994]; T.1066/11-12 (MR).

<sup>54</sup> J [984]; T.1065/38-45 (MR).

<sup>55</sup> J [989]-[994]; T.1066/27-44 (MR).

<sup>56</sup> J [989]-[994]; T.3610/18 (P7).

<sup>57</sup> J [989]-[994]; Ex R-1.

<sup>58</sup> J [989]-[994]; T.3610/1-8 (P7).

<sup>59</sup> J [987]-[988]; Ex R-1.

<sup>60</sup> J [987]-[988]; Ex R-11 (page 3).

<sup>61</sup> J [987]-[988]; Ex R-1.

<sup>62</sup> J [987]-[988]; T.965/33 -966/39 (MH); T.1088/19-1090/18 (MR).

***Ali Jan and Hanifa were shot at attempting to leave***

394. Hanifa and Mangul were in the guesthouse when they saw Ali Jan with two or three donkeys coming towards them.<sup>63</sup> He was coming in the riverbed from the village towards Mangul's house.<sup>64</sup> Baag (Ali Jan's home) was to the south of Darwan.<sup>65</sup> Ex R-1 shows that walking out of Darwan, past Mangul's house, is travelling in a southerly direction.
395. Ali Jan was holding the rope of one donkey and one was walking in front of him.<sup>66</sup> When Ali Jan arrived at the area near the guesthouse, Hanifa shouted to Ali Jan, "wait, I also want to go with you".<sup>67</sup> Hanifa joined Ali Jan and took one of the donkeys from him while Ali Jan took another one.<sup>68</sup> They walked away together and Mangul lost sight of them.<sup>69</sup>
396. As Hanifa and Ali Jan were walking away together, two shots were fired at them.<sup>70</sup> Hanifa saw the soldiers who fired at them sitting "at the top of the mountain".<sup>71</sup> The mountain was on the east side of the village.<sup>72</sup> Mangul could not see Ali Jan and Hanifa when he heard the two shots fired but could see two soldiers on the other side of the river on the hilltop.<sup>73</sup> Shahzada was sitting at his house at this time. He too saw Hanifa and Ali Jan walking in the valley and saw shots fired at them by soldiers sitting at the top of the mountain.<sup>74</sup> Shahzada saw the shots impact in front of them, which he interpreted to mean they should not go on.<sup>75</sup>
397. Hanifa, Mangul and Shahzada's evidence that the shots were fired by soldiers "at the top of the mountain" (and to the east of the village according to Hanifa) was consistent with the location of the overwatch.<sup>76</sup> It was near the Bottle 3 HLZ on top of a mountain on the east side of the village.<sup>77</sup> Photographs taken from the overwatch show soldiers in that location had a clear line of sight to Mangul's compound and up the dry riverbed to the south.<sup>78</sup>
398. The shots caused Hanifa and Ali Jan to turn around and go to Mangul's house.<sup>79</sup> Ali Jan and Hanifa went to the guesthouse where Hanifa gave the donkeys to the children to tie up.<sup>80</sup> Mangul told his children to tie up the donkeys and to give them something to eat.<sup>81</sup> Hanifa, Ali Jan and Mangul then sat in the guesthouse and ate melon and drank tea.<sup>82</sup> Ali Jan told them he had left

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<sup>63</sup> J [989]-[994]; T.1067/13-25 (MR); T.942/0-3 (MH).

<sup>64</sup> J [989]-[994]; T.1067/13-25 (MR).

<sup>65</sup> J [989]-[994]; T.974-975 (MH). See also T.1098/45-1099/3 (MR).

<sup>66</sup> J [989]-[994]; T.942/1-3 (MH).

<sup>67</sup> J [989]-[994]; T.1067/30 (MR); T.942/7-15 (MH).

<sup>68</sup> J [989]-[994]; T.942/15 (MH).

<sup>69</sup> J [989]-[994]; T.1067/11-1068/14 (MR).

<sup>70</sup> J [989]-[994]; T.944/3 (MH).

<sup>71</sup> J [989]-[994]; T.990/39-992/2 (MH).

<sup>72</sup> J [989]-[994]; T.991/44-995/2 (MH).

<sup>73</sup> J [989]-[994]; T.1068/13-18, 1102/35-1103/1 (MR).

<sup>74</sup> J [989]-[994]; T.1156/1-3 (SF).

<sup>75</sup> J [989]-[994]; T.1140/25-32 (SF).

<sup>76</sup> J [989]-[994]; T.232/23-28 (BRS).

<sup>77</sup> J [989]-[994]; Ex R-1.

<sup>78</sup> J [989]-[994]; T.944/25-31 (MH); Ex R-1, page 1.

<sup>79</sup> J [989]-[994]; T.1140/25-36 (SF).

<sup>80</sup> J [989]-[994]; T.942/40 (MH).

<sup>81</sup> J [989]-[994]; T.1068/24-30 (MR).

<sup>82</sup> J [989]-[994]; T.1068/35-40 (MR); T.944/16 (MH).

his flour behind because a raid had started.<sup>83</sup>

399. At 6:08DE, the Turn 2 helicopters departed Tarin Kowt for Darwan with FE-B (the Commandos). Wheels down in Darwan was at 6:23DE.<sup>84</sup>

400. Hanifa, Mangul and Ali Jan were sitting in front of the guest house when four more helicopters arrived.<sup>85</sup> It was put to Hanifa that the evidence he gave about the second group of four helicopters was not true, but in fact it is perfectly consistent with him having observed the turn 2 insertion.<sup>86</sup> The trial judge found that this suggested that Ali Jan and Hanifa's failed attempt to leave the village occurred sometime before the arrival of Turn 2 at 06:23DE.<sup>87</sup>

### ***Mr Roberts-Smith engaged an insurgent at the Helmand River***

401. Meanwhile, Mr Roberts-Smith's patrol had commenced its initial task of patrolling the river.<sup>88</sup> At one point, a message came over the radio from the overwatch saying a squirter had been observed crossing the river. Mr Roberts-Smith responded, "roger that, we will look after it".<sup>89</sup> Mr Roberts-Smith's team identified the individual on the opposite side of the river walking away from the target area.<sup>90</sup> Mr Roberts-Smith and Person 11 fired at the individual.<sup>91</sup>

402. Mr Roberts-Smith then decided they should clear that individual.<sup>92</sup> The river was flowing and was deep, so Mr Roberts-Smith decided he would cross alone.<sup>93</sup> He directed Person 11 to stay in location<sup>94</sup> then crossed the river<sup>95</sup> where he engaged the individual.<sup>96</sup> After disappearing behind a large rock for a period, Mr Roberts-Smith emerged and lifted the insurgent's body so Person 4 could take a photo for SSE purposes.<sup>97</sup>

403. Mr Roberts-Smith claimed, for the first time at trial, that before lifting the body for the SSE photograph, he first put his foot on the deceased individual's back which pushed him down an embankment, and the body rolled down to the base.<sup>98</sup> Mr Roberts-Smith said his purpose was to get the body to the base, hold it up, then get Person 4 to take a photo with the camera.<sup>99</sup>

404. After the SSE photo was taken, Mr Roberts-Smith placed the body down and grabbed the equipment he had removed.<sup>100</sup> He then crossed back over the river.<sup>101</sup> Person 4 observed that

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<sup>83</sup> J [989]-[994]; T.1102/6-11 (MR).

<sup>84</sup> J [980]; Ex R-10, page 2.

<sup>85</sup> J [989]-[994]; T.944/30-31 (MH).

<sup>86</sup> T.992/24-25 (MH).

<sup>87</sup> J [991].

<sup>88</sup> J [1001]-[1006]; T.4747/22-24 (P56).

<sup>89</sup> J [1001]-[1006]; T.3610/40-47 (P7).

<sup>90</sup> J [1001]-[1006]; T.2608/17-18 (P4).

<sup>91</sup> J [1001]-[1006]; T.2608/25-29 (P4).

<sup>92</sup> J [1001]-[1006]; T.2608/40-45 (P4).

<sup>93</sup> J [1001]-[1006]; T.2797/10-11 (P4).

<sup>94</sup> J [1001]-[1006]; T.2797/11-12 (P4).

<sup>95</sup> J [1001]-[1006]; T.2797/12 (P4).

<sup>96</sup> T.2797/15-16, 2611/43 -2612/1 (P4); Ex R-126.

<sup>97</sup> J [1003]; T.2609/26-30 (P4); T.4748/7-16 (P56); T.4794/14 (P56).

<sup>98</sup> J [1003] T.236/21-23 (BRS).

<sup>99</sup> J [1003] T.236/23-26 (BRS).

<sup>100</sup> J [1003]; T.2609/41- 2610/4 (P4).

<sup>101</sup> J [1004]; T.2610/10-11 (P4).

Mr Roberts-Smith had retrieved an AK variant that had been struck by a round during the engagement with the EKIA,<sup>102</sup> a length of det cord and an ICOM radio.<sup>103</sup> From there the patrol moved to join up with the rest of the troop.<sup>104</sup>

405. The OPSUM<sup>105</sup> and the storyboard<sup>106</sup> record one Chicom-type 56 assault rifle, one PCD with two SIM cards, and one ICOM radio were recovered from the EKIA killed over the river.

***Mr Roberts-Smith lied about pushing or kicking the insurgent's body***

406. At the start of the trial, Mr Roberts-Smith intended for his evidence that he “pushed” or “kicked” the insurgent’s body to play a prominent role in his case. That was apparent from the opening address. Initially, Mr McClintock SC said the body was “dragged.”<sup>107</sup> He then returned after an adjournment to “clarify” that “I said he dragged him down ... in fact, he kicked him down ... by kicking him with his boot or pushing him with his boot. Whether that had a knock-on effect to other events that day or perceptions of other [e]vents that day is a matter that can wait till later.”<sup>108</sup> Mr Roberts-Smith's outline of evidence filed in July 2019 made no reference to this insurgent's body being "pushed" or "kicked". This story was raised for the first time at trial.

407. Mr Roberts-Smith initially intended to use this story to explain the awkward fact that Persons 4, 11 and 56 immediately started speaking about a “cliff kick” after the mission. Indeed, that theory was expressly put to two witnesses. Person 4 denied a suggestion that when Mr Roberts-Smith later told colleagues “I kicked the cunt off the cliff,”<sup>109</sup> Mr Roberts-Smith was referring to this incident.<sup>110</sup> Person 31 similarly denied a suggestion that in late 2012 or early 2013, when Person 7 told him Person 4 had disclosed that Mr Roberts-Smith kicked a PUC off a cliff, Person 31 heard of an “embankment” rather than a cliff kick.<sup>111</sup>

408. In any event, Mr Roberts-Smith’s attempt to establish an alternative source for the “cliff kick” story failed. The trial judge correctly observed at J [1007] that Mr Roberts-Smith’s account found no support. His Honour observed that if the act of rolling the insurgent down the slope with his foot was intended to explain the genesis of the cliff kick story, one would assume that at least Person 4, 11 or 56 remembered it. Yet none of them did. By closing submissions, the attempt to proffer this as alternative source for the “cliff kick” had been abandoned.<sup>112</sup>

409. The trial judge found that Mr Roberts-Smith’s evidence that he “pushed” or “kicked” the insurgent’s body with his foot was a lie, made with a view to possibly explaining evidence from

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<sup>102</sup> J [1005] T.4748/20-33 (P56).

<sup>103</sup> J [1004]; T.2610/13-16 (P4). Note: Mr Roberts-Smith could not recall whether an ICOM was found on the body of that insurgent: T.386/10 (BRS).

<sup>104</sup> T.2797/23-25 (P4).

<sup>105</sup> J [1009]; Ex R-11, page 3

<sup>106</sup> J [1009]; Ex R-1.

<sup>107</sup> T.2627/33-37 (BRS).

<sup>108</sup> T.45/40-46/4 (Mr McClintock opening).

<sup>109</sup> T.2893/1-13 (P4).

<sup>110</sup> T.2943 (P4).

<sup>111</sup> T.4673/13-39 (P31).

<sup>112</sup> J [1008].

witnesses which otherwise might seem unfavourable to him.<sup>113</sup> That finding is unchallenged.

### ***Mr Roberts-Smith's patrol joined the compound clearance***

410. Returning to the narrative, Mr Roberts-Smith's patrol next moved into the village.<sup>114</sup> Items recovered from the EKIA over the river were handed to the Troop Sergeant.<sup>115</sup> Mr Roberts-Smith's patrol was then tasked to continue the assault<sup>116</sup> of the remaining compounds.<sup>117</sup>

411. By approximately 09:06DE, Mr Roberts-Smith's patrol had reached compound 40 (in the middle set of compounds) and had placed several persons under control.<sup>118</sup> At 09:07DE, clearance was continuing to move south from the western and eastern compounds.<sup>119</sup> This equates to right to left by reference to page 1 of the bundle of Darwan photographs, Ex R-175,<sup>120</sup> paralleling the creek bed.<sup>121</sup> Further events took place between 09:11DE and 09:22DE.<sup>122</sup>

412. When Mr Roberts-Smith reached compound 43 – the last compound before the gap that led to the southern set – he was still wet from crossing the Helmand River. Person 7 saw Mr Roberts-Smith in the vicinity of compound 43 and he was wet.<sup>123</sup> Person 35 said Mr Roberts-Smith was soaking wet.<sup>124</sup> Person 16<sup>125</sup> said Mr Roberts-Smith was “saturated from the waist down”.<sup>126</sup>

### ***The baseless credit attack concerning Mohammed Shah***

413. From Mangul's compound, Hanifa could see soldiers coming through houses on both sides of the river.<sup>127</sup> He indicated the middle set of compounds as the location where he could see the soldiers.<sup>128</sup> Hanifa's brother, Mohammed Shah, was still irrigating the fields and providing updates to Hanifa as to where the soldiers were.<sup>129</sup> Mangul and Shahzada also gave evidence that Mohammed Shah was in Darwan on the day of the raid.<sup>130</sup>

414. We emphasise the presence of Mohammed Shah in these submissions for good reason. A central issue at trial was that Mohammed Shah had been detained by Australian soldiers in an *earlier* raid, he was still in custody, he could not have been in Darwan that day, and this was definitive proof of Shahzada, Mangul and Hanifa's dishonesty. The witnesses were repeatedly and forcefully accused of lying.<sup>131</sup> But the challenge was baseless, and was rejected by the trial

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<sup>113</sup> J [1234].

<sup>114</sup> J [1010]; T.2610/23-38, 2612/2-6 (P4); Ex R-126 (Darwan photographs marked by P4).

<sup>115</sup> J [1010]; T.2797/26-27 (P4).

<sup>116</sup> J [1011]-[1012]; T.2797/28-30 (P4).

<sup>117</sup> J [1011]-[1012]; T.2611/26-27 (P4).

<sup>118</sup> J [1018]; Ex R-21 (a closed court exhibit).

<sup>119</sup> OPSUM (Ex R-11 page 1 ("OPSUM")).

<sup>120</sup> T.4750/31-32 (P56).

<sup>121</sup> T.4749/14-16 (P56).

<sup>122</sup> Closed Court reasons at [70]-[72].

<sup>123</sup> J [1019]; T.3611/42-3612/5 (P7); Ex R-144 page 1.

<sup>124</sup> J [1016]; T.5205/9-22 (P35).

<sup>125</sup> J [1016]; T.1810/24-1811/1 (P35). See also Ex A-24 (a closed court exhibit).

<sup>126</sup> J [1016]; T.1812/12 (P16).

<sup>127</sup> J [1020]; T.944/35-47 (MH).

<sup>128</sup> J [1020]; T.946/8-9 (MH).

<sup>129</sup> T.945/3-6 (MH).

<sup>130</sup> T.1095/5-8 (MR); T.1140/38-46 (SF).

<sup>131</sup> T.1008/27-39 (MH). See also T.1158/21-25 (SF).

judge for the reasons set out at CCJ [75].<sup>132</sup> Thus, Mohammed Shah was *not* in the custody of Australian soldiers on 11 September 2012. The witnesses' fortitude in the face of forceful and erroneous accusations of dishonesty provided powerful support for their account. Mr Roberts-Smith unsurprisingly makes no mention of Mohammed Shah in his appeal.

***At about 09:30DE, Mr Roberts-Smith's patrol moved into southern compounds***

415. At J [1021], the trial judge observed that other than some issues concerning the engagement at the Helmand River, there was little between the parties' cases up to this point. However, the parties' cases began to diverge at the point the patrol crossed over the gap from the middle compound set to the southern compound set. Mr Roberts-Smith's case was that the interpreter was sent back to the Troop Bravo before his patrol crossed the gap, and that there was nothing significant in the last set of compounds. He said they were empty; and the patrol waited in the end compound for 10 minutes, and then walked to the HLZ for extraction.<sup>133</sup>

416. The trial judge correctly rejected Mr Roberts-Smith's case that the interpreter had been sent back, that there were no Afghan males in the southern set of compounds.<sup>134</sup> The trial judge found that Mr Roberts-Smith's patrol *did* find people in the southern compounds, including Mangul, Hanifa, Shahzada and Ali Jan, and that Mr Roberts-Smith's patrol was in the end compound for almost an hour and a half. We set out the relevant evidence and findings below.

***Shahzada was found and moved to a hut next to the dry bed***

417. The trial judge found that Shahzada was detained by Australian soldiers in his compound and later sent down to a hut next to the extraction HLZ.<sup>135</sup> That finding is not challenged on appeal. The evidence is set out below.

418. Shahzada saw the soldiers when they got to the house of his neighbour, Amir Jan Aka.<sup>136</sup> The soldiers then came with an interpreter to Shahzada's house.<sup>137</sup> He saw many soldiers, including on the rooftop and in the house.<sup>138</sup> The soldiers had paint on their faces and one of the soldiers was tall.<sup>139</sup> The interpreter said to him, "show me the Taliban." Shahzada replied, "I don't know where the Taliban are".<sup>140</sup> The soldiers did not tie his hands.<sup>141</sup> Shahzada's son Mohammed Shah had been down in the fields, but Shahzada then saw him with his hands tied and placed near a wall.<sup>142</sup> From his house, Shahzada could see where Mohammed Shah was tied near the wall because the house was on higher ground.<sup>143</sup> Some of the soldiers, including the tall soldier,

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<sup>132</sup> J [1196].

<sup>133</sup> J [1027]-[1029].

<sup>134</sup> J [1030].

<sup>135</sup> J [1368(2)].

<sup>136</sup> J [1031]; T.1141/32, 1136/9 (SF).

<sup>137</sup> J [1031]; T.1142/4-10 (SF).

<sup>138</sup> J [1031]; T.1142/14-16 (SF).

<sup>139</sup> J [1031]; T.1142/21-23 (SF).

<sup>140</sup> J [1031]; T.1141/44 -1142/10 (SF).

<sup>141</sup> J [1031]; T.1142/2 (SF).

<sup>142</sup> J [1031]; T.1140/38-1141/5 (SF).

<sup>143</sup> J [1031]; T.1171/33-38 (SF).



then went to Mangul's house while other soldiers took Shahzada to Amir Jan Aka's hut down where the river is, near the fields.<sup>144</sup> When Shahzada got to the hut, Amir Jan Aka was already there with four of his sons.<sup>145</sup> Amir Jan Aka's sons had their hands tied and they were sitting with their heads down. Amir Jan Aka was also sitting there but his hands were not tied.<sup>146</sup>

***Hanifa, Mangul and Ali Jan were found in Mangul's compound***

419. The trial judge found that Mr Roberts-Smith's patrol found at least Ali Jan, Hanifa and Mangul in and around Mangul's compound.<sup>147</sup> That factual finding is not challenged on appeal. The evidence is set out below.

420. At 09:30DE, the FE reported that clearance was nearing completion.<sup>148</sup> The trial judge found that the clearance of Mangul's compound is likely to have occurred at approximately 09:30DE.<sup>149</sup> As the soldiers got closer, Mangul, Hanifa and Ali Jan went inside the guesthouse.<sup>150</sup> Mangul said to Hanifa and Ali Jan, "let me go and get the children so that the foreigners...don't fire at them".<sup>151</sup> Mangul went and got his children and told them to sit down under the hut because "the foreign soldiers are here".<sup>152</sup> Hanifa recalled sitting inside the guesthouse with his daughter, two of Mangul's daughters, and Ali Jan.<sup>153</sup>

421. A soldier pointed a flashlight at Hanifa and said, "get up, stand up".<sup>154</sup> The soldier grabbed Hanifa by the neck and hit his head against the wall.<sup>155</sup> Hanifa saw the soldiers had one colour of paint on one side and another colour of paint of the other side of their face.<sup>156</sup> The dog went towards Hanifa's daughter and he told his daughter to come to him.<sup>157</sup> The soldiers then took Ali Jan's jacket and his turban and tied Hanifa's hands behind his back.<sup>158</sup> Hanifa and Ali Jan were made to stand near the wall in front of the guesthouse.<sup>159</sup>

422. The soldiers searched Mangul, tied his hands behind his back and pushed him towards the ground, such that he went onto his knees and lowered his head.<sup>160</sup> The soldiers took Mangul to the wall in front of the guesthouse<sup>161</sup> and sat him down facing towards the river.<sup>162</sup> Mangul was tied up next to the oven.<sup>163</sup> When Mangul was sitting down there, he could see Hanifa and Ali

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<sup>144</sup> J [1032]; T.1142/27-30 (SF); Ex R-89, page 3 (Photographs marked by Shahzada).

<sup>145</sup> J [1032]; T.1142/36-46 (SF).

<sup>146</sup> J [1032]; T.1142/36-46 (SF).

<sup>147</sup> J [1368(4)], [1036]-[1040].

<sup>148</sup> Ex R-11, page 4.

<sup>149</sup> J [1035].

<sup>150</sup> J [1039]; T.1069/6-13 (MR).

<sup>151</sup> J [1039]; T.1069/13-15 (MR).

<sup>152</sup> J [1039]; T.1069/20 (MR).

<sup>153</sup> J [1039]; T.946/14-16 (MH).

<sup>154</sup> J [1036]-[1040]; T.946/44-47 (MH).

<sup>155</sup> J [1036]-[1040]; T.947/40-45 (MH); Ex R-87, page 4 (marking "C").

<sup>156</sup> J [1036]-[1040]; T.949/40 (MH).

<sup>157</sup> J [1036]-[1040]; T.949/38 (MH).

<sup>158</sup> J [1036]-[1040]; T.950/20 (MH).

<sup>159</sup> J [1036]-[1040]; T.950/45 (MH).

<sup>160</sup> J [1036]-[1040]; T.1072/5-10 (MR).

<sup>161</sup> J [1036]-[1040]; T.1072.13-45 (MR); Ex R-88, page 4 (wall of Mangul's guesthouse marked "C").

<sup>162</sup> J [1036]-[1040]; T.1072/13-15 (MR); Ex R-88, page 4.

<sup>163</sup> J [1036]-[1040]; T.951/14 (MH).

Jan under the hut facing the cliff.<sup>164</sup>

423. Person 56's evidence corroborated the evidence of Hanifa and Mangul that they, and Ali Jan, were detained by foreign soldiers in Mangul's compound. Person 56 was involved in the clearance of the end compound.<sup>165</sup> Person 56 said he was there with Mr Roberts-Smith, Person 4, Person 11, an interpreter, and potentially the other regiment member, who may have been the dog handler.<sup>166</sup> Critically, Person 56 said that in the end compound his patrol found local nationals of both sex, including children and, relevantly, fighting aged males.<sup>167</sup>
424. Person 4's evidence was also consistent with that of Hanifa, Mangul and Person 56. Person 4 said his patrol went to the very end compound in the village.<sup>168</sup> Person 56 and Person 47 (the dog handler) were there.<sup>169</sup> As the patrol cleared the end compound, they found one individual approximately where the ascending track terminates into a compound.<sup>170</sup> That is the area Mangul and Hanifa identified as just outside the guesthouse.<sup>171</sup> He had a donkey with a distinct red, Afghani designed rug on it and there were baskets on the donkey full of wood.<sup>172</sup> Person 4's description of the donkey was consistent with Hanifa and Mangul's evidence that for work, Ali Jan would bring woods to sell.<sup>173</sup> The individual was PUC'd,<sup>174</sup> handcuffed to the rear, placed up against a wall and placed on the ground.<sup>175</sup> Person 4 recalled a second local individual being in the end compound at some point, but he did not recall when.<sup>176</sup>

#### ***The interpreter and the military working dog were in Mangul's compound***

425. At trial, the dispute between the parties concerning the presence of Afghan men in the final compound had several subsidiary factual disputes. The most important of these were whether an interpreter and the military working dog were present in the end compound.<sup>177</sup> Mangul and Hanifa both placed an interpreter and a dog in Mangul's compound. Mr Roberts-Smith denied that either the interpreter, or the military working dog, were there.
426. The trial judge found that both an interpreter and the military working dog were present in the end compound.<sup>178</sup> Mr Roberts-Smith's failed attempt to deny the presence of the interpreter and the military working dog in the end compound was an important factor in the trial judge's findings. It supported the credit of Hanifa and Mangul. Equally, it undermined the credibility of Mr Roberts-

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<sup>164</sup> J [1036]-[1040]; T.1073/14-15; Ex R-88, page 4 (marked "D").

<sup>165</sup> J [1043]; Ex R-175 page 1 (marked "C").

<sup>166</sup> J [1043]; T.4752/22-25 (P56).

<sup>167</sup> J [1043]; T.4751/32-35 (P56).

<sup>168</sup> T.2620/19-20 (P4); Ex R-126 page 3 (marked "C" with a dot).

<sup>169</sup> J [1041]; T.2621/33-34; T.2928/29-39 (P4).

<sup>170</sup> J [1041]; T.2621/4-25 (P4); Ex R-126, page 3 (marked "D" with a dot) T.2929/1-17 (P4).

<sup>171</sup> J [1041]; T1072.13-45 (MR); Ex R-88, page 2 (wall of Mangul's guesthouse marked "C"); T.947/41 - 948/8 (MH); Ex R-87 page 4 (marked "C" as the wall in front of Mangul's house, where the guesthouse is).

<sup>172</sup> J [1041]; T.2621/27-31 (P4).

<sup>173</sup> T. 923/19 -924/3 (MH); T.1050/34-1052/11 (MR).

<sup>174</sup> J [1041]; T.2621/39 (P4)

<sup>175</sup> J [1041]; T.2622/5-12 (P4).

<sup>176</sup> J [1042]; T.2622/25-29, T.2925/46 (P4).

<sup>177</sup> J [1021].

<sup>178</sup> J [1368(3) and (7)].

Smith.<sup>179</sup> The trial judge described his evidence as “improbable”.<sup>180</sup> It was analogous to his failed attempts to remove Gothic 4 entirely from the north-west corner of the W108 compound, his initial attempt to remove Persons 40-43 entirely from the tunnel courtyard at W108, and the deliberately dishonest attempt to remove Person 12 entirely from the Chinartu mission.

#### Person 47 and the military working dog

427. The trial judge accepted the evidence of Hanifa, Mangul and Person 4 that there was a dog in Mangul’s compound.<sup>181</sup> That, of course, was consistent with the fact that Person 47 (the military working dog handler) was attached to Mr Roberts-Smith’s patrol that day. His Honour accepted the following evidence, none of which is challenged on appeal:

- (a) Hanifa saw a dog in front of the guesthouse. The dog had glasses and something like a belt around his neck.<sup>182</sup> Hanifa said the dog was black.<sup>183</sup> Photographs of Darwan taken by the SASR show a black dog was attached to FE Alpha that day.<sup>184</sup>
- (b) Mangul heard shouting in a foreign language then gestured to the soldiers to come and search, at which time the soldiers pointed their guns at him and unleashed the dog.<sup>185</sup> The dog attacked and bit Mangul on his right thigh.<sup>186</sup> The soldiers said something to the dog and the dog then went away.<sup>187</sup>
- (c) Person 4 also gave evidence that Person 47 was present while the end compound was being cleared.<sup>188</sup> The trial judge rightly found that it was reasonable to assume that if Person 47 was present, so too was the military working dog.<sup>189</sup>

428. At trial, Mr Roberts-Smith and Person 11 denied that Person 47 and the military working dog were in the end compound.<sup>190</sup> The trial judge correctly rejected this account.<sup>191</sup> His Honour held that it was implausible that the military working dog would not be with Mr Roberts-Smith’s patrol during the clearance of the southern compound set.<sup>192</sup> Indeed, his Honour’s finding was consistent with Mr Roberts-Smith and Person 11’s own evidence that a dog handler was used for assaulting and clearing compounds.<sup>193</sup>

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<sup>179</sup> J [1233(1) and (2)].

<sup>180</sup> J [1233(1) and (2)].

<sup>181</sup> J [1239].

<sup>182</sup> J [1036]-[1040]; T.946/44-47 (MH).

<sup>183</sup> J [1036]-[1040]; T.992/35 (MH).

<sup>184</sup> Ex R-21 (a closed court exhibit).

<sup>185</sup> J [1036]-[1040]; T.1069/30-32 (MR).

<sup>186</sup> J [1036]-[1040]; T.1070/10-27 (MR).

<sup>187</sup> J [1036]-[1040]; T.1071/44 (MR).

<sup>188</sup> T.2621/33-34 (P4).

<sup>189</sup> J [1238].

<sup>190</sup> J [1221]; T.403/12-17 (BRS); T.5674/4-5, 5732/29-5734/5 (P11).

<sup>191</sup> J [1238][1239].

<sup>192</sup> J [1233(2)], [1238]-[1239].

<sup>193</sup> T.397/1-3 (BRS); T.5733/36-5734/7 (P11).

## Person 56 and the interpreter

429. Mr Roberts-Smith's efforts to remove the interpreter from the end compound were more elaborate. To deal with this problematic evidence and undermine the evidence of the Afghan witnesses, Mr Roberts-Smith concocted a false story in which the interpreter never came into the southern compound set, *at all*. Mr Roberts-Smith said he left the interpreter with Person 56 in the middle compound set,<sup>194</sup> and only reunited with Person 56 at the HLZ at the end of the mission.<sup>195</sup> Person 11 also stated that Mr Roberts-Smith sent Person 56 to escort the interpreter back, but said it was in the vicinity of the southern-most compound set.<sup>196</sup> The gravamen of the lie was that neither Person 56 nor the interpreter were *ever* in the end compound.
430. The trial judge correctly rejected Mr Roberts-Smith's account, for two main reasons.<sup>197</sup>
431. The *first* flaw with Mr Roberts-Smith's account was that the timing made no sense. Initially, Mr Roberts-Smith said the patrol cleared to the end of the compounds, waited "in the vicinity of 10 minutes",<sup>198</sup> then moved to the HLZ for extraction where he reunited with Person 56.<sup>199</sup> Person 11 claimed to have no recollection of the timing, although he denied it was longer than 10 to 15 minutes, or was a period "well in excess of an hour."<sup>200</sup> However, in cross-examination, a gaping hole emerged in Mr Roberts-Smith and Person 11's timing.
432. The move into the final set of compounds occurred no later than 0930DE when the FE reported clearance was nearing completion.<sup>201</sup> On Mr Roberts-Smith's account, they reunited with Person 56 after 1109DE (when EKIA 4 was reported) and before 1121DE (when extraction occurred).<sup>202</sup> Applying the objective timing to Mr Roberts-Smith and Person 11's account, Person 56 was separated from his patrol for over an hour and a half.<sup>203</sup> The trial judge found that it was improbable that Person 56 would have been away from his patrol for an hour and half for a task that should have taken no more than 10 minutes.<sup>204</sup> The walk from compound 43 (where Mr Roberts-Smith said he last saw Person 56), back to the troop Bravo at the other end of the middle compound set, should have taken approximately 3-5 minutes.<sup>205</sup> It was a 10-minute round trip<sup>206</sup> and Mr Roberts-Smith said he expected Person 56 to return as soon as he had safely delivered the interpreter back to Bravo.<sup>207</sup> Mr Roberts-Smith could not explain where Person 56 was for the hour and a half he was apparently absent.<sup>208</sup>

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<sup>194</sup> J [1022], [1211]-; T.397/13- 399/40; 478/9-10 (BRS).

<sup>195</sup> T.400/4-7 (BRS).

<sup>196</sup> T.5673/23-34 (P11); Ex A-228, page 2 (marked with the letter "I").

<sup>197</sup> J [1224]-[1231], [1232(1)], [1368(1)].

<sup>198</sup> J [1224]-[1231], [1232(a)]; T.406/36-43 (BRS).

<sup>199</sup> J [1224]-[1231], [1232(a)]; T.400/4-7 (BRS).

<sup>200</sup> T.5728/9-17 (P11).

<sup>201</sup> Ex R-11, page 4.

<sup>202</sup> Ex R-10, page 4.

<sup>203</sup> J [1229].

<sup>204</sup> J [1233(a)].

<sup>205</sup> T.391/41-42 (BRS).

<sup>206</sup> T.391/41-42 (BRS).

<sup>207</sup> T.478/19-22 (BRS).

<sup>208</sup> T.483/14-1; 485/1-13; 491/17-30 (BRS).

433. The *second* flaw in Mr Roberts-Smith and Person 11's account was that it was contradicted by every other witness who gave evidence on this point (other than the thoroughly discredited Person 35). The trial judge observed that:<sup>209</sup>

- (a) Person 56 said he was involved in the clearance of the compound that was the furthest point that their patrol extended.<sup>210</sup> Person 56 recalled that the interpreter was present at the end compound.<sup>211</sup>
- (b) Person 4 distinctly recalled clearing the final compound set with Person 56.<sup>212</sup> He said when the limit of exploitation was reached (i.e., Mangul's compound), Person 56 and Person 47 moved together to a small structure above the final two compounds.<sup>213</sup> Person 4 also denied that Person 56 was sent back to the PUC holding area before his patrol crossed the gap to the southern compound set.<sup>214</sup> Person 4 recalls an interpreter being present in the end compound.<sup>215</sup>
- (c) Hanifa and Mangul both recalled an interpreter being present in Mangul's compound. We return to this at paragraphs 438 to 444 below.
- (d) Shahzada recalled an interpreter at his compound.<sup>216</sup>

434. At BRS [22.15], Mr Roberts-Smith makes a submission about apparent inconsistencies between the evidence of Persons 4, 56 and 7 concerning the movements of the interpreter (although this is not raised in a particular to the Notice of Appeal). The submission is wrong; it is premised on a misstatement of Person 56's evidence. As outlined above, Person 56 said the interpreter was present at the final compound.<sup>217</sup> However, he said he did not recall when he first saw the interpreter or when the interpreter first came to be with the patrol at any stage.<sup>218</sup> Contrary to BRS [22.15], he did *not* say that the interpreter "accompanied the patrol as it reached the southernmost set of compounds". Person 4, for his part, said that after they arrived at the end compound and found Afghan people there, Mr Roberts-Smith sent Person 56 back to THQ to fetch the interpreter.<sup>219</sup> Person 56 then returned to the "end compound" with the interpreter where tactical questioning was conducted.<sup>220</sup> Person 4 and Person 56's evidence is not inconsistent in the sense that it cannot sit together. Person 56 did not recall a detail that Person

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<sup>209</sup> J [1224].

<sup>210</sup> T.4751/24-26 (P56).

<sup>211</sup> T.4752/22-27 (P56).

<sup>212</sup> T.2937/29-30 (P4).

<sup>213</sup> T.2937/1-41 (P4).

<sup>214</sup> T.2937/1-5 (P4).

<sup>215</sup> T.2622/25-41 (P4).

<sup>216</sup> T.1142/4-10 (SF).

<sup>217</sup> T.4752/22-27 (P56).

<sup>218</sup> T.4795/13-19 (P56).

<sup>219</sup> T.2622/34-41 (P4).

<sup>220</sup> T.2622/25-41 (P4) | NB: At line 41, Person 4 says Person 56 came back to "that compound" with the interpreter. Having regard to line 29, it is clear the compound that Person 4 is referring to is the "end compound". This is reinforced when Person 4 confirms, at line 44, that tactical questioning was conducted with the use of the interpreter at the "end compound".

4 did. On both accounts, an interpreter was present in the end compound.

435. The submission at BRS [22.15] must also be viewed in the context of the challenge made to these witnesses' evidence at trial. Mr Roberts-Smith's case was that the interpreter was not in the final compound *at all*. That was the fundamental challenge to their accounts, which the trial judge correctly rejected, and which is not the subject of appeal.

***Mr Roberts-Smith's patrol was in Mangul's compound for over an hour***

436. At or about 0945DE, the clearance was complete, and the troop requested extraction.<sup>221</sup> Wheels up for turn 1 at Tarin Kowt was planned for 1020DE.<sup>222</sup> Factoring in a 15-minute flight from Tarin Kowt,<sup>223</sup> that put the turn 1 extraction (this time turn 1 would be the Commandos) from Darwan at around 1035DE. The Turn 2 extraction from Darwan (the SASR) would have been at approximately 1105DE (following a half hour round trip for the helicopters to take the turn 1 extraction back to Tarin Kowt and then return). The upshot was that at 0945DE, Mr Roberts-Smith's patrol had approximately 1 hour and 20 minutes to wait before they would leave the village. That timeframe soon expanded. At 1008DE, a mechanical issue with one extraction aircraft pushed the timeframe back by around 20 minutes.<sup>224</sup> In total, that meant Mr Roberts-Smith's patrol had around one and a half hours to wait for extraction at just after 1120DE.<sup>225</sup>

***0945DE – 1045DE: Ali Jan, Hanifa and Mangul were questioned***

437. The trial judge found that Hanifa, Ali Jan and Mangul were detained (handcuffed behind their back) and questioned by at least Mr Roberts-Smith through an interpreter. The trial judge also found that they were asked whether they, or the people they were with, were Taliban and as to the whereabouts of Hekmatullah. His Honour also found that some physical force was applied to one or more of the Afghan men.<sup>226</sup> We set out the evidence below.

438. Inside Mangul's compound, the big soldier approached Hanifa.<sup>227</sup> Hanifa saw the big soldier had green-brown eyes<sup>228</sup> and was wet up to his chest area<sup>229</sup> and there was sand on his uniform.<sup>230</sup> The soldiers took Hanifa, Ali Jan and Mangul to the wall and made them face the wall so they could not see the soldiers anymore.<sup>231</sup> Two soldiers came from the direction of Hanifa's house and went up to Hanifa. One put his hand on Hanifa's right shoulder, and he started questioning him.<sup>232</sup> Hanifa's description of the two soldiers coming from the direction of his house is consistent with Person 4's account that Person 56 was sent back to get the interpreter.

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<sup>221</sup> Ex R-10, page 3.

<sup>222</sup> Ex R-10, page 3.

<sup>223</sup> Ex R-10, page 2, records a 15-minute flight time between 0532 Turn 1 E/U TK and 0527DE W/D at the objective.

<sup>224</sup> Ex R-10, page 3.

<sup>225</sup> J [1035].

<sup>226</sup> J [1368(5)-(6)].

<sup>227</sup> T.952/10-15 (MH).

<sup>228</sup> T.952/18; CCT 27.7.21, p.21/4-33 (MH).

<sup>229</sup> T.952/28 (MH).

<sup>230</sup> T.958/7 (MH).

<sup>231</sup> J [1049]-[1051]; T.953/3 (MH).

<sup>232</sup> J [1049]-[1051]; T.953/1-22 (MH).

439. The soldier, through an interpreter said to Hanifa, "Are you a Talib?" and he said, "No." The interpreter said, "Why you are not a Talib?" and then told Hanifa, "Show me Hekmatullah."<sup>233</sup> Hanifa said the interpreter then took out a pistol and put it on Hanifa's throat and said, "You are a Talib. I shot your father."<sup>234</sup> The interpreter pointed the pistol to Hanifa's head and hit Hanifa with the pistol and said, "show me Hekmatullah, otherwise I will shoot you in the head".<sup>235</sup> Mangul also saw the interpreter pull out the pistol and hold it towards Hanifa and say, "where are the Taliban?" and Hanifa said, "I don't know".<sup>236</sup>
440. The interpreter then asked Hanifa where he was going when the shots were fired at him.<sup>237</sup> Hanifa replied he was going with his uncle (Ali Jan) to the mountain to bring his stepmother, but after the shots were fired, he returned to see what the soldiers wanted and what was going on.<sup>238</sup> The interpreter slapped Mangul and hit Hanifa with the pistol on the forehead.<sup>239</sup>
441. The interpreter and the soldier then started to question Ali Jan and Mangul.<sup>240</sup> Hanifa did not hear the questions because he was told not to look around.<sup>241</sup> During this time, the big soldier was sitting beside Mangul. Every time Mangul looked at the big soldier, he hit Mangul.<sup>242</sup> The interpreter told Mangul not to look at the big soldier because "they don't like people looking at them".<sup>243</sup> The interrogation continued and Mangul was asked where Hekmatullah and the Taliban were. Mangul said he did not know where they were.<sup>244</sup>
442. The soldiers then moved Hanifa and Ali Jan outside and made them stand up in front of the guesthouse. Mangul remained inside the compound, on the other side of the wall, and could not see Ali Jan and Hanifa anymore.<sup>245</sup> Mangul was asked by the interpreter whether Hanifa and Ali Jan were Taliban, to which Mangul replied "no, they are not Taliban".<sup>246</sup> The interpreter then interrogated Hanifa and Ali Jan, but Mangul could not hear what was said.<sup>247</sup>
443. At some point, the big soldier went into the guesthouse followed by the interpreter.<sup>248</sup> Another soldier kicked Hanifa in the back and he fell into the guest room.<sup>249</sup> After that, the interpreter stood behind Hanifa, and the big soldier looked into his eyes. The interpreter told Hanifa he must look into the big soldier's eyes.<sup>250</sup> When the interpreter asked questions, Hanifa turned around

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<sup>233</sup> J [1049]-[1051]; T.953/21-22 (MH).

<sup>234</sup> J [1049]-[1051]; T.953/42-45 (MH).

<sup>235</sup> J [1049]-[1051]; T.954/1-5 (MH).

<sup>236</sup> J [1049]-[1051]; T.1075/9-15 (MR).

<sup>237</sup> J [1049]-[1051]; T.954/34 (MH).

<sup>238</sup> J [1049]-[1051]; T.954/34-38 (MH).

<sup>239</sup> J [1049]-[1051]; T.955/42-45 (MH); T.1075.29-39 (MR).

<sup>240</sup> J [1049]-[1051]; T.955/36 (MH).

<sup>241</sup> J [1049]-[1051]; T.955/44 (MH).

<sup>242</sup> J [1049]-[1051]; T.1075/42-44 (MR).

<sup>243</sup> J [1049]-[1051]; T.1075/45 (MR).

<sup>244</sup> J [1049]-[1051]; T.1076/1-23 (MR).

<sup>245</sup> J [1049]-[1051]; T.1076/45-1076/3 (MR).

<sup>246</sup> J [1049]-[1051]; T.1076/27-36 (MR).

<sup>247</sup> J [1049]-[1051]; T.1078/1-14 (MR).

<sup>248</sup> J [1049]-[1051]; T.957/20-31 (MH).

<sup>249</sup> J [1049]-[1051]; T.957/20-31 (MH).

<sup>250</sup> J [1049]-[1051]; T.958/11-14 (MH).

to look at the interpreter, which caused the big soldier to punch him many times.<sup>251</sup> Hanifa again saw that the big soldier's uniform was wet until his lower chest, with sand from the river on his uniform.<sup>252</sup> The interpreter said "show me Hekmatullah" and asked whether he was a Talib. Hanifa said he was not a Talib, and he did not know where Hekmatullah was. The big soldier kicked Hanifa in the upper abdomen area hard.<sup>253</sup> Hanifa was then forced to sit right near the door entrance.<sup>254</sup>

444. The interpreter then brought Ali Jan near to Hanifa and said something to Ali Jan, who smiled. Hanifa told Ali Jan not to laugh or smile because they do not like when you laugh or smile.<sup>255</sup> Ali Jan's hands were still tied behind his back.<sup>256</sup> They were less than two metres away from Hanifa.<sup>257</sup> The interpreter then left and went away from Ali Jan.<sup>258</sup>

### ***The timing of Ali Jan's arrival in the end compound (Notice of Appeal particular 20(b))***

445. At Notice of Appeal particular 20(b) and BRS [22.17] to [22.20], Mr Roberts-Smith submits that there is a "significant inconsistency" between the evidence of Person 4 on the one hand, and Hanifa and Mangul on the other, about the timing of Ali Jan's arrival that makes the evidence of Mangul and Hanifa "simply impossible". The submission should be rejected.

446. *First*, the submission is premised on a misrepresentation of Person 4's evidence. Person 4 never said "the last compound was empty until a man on a donkey arrived" (cf BRS [22.18]). Person 4 made clear that the man was found *during the clearance* of the compound.<sup>259</sup> He said this:

Now, can you tell his Honour; in relation to that last compound, so the one that you've marked C, can you tell his Honour what you recall of the clearance at that location?---As it was identified as the last compound, Ben Roberts-Smith, Person 11, got to the compound wall, or the entrance, first. **And as we went through and cleared it, there was – the timeline is a bit rough, but potentially there was an individual at that point located.**

447. On two other occasions, Person 4 described this man as "the individual that had arrived with the donkey".<sup>260</sup> This evidence says nothing as to the timing of Ali Jan's arrival. Person 4 did not say Ali Jan arrived *after* the patrol was already there. If anything, the past tense (*had* arrived) shows that Person 4 knew Ali Jan had arrived at the compound at an earlier point that morning with a donkey. Person 4's understanding that Ali Jan had arrived (at some point) with a donkey is consistent with the evidence of Hanifa, Mangul and Shahzada that Ali Jan and Hanifa attempted to leave the village and returned to Mangul's compound after being shot at. Hanifa and Ali Jan's aborted attempt to leave the village earlier that morning was known to members of the patrol

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<sup>251</sup> J [1049]-[1051]; T.958/20-22 (MH).

<sup>252</sup> J [1049]-[1051]; T.958/31-41 (MH).

<sup>253</sup> J [1049]-[1051]; T.959/6-10 (MH).

<sup>254</sup> J [1049]-[1051]; T.950/23-24 (MH).

<sup>255</sup> J [1049]-[1051]; T.959/29-36 (MH).

<sup>256</sup> J [1049]-[1051]; T.960/11-13 (MH).

<sup>257</sup> J [1049]-[1051]; T.959/37-40 (MH).

<sup>258</sup> J [1049]-[1051]; T.959/39-44 (MH).

<sup>259</sup> T.2621/15-34 (P4).

<sup>260</sup> T.2625/34-34; T.2798/10-11 (P4).



because the interpreter questioned Hanifa on it.<sup>261</sup>

448. *Second*, the evidence of Person 4, Hanifa, Mangul and Shahzada is corroborated by the evidence of Person 56. He said his patrol found fighting aged males in the final compound.<sup>262</sup> The trial judge accepted that evidence and Mr Roberts-Smith does not challenge any aspect of Person 56's account on appeal.
449. *Third*, to the extent Mr Roberts-Smith takes a point about an inconsistency in the number of Afghan males seen in the compound, that too should be rejected. Person 56 did not specify a precise number of fighting aged males in the compound. His evidence readily supports both Person 4, Hanifa, Mangul and Shahzada's accounts.
450. Person 4, for his part, made clear that he recalled two Afghan males. Both were present during tactical questioning, but one individual was deemed not to be a primary concern.<sup>263</sup> The other individual had an evidence bag positioned at his feet.<sup>264</sup> In context, it was clear that the person of "primary concern" was the same person who Person 4 said was eventually kicked off the cliff. In other words, the individual deemed to be of "primary concern", and who had an evidence bag at his feet, was Ali Jan. The use of handcuffs and the presence of an evidence bag indicates that at least at this stage, the usual PUC-handling procedures were being followed.
451. It is important to recall Person 4's perspective during these events. As patrol 2IC, he was focused *outwards* from the compound.<sup>265</sup> Hanifa and Mangul's evidence was that Hanifa and Ali Jan were placed outside the compound. Mangul, in contrast, remained *inside* the compound where the patrol commander was focused.<sup>266</sup> Thus, Person 4's recollection of two PUCs being questioned, and one being of "primary concern", is entirely consistent with his outward focus from the compound in the very area where Hanifa and Ali Jan were moved to. The fact that Person 4 did not recall a third Afghan male is consistent with Mangul remaining at all times inside the compound, outside of Person 4's area of focus.
452. In summary, the trial judge made no error in assessing the whole of the evidence concerning the presence of Afghan males in the end compound and concluding that Ali Jan, Hanifa and Mangul were present.<sup>267</sup> Notice of Appeal particular 20(b) should be dismissed.
453. Furthermore, this challenge demonstrates once more why it is not possible to leave out of account the rejected account of Mr Roberts-Smith and his witnesses in considering the discrete challenges raised on appeal. The only purpose of challenging the findings concerning the presence of Ali Jan in Mangul's compound is to render more probable the account of Ali Jan being a spotter who was encountered in the cornfield. The evidence, and the two explanations

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<sup>261</sup> See paragraph 440 above.

<sup>262</sup> J [1043]; T.4751/32-35 (P56).

<sup>263</sup> J [1047]; T.2623/7-10 (P4).

<sup>264</sup> T.2623/31-33 (P4).

<sup>265</sup> T.2623/14-18 (P4).

<sup>266</sup> T.2623/14-15 (P4).

<sup>267</sup> J [1368(4)].

open on it (there being no other possible explanation available on the evidence in light of the forensic decision made by Mr Roberts-Smith and Person 11 to give a positive account of events in the cornfield), must be assessed as a whole.

#### **D. The murder of Ali Jan**

##### ***Person 56 and the interpreter were sent away***

454. Person 56 said Mr Roberts-Smith's patrol was located in the final compound for some period towards the end of the mission.<sup>268</sup> Person 56 said he remained at the final compound for around half an hour.<sup>269</sup> At around 1045DE or 1050DE, or approximately half an hour before extraction, an extraction call came over the radio.<sup>270</sup> That prompted the patrol to expediate whatever jobs still required doing and then start their move to their extraction point.<sup>271</sup>

455. At about this same time,<sup>272</sup> Mr Roberts-Smith directed Person 56 to take the interpreter back towards troop headquarters.<sup>273</sup> Person 56 recalled being tasked by either Mr Roberts-Smith or Person 4 to leave the end compound and head to an area to select or provide security for an HLZ.<sup>274</sup> Person 56 went with the interpreter down to the dry creek bed<sup>275</sup> then across to the other side of the flat area into a vegetated area.<sup>276</sup>

456. As Person 56 and the interpreter left the end compound, Person 4 moved up to the corner of the compound and watched them walk back towards the axis of clearance, towards the other call signs, for as long as he could to make sure they were in a position of security.<sup>277</sup>

457. Upon reaching the HLZ, Person 56 waited there for approximately half an hour.<sup>278</sup> Person 7, who was back in the middle compound set, gave evidence that after the call for extraction came, he placed the PUCs into compound 43 with the help of an interpreter, then went and joined his patrol at the Stream 6 extraction site where he heard the "helos 10 minutes out" call.<sup>279</sup> At BRS [22.15], Mr Roberts-Smith submits that the trial judge disregarded a submission that Person 7's account supports a finding that Person 56 and the interpreter were sent back earlier in time, without ever reaching the southern compounds. Person 7's evidence does no such thing. All it supports is a conclusion that he had an interpreter with him just before the 10-minute extraction call, very close to the end of the mission.

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<sup>268</sup> J [1044]-1046]; T.4751/24-26 (P56).

<sup>269</sup> J [1044]-1046]; T.4752/32-33 (P56).

<sup>270</sup> Ex R-10, page 3.

<sup>271</sup> T.2623/35-39 (P4).

<sup>272</sup> T.4753/4-6 (P56). Turn 2 extraction was at 1121DE (see Ex R-10, page 4). That places Person 56's evidence of being sent back with the interpreter to approximately 1050DE.

<sup>273</sup> J [1048]; T.2624/46-47 (P4).

<sup>274</sup> J [1048]; T.4752/38-44 (P56).

<sup>275</sup> J [1048]; T.4753/1-2 (P56) (along the route marked with a dashed line on Ex R-175).

<sup>276</sup> J [1048]; T.4753/20-40 (P56) (following the route marked with a solid line on Ex R-175).

<sup>277</sup> J [1058]; T.2625/1-11 (P4) (marked with a dot and F on page 3 of Ex R-126).

<sup>278</sup> J [1048]; T.4754/10-11 (P56).

<sup>279</sup> T.3612/33-3613/4 (P7).

458. At 1052DE,<sup>280</sup> the turn 1 helicopters extracted the Commandos<sup>281</sup> from the HLZ called Eurodos 1, the same HLZ that would be used to extract Mr Roberts-Smith on turn 2.<sup>282</sup> For the reasons set out in the Respondents' Closed Court Submissions at B10 – B18, that meant the area around the Eudoros 1 HLZ – including the cornfield in which Ali Jan was shot - was scanned by the Heron drone and the Apache helicopters, using all of their available electronic warfare equipment, and cleared of any threats at or just before 1052DE.<sup>283</sup> The overwatch also had a direct line of sight to the HLZ and the surrounding fields throughout this time.<sup>284</sup> There was no evidence that any spotters were detected in the cornfields around the Eudoros 1 HLZ by any person or any electronic warfare equipment during the turn 1 scans or extraction.<sup>285</sup>

***Mr Roberts-Smith kicked Ali Jan off the cliff***

459. From Amir Jan Aka's hut, Shahzada could see Ali Jan and Hanifa sitting near the wall at Mangul's compound with their hands tied<sup>286</sup> and their heads lowered.<sup>287</sup> Shahzada could see Hanifa's dark clothes.<sup>288</sup> The big soldier then approached Ali Jan and made him stand up.<sup>289</sup> There were no other soldiers with the big soldier but there were other soldiers "sitting there" with Ali Jan and Hanifa.<sup>290</sup> The big soldier said something to Ali Jan and Ali Jan smiled.<sup>291</sup>

460. Person 4 was still behind the compound at this stage. Once he was happy with Person 56's position, Person 4 moved down a rocky slope and got to a corner of a compound.<sup>292</sup> As Person 4 was negotiating the corner, he saw Person 11 positioned with his back towards a large drop-off and holding the PUC who had been found with the donkey.<sup>293</sup> The PUC – Ali Jan – was handcuffed to the rear and had his back towards the large slope.<sup>294</sup> Person 11 was holding him by his right shoulder.<sup>295</sup> The trial judge accepted this evidence at J [1368(8)].

461. The trial judge found that Mr Roberts-Smith then took some steps back then moved forward and kicked Ali Jan off the small cliff or steep slope into the dry creek bed below.<sup>296</sup> Three eyewitnesses gave evidence of this event. The trial judge accepted all of their accounts.

462. Person 4's evidence was Mr Roberts-Smith moved forward at speed and kicked the PUC in the chest.<sup>297</sup> Person 11 was still holding the PUC when this occurred.<sup>298</sup> The PUC was catapulted

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<sup>280</sup> Based on a departure time of 1035DE and 15 minutes travel time from Tarin Kowt to Darwan: see Ex R-10 page 3.

<sup>281</sup> Ex R-10 (page 3).

<sup>282</sup> Ex A-10, tab 43; T.3614/7-8 (P7).

<sup>283</sup> CCT 15.6.21, p.17/42-18/3 (BRS); T.3613/19 – 3614/8 (P7).

<sup>284</sup> T.5736/29-33 (P11); CCT 16.03.22, p.7/32-35 (P7).

<sup>285</sup> Ex R-30; CCT 22.06.21, p.46/35-44 (BRS); CCT 22.06.21, p.47/30 – p.48/20 (BRS)

<sup>286</sup> J [1057]; T.1149/19-30 (SF).

<sup>287</sup> J [1057]; T.1149/36 (SF).

<sup>288</sup> J [1057]; T.1171/29-31 (SF).

<sup>289</sup> J [1057]; T.1149/41-42 (SF).

<sup>290</sup> J [1057]; T.1149/44-1150/2 (SF).

<sup>291</sup> J [1052]; T.960/1-4 (MH).

<sup>292</sup> J [1058]; T.2625/15-17 (P4).

<sup>293</sup> J [1058]; T.2625/20-24 (P4).

<sup>294</sup> J [1058]; T.2625/26-28; 2626/45-46 (P4).

<sup>295</sup> J [1058]; T.2625/30-31 (P4).

<sup>296</sup> J [1368(8)].

<sup>297</sup> J [1058]; T.2625/33-37; T 2776.22-30 (P4).

<sup>298</sup> J [1058]; T.2625/39-40 (P4).

backwards and fell down the slope.<sup>299</sup> Person 4, who was still negotiating the corner, looked down the drop-off and saw the PUC's face strike a large rock and sustain a serious injury.<sup>300</sup> The PUC knocked out a number of his teeth including his front teeth,<sup>301</sup> which exploded or were thrown out of his face.<sup>302</sup> The trial judge found that Ali Jan injured his face and teeth in the fall.<sup>303</sup>

463. From his position next to the compound wall, Hanifa also saw the big soldier kick Ali Jan with his toes really hard and Ali Jan went "rolling, rolling down until he reached the river".<sup>304</sup> Consistent with Person 4's evidence, Hanifa observed that Ali Jan's hands were still tied behind his back.<sup>305</sup> Hanifa could see Ali Jan rolling in the beginning but then lost sight of him. He could also see the big soldier standing and looking down at Ali Jan.<sup>306</sup> Hanifa was scared and lowered his head.<sup>307</sup> Hanifa heard the big soldier shout then the soldier disappeared.<sup>308</sup>

464. From his location at Amir Jan Aka's hut, Shahzada could see Ali Jan's hands were tied up.<sup>309</sup> Ali Jan was facing the soldier then the soldier kicked Ali Jan and Ali Jan fell to the river.<sup>310</sup> Shahzada then lost sign of Ali Jan because the trees blocked him from Shahzada's sight.<sup>311</sup>

### ***The death of Ali Jan***

465. As Ali Jan lay badly injured at the bottom of the cliff, Mr Roberts-Smith and Person 11 started to move along the top of the drop-off face and moved to a track system that led down to the creek bed,<sup>312</sup> a Z-like pathway that led down to the creek line.<sup>313</sup> Person 4 followed Mr Roberts-Smith and Person 11 down the same path.<sup>314</sup> He was in shock<sup>315</sup> due to the incident being something he had never encountered before, as well as the injuries sustained and the visual effect of seeing the PUC go over the side.<sup>316</sup> Person 4 said it was conducted during extraction so there were quite a few elements manoeuvring.<sup>317</sup>

466. Shahzada watched the big soldier come down a path from Mangul's compound to the riverbed.<sup>318</sup> Shahzada saw the other soldiers come down after the big soldier.<sup>319</sup>

467. Mr Roberts-Smith, Person 11 and Person 4 negotiated the track system into the riverbed, and

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<sup>299</sup> J [1058]; T.2625/42-43 (P4).

<sup>300</sup> J [1058]; T.2625/45 -2626.2 (P4).

<sup>301</sup> J [1058]; T.2626/4-6 (P4).

<sup>302</sup> J [1058]; T.2798/21-24 (P4).

<sup>303</sup> J [1368(9)].

<sup>304</sup> J [1052]; T.960/1-26 (MH).

<sup>305</sup> J [1052]; T.960/11 (MH).

<sup>306</sup> J [1052]; T.960/25-32 (MH).

<sup>307</sup> J [1052]; T.960/2-6 (MH).

<sup>308</sup> J [1052]; T.961/1-5 (MH).

<sup>309</sup> J [1057]; T.1150/6-7 (SF).

<sup>310</sup> J [1057]; T.1150/5-20 (SF).

<sup>311</sup> J [1057]; T.1150/13-15 (SF).

<sup>312</sup> J [1059].T.2626/13-15 (P4).

<sup>313</sup> J [1059].T.2798/25-26 (P4).

<sup>314</sup> J [1059].T.2626/17-20 (P4).

<sup>315</sup> J [1059].T.2626/22-23 (P4).

<sup>316</sup> J [1059].T.2626/25-30 (P4).

<sup>317</sup> J [1059].

<sup>318</sup> J [1082]; T.1150/19-28 (SF).

<sup>319</sup> J [1082]; T.1150/30-39 (SF).

ended up at the foot of the drop-off, where the PUC was located.<sup>320</sup> The PUC was dusty and had sustained a serious facial injury.<sup>321</sup> As they approached the PUC, he attempted to sit up and then fell back down again.<sup>322</sup> He was still handcuffed to the rear.<sup>323</sup>

468. The trial judge found that at Mr Roberts-Smith's direction or order, Persons 11 and 4 carried the injured and handcuffed Ali Jan from the position at which he had fallen to a cornfield on the opposite side of the dry creek bed.<sup>324</sup> Person 11 and Person 4 dragged him to a large tree.<sup>325</sup> Ali Jan was still handcuffed at that point.<sup>326</sup> Hanifa observed Person 4 and Person 11 drag Ali Jan, who was on his back, to the berry tree.<sup>327</sup> Drops of blood were left behind as Ali Jan was dragged to the berry tree.<sup>328</sup>

469. The location to which Ali Jan was dragged was marked on photographs by Person 4, Hanifa and Mangul.<sup>329</sup> Person 4, Hanifa and Mangul all marked the same area. The location marked by Person 4, Hanifa and Mangul is also consistent with the grid reference that appears on the SSE bag placed on EKIA 4 and the GPS coordinates recorded in the metadata of the photographs taken during the SSE process.<sup>330</sup>

470. The trial judge found that Ali Jan was placed on the ground. Mr Roberts-Smith and Person 11 then conferred briefly, then Person 11 shot Ali Jan who was at that point standing and still handcuffed.<sup>331</sup> The trial judge concluded that Mr Roberts-Smith and Person 11 agreed that Ali Jan would be shot.<sup>332</sup> Person 4's account of the shooting was as follows:

- (a) Person 4 moved off about four or five metres and Mr Roberts-Smith and Person 11 had a quick conversation.<sup>333</sup> Person 4 was facing back towards the HLZ, primarily to try and identify where Person 56 was.<sup>334</sup> As Person 4 moved off and the conversation had started, he quickly turned around. The PUC was standing at that point and was still handcuffed.<sup>335</sup> No-one was holding the PUC as he was not moving anywhere.<sup>336</sup>
- (b) Person 4 turned back to look once again where Person 56 was and other call signs were

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<sup>320</sup> J [1059]; T.2626/35-37 (P4).

<sup>321</sup> J [1060]; T.2626/39-40 (P4).

<sup>322</sup> J [1060]; T.2626/42-43 (P4).

<sup>323</sup> J [1060]; T.2626/46-2627/1 (P4).

<sup>324</sup> J [1368(10)], [1060]; T.2798/29-32 (P4).

<sup>325</sup> J [1060]; T.2627/7-14 (P4); T.961/12-16 (MH).

<sup>326</sup> J [1060]; T.2627/22-23 (P4).

<sup>327</sup> J [1060]; T.961/13-17 (MH).

<sup>328</sup> T.1084/19-44 (MR) (marked E on page 4 of Ex R-88); T.963/27 (MH).

<sup>329</sup> Person 4 marked the approximate location of the tree with a dot and letter G on page 3 of Ex R-126. See T.2627/19-21 (P4). Hanifa marked the tree with the letter F on page 4 of Ex R-87. See T.961 (MH). Mangul marked page 4 of Ex R-88 with the letter G. See T.1085/20-1086/39 (MR).

<sup>330</sup> Ex R-13; Ex R-278.

<sup>331</sup> J [1368(11)].

<sup>332</sup> J [1368(11)].

<sup>333</sup> J [1060]; T.2627/35-45 (P4).

<sup>334</sup> J [1060]; T.2628/1-2 (P4).

<sup>335</sup> J [1060]; T.2628/4-9 (P4).

<sup>336</sup> J [1060]; T.2628/12 (P4).

and then a number of shots rang out.<sup>337</sup> Two to three rounds, shot by an M4.<sup>338</sup> Person 11 and Mr Roberts-Smith were both carrying an M4 on that day.<sup>339</sup>

- (c) Person 4 looked around and Person 11 had his rifle sitting in a firing position in his shoulder.<sup>340</sup> The weapon was in a position that it would usually be post firing the weapon.<sup>341</sup> At the time Person 11 had his rifle raised, Mr Roberts-Smith was four or five metres to the rear, around the tree.<sup>342</sup> Person 4 then turned back and refocused towards where he expected Person 56 to approach from.<sup>343</sup>

471. Hanifa did not see the shots that killed Ali Jan, although he heard shots after Ali Jan was dragged to the berry tree and subsequently saw that Ali Jan had been shot.<sup>344</sup> Shahzada also heard light firing, but he could not see it because of the berry trees.<sup>345</sup>

### ***An ICOM was placed on Ali Jan's body as a throwdown***

472. The trial judge found that after Ali Jan was shot, SSE was performed on his body.<sup>346</sup> First, the handcuffs were removed.<sup>347</sup> Next, Person 11 wrote the GPS coordinates of the body's location on an SSE bag and placed it on Ali Jan's body.<sup>348</sup>

473. The trial judge found that at this point, an ICOM radio was placed on Ali Jan's body by either Mr Roberts-Smith or Person 11.<sup>349</sup> Then, Mr Roberts-Smith asked Person 4 to hand the camera to Person 11 who took photos.<sup>350</sup> While Person 11 was taking photos, Person 4 saw an ICOM radio positioned next to the body of the PUC.<sup>351</sup> Person 4 was shown the SSE photos (Ex R-13) and identified both the PUC and the ICOM.<sup>352</sup>

474. The trial judge's finding that the ICOM was placed on Ali Jan's body as a throwdown during SSE was consistent with the evidence of Hanifa, Mangul and Shahzada. Hanifa said he had never seen Ali Jan with a radio.<sup>353</sup> Mangul said that he did not see Ali Jan carrying a radio on the day, and that Ali Jan would not know how to operate a wireless device.<sup>354</sup> Shahzada said Ali Jan did not have a wireless device, and he had never seen Ali Jan with a radio.<sup>355</sup>

475. The trial judge's finding about the ICOM was further supported by his Honour's finding that Mr

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<sup>337</sup> J [1060]; T.2628/14-19 (P4).

<sup>338</sup> J [1060]; T.2828/21-24 (P4).

<sup>339</sup> J [1060]; T.2628/29-30 (P4).

<sup>340</sup> J [1060]; T.2628/32-38 (P4).

<sup>341</sup> J [1060]; T.2798/37-39 (P4).

<sup>342</sup> J [1061]; T.2629/4-9 (P4).

<sup>343</sup> T.2627/46-2629.2 (P4).

<sup>344</sup> J [1054]; T.968/15-44, 973/23-37 (MH).

<sup>345</sup> J [1082]; T.1150/38-45 (SF).

<sup>346</sup> J [1368(12)].

<sup>347</sup> J [1368(12)]; J [1061]; T.2630/7-12 (P4).

<sup>348</sup> J [1061]; T.5745/34-35 (P11).

<sup>349</sup> J [1368(12)].

<sup>350</sup> J [1061]; T.2629/14-25 (P4).

<sup>351</sup> J [1061]; T.2629/27-30 (P4).

<sup>352</sup> J [1061]; T.2930/14-27 (P4).

<sup>353</sup> T.965/30-31 (MH).

<sup>354</sup> T.1088/13-17 (MR).

<sup>355</sup> T.1154/41-47 (SF).

Roberts-Smith told Person 4 in 2012 that the patrol “needed” to carry items to validate engagements (that is, throwdowns).<sup>356</sup> That finding is unchallenged.

***An ICOM was deployed as a throwdown (Notice of Appeal particular 22)***

476. At trial, Mr Roberts-Smith submitted that the presence of the ICOM radio was an indication that EKIA 4 was a spotter.<sup>357</sup> Mr Roberts-Smith also submitted that there was an apparent inconsistency in Person 4’s evidence about the ICOM.<sup>358</sup> The apparent inconsistency was this. Person 4 said he assumed the ICOM throwdown came from the insurgent killed at the Helmand River based on its appearance, but he also gave evidence that that ICOM had been handed to the troop sergeant prior to the movement into the southern compound set.

477. The trial judge found that Person 4 must have been mistaken about at least one of those matters.<sup>359</sup> Ultimately, the trial judge considered these matters in the context of the evidence as whole and concluded that the man in the cornfield was Ali Jan, he was not a spotter, and he did not have an ICOM radio.<sup>360</sup> Once all his Honour’s other findings were taken into account, the conclusion that the ICOM was a throwdown was irresistible. It was never part of the Respondents’ case *where* the throwdown came from. The Respondents do not need to prove the provenance of the throwdown to establish the fact that a throwdown was *in fact* placed on Ali Jan’s body by Mr Roberts-Smith’s patrol.

478. This is a convenient point to address Notice of Appeal particular 22 and BRS [22.1]-[22.8]. There, Mr Roberts-Smith makes submissions about the ICOM similar to those rejected by the trial judge. To consider this submission properly, it is necessary to first outline the evidence about the 2012 training and precisely what Person 4 said about the ICOM.

The pre-deployment instruction to use throwdowns

479. In May or June 2012, there was a troop training exercise at the Bindoon training facility. At one point, there was a discussion about the SSE process.<sup>361</sup> Mr Roberts-Smith was there.<sup>362</sup> The patrol members there relevantly included Persons 4, 11, and 56.<sup>363</sup>

480. Person 19 was a patrol member at the time. He gave evidence that during this session, Mr Roberts-Smith or Person 35 said “if someone has been shot you can put a weapon that you carried into target down and photograph them so that they would be deemed an enemy combatant”.<sup>364</sup> The trial judge found Person 19 had a genuine recollection but the words could

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<sup>356</sup> J [1601].

<sup>357</sup> J [1303]-[1306], [1327]-1336].

<sup>358</sup> J [1117]-[1118].

<sup>359</sup> J [1119].

<sup>360</sup> J [1306].

<sup>361</sup> T.2319/22-27 (P19).

<sup>362</sup> T.2319/29-33; 2364/30-31 (P19).

<sup>363</sup> T.2364/10-11 (P19).

<sup>364</sup> T.2320/9-17; 2363/45-2364/2 (P19).

not be attributed to Mr Roberts-Smith (as opposed to Person 35).<sup>365</sup>

481. However, Person 4 also gave evidence that in 2012, he recalled Mr Roberts-Smith saying that “we needed to carry items on our equipment to validate engagements”.<sup>366</sup> The trial judge accepted that evidence.<sup>367</sup> It is not challenged on appeal.

482. Person 56 gave evidence that he had heard the term “throwdowns”. His understanding was that it was “an item or items that can be used to make a situation look a certain way.” He said his understanding was that the sorts of items that might constitute throwdowns included “A weapon. Other military equipment, for example, a magazine, a grenade. Typically military equipment.”<sup>368</sup> Person 56 was then asked this question: “Did you or any other member of Mr Roberts-Smith’s patrol, to your knowledge, carry throwdowns on missions in 2012?” Person 56 declined to answer the question on the basis that it might incriminate him. The trial judge declined to compel him to give the answer.<sup>369</sup>

483. Mr Roberts-Smith himself said he was aware of the term “throwdown” in the period 2006 to 2012.<sup>370</sup> He recalled discussions in 2012 that the Afghan authorities “didn’t fully appreciate or understand the [Rules of Engagement], it would be a simpler process so that we didn’t get caught up in all these white space issues which were hamstringing, you know future operations”. He expressly acknowledged “in my instance, it was discussed whether or not they should do it”.<sup>371</sup> However, he said he could not recall such a discussion at Bindoon.<sup>372</sup> He claimed to be unaware of throwdowns actually being used (by Australian forces).<sup>373</sup>

#### The evidence of Person 4

484. Person 4 gave evidence that during the engagement with the insurgent by the Helmand River, an AK-47 rifle, some det cord and an ICOM radio were recovered from the insurgent’s body. He gave the following evidence in chief about those items:<sup>374</sup>

You mentioned before some cord and an ICOM. Were they handed over to troop headquarters?---At that point, it was placed in a bag – an evidentiary bag or evidence bag, so I was unaware of – of the contents of that bag. And that was handed over to the troop headquarters as well.

Okay. So just to be clear, did you know one way or another what else was handed over to troop headquarters other than the rifle?---I – I think it was the det cord.

485. Person 4 then said this about the ICOM placed on EKIA 4’s body:<sup>375</sup>

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<sup>365</sup> J [920], [924], [925].

<sup>366</sup> T.2636/29-2641/33 (P4)

<sup>367</sup> J [1601].

<sup>368</sup> T.4761/32-4762/3 (P56).

<sup>369</sup> T.4761-4762/34 (P56).

<sup>370</sup> T.378/22-23 (BRS).

<sup>371</sup> T.378/29-46 (BRS).

<sup>372</sup> T.827/33-34 (BRS).

<sup>373</sup> J.379/1 (BRS).

<sup>374</sup> F.2611/5-11 (P4).

<sup>375</sup> T.2629/27-45 (P4).



Are you aware how that ICOM came to be placed next to his body?---No.

To your knowledge, did that PUC have on his body – during the time he had been PUC'd, kicked off the cliff, dragged across the river, did he have an ICOM on his body to your knowledge?---To my knowledge, no.

Okay. Did you recognise the ICOM?---The – the ICOM was slightly wet. The screen had – had water penetrated in it. So it was fogged up.

And did you have any understanding where that ICOM had come from?---I guess it dawned on me that I – I did know where – where it came from.

And where did it dawn on you it had come from?---From the individual across the river.

486. In cross-examination, Person 4 then gave the following evidence:<sup>376</sup>

We saw an AK-47, an ICOM radio and some other items, with one item being some – a piece of det cord. The – the items were bagged in an evidentiary bag by Person 11, and from there we proceeded to move up to the elements of tactical headquarters that was on the ground attached to the assault force. Once we married up with that element, the weapon was handed off, and items were handed off in that evidentiary bag to the troop sergeant.

487. To this point, Person 4's evidence was that the "det cord" was put into the evidence bag, and that "items" had been put into an evidence bag. However, the following question was then put to Person 4 in cross-examination:

Because what you told the court yesterday was that the items which were recovered from the individual across the Helmand River, the AK-47, an ICOM radio and a piece of det cord were bagged in an evidentiary bag by Person 11 and handed off to the troop sergeant?---That's correct.

Yes. And that's your recollection of what happened, correct?---That is correct.

488. Ultimately, Person 4 readily accepted that he had made an assumption about where the ICOM radio came from. He said this in cross-examination:<sup>377</sup>

And why did it dawn upon you that this was the same ICOM?---Because the LCD screen was fogged up and there was moisture around the keypad.

Thank you. That's what made you think it was the same ICOM, correct?---That's correct.

But you did not know for a fact that it was, correct?---That's correct.

You're just making an assumption, correct?---Yes, because that was the only wet item on this individual.

Yes. But that was an assumption you were making, correct?---That is correct.

#### The submissions on appeal

489. Mr Roberts-Smith's submissions on the ICOM yet again expose the tension at the heart of his appeal. The first sentence of BRS [22.1] invites the Full Court to consider the possibility that the ICOM radio "indicates that EKIA 4 was a spotter affiliated with the Taliban". That is the case that

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<sup>376</sup> T.2797/22-27 (P4).

<sup>377</sup> T.2797/17-37 (P4).

the trial judge rejected, which Mr Roberts-Smith does not challenge on appeal, and which he told the Full Court at BRS [20.6] that it need not form a view on. Putting that to one side, there is no error in the trial judge's finding in any event.

490. *First*, the trial judge made no error in not making a positive finding as to the underlying source of the ICOM throwdown (cf BRS [22.1] and [22.4]). The source of the throwdown is not an essential aspect of a finding that a throwdown was used. Further, in this case, the precise source of the ICOM was peculiarly within the knowledge of Mr Roberts-Smith or Person 11 (or both). The trial judge was correct *not* to make a positive finding as to the source of the ICOM when the only two people who knew the truth gave dishonest accounts as to its origin. In those circumstances, his Honour took the correct approach of *not* making a speculative finding as to the source of the ICOM and limiting his finding to the conclusion that Person 4 “must be mistaken about at least one of those matters”, then taking the mistake into account when reaching the conclusion, based on the whole of the evidence, that Ali Jan was not a spotter and did not have an ICOM radio.<sup>378</sup> There was no error in that approach.
491. *Second*, Mr Roberts-Smith overstates the nature of the alleged inconsistency in Person 4's evidence (cf [BRS [22.3]). Person 4 made clear it was an *assumption* that the ICOM radio came from over the river, but he did not know that for a fact. At worst, that assumption was incorrect. It does not follow that no throwdown was used. Person 4's evidence about what had been handed to the troop sergeant was also qualified. Initially he said he “thought” it was the det cord, he then said it was “items”, and finally he agreed with a suggestion in cross-examination that his “recollection” was it was all items. Neither half of the alleged “irreconcilable inconsistency” is the immutable statement Mr Roberts-Smith suggests.
492. *Third*, the trial judge did not make an “apparent” finding that the ICOM came from the insurgent killed at the Helmand River (cf BRS [22.4] and [22.7]). His Honour properly considered the inconsistency in the OPSUM between the number of ICOMs recovered versus the number returned to Tarin Kowt but did not make a finding (one way or the other) about whether OPSUM was accurate. There was no error in that approach.
493. The submissions about the trial judge's consideration of the OPSUM at BRS [22.7] are wrong in multiple respects. For a start, the trial judge did not “infer” that the single ICOM returned to Tarin Kowt had been used in two engagements. Next, the trial judge did not fail to consider human error as an explanation for the inconsistency in the OPSUM. His Honour considered Mr Roberts-Smith's submission on this point (at J [1303]) and rejected it at [1306]. Finally, the submission that the OPSUM contains other similar errors is factually wrong. Mr Roberts-Smith submits that there is an inconsistency between the number of rifles referred to in the “summary of timings” (two) versus the number returned to Tarin Kowt (three). However, the “summary of timings” in fact describes the recovery of three different weapons: (1) the time entry at 0610DE refers to a

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<sup>378</sup> J [1306].

rifle found in a clearance of one compound; (2) the paragraph then refers to a subsequent engagement in *another* compound in the same complex during which a *second* rifle was recovered; then (3) the time entry at 0805DE refers to a *third* rifle recovered from Mr Roberts-Smith's engagement over the river. Nor is there an inconsistency in the number of pistols mentioned: there is no mention, one way or another, of a pistol in the summary section. The criticism of his Honour's analysis is therefore misplaced.

494. *Fourth*, the submission at BRS [22.6] that Mr Roberts-Smith was deprived of an opportunity to respond to the allegation that a throwdown was used, and to give evidence as to the precise source of the throwdown, is wrong.

- (a) It was expressly put to Mr Roberts-Smith in cross-examination that the ICOM was a throwdown and he denied it.<sup>379</sup>
- (b) He was expressly asked whether he found an ICOM on the body of the insurgent killed next to the Helmand River and he could not recall.<sup>380</sup>
- (c) He gave positive evidence about the source (on his case) of the ICOM.<sup>381</sup> He said it was discovered during the SSE process underneath the body of a spotter in the cornfield.
- (d) He called Person 11 to give evidence about where the ICOM came from.<sup>382</sup>
- (e) Person 4 was cross-examined extensively on his instructions about the ICOM.<sup>383</sup>
- (f) He made extensive submissions at trial about whether the ICOM was a throwdown, including about the references to the ICOM in the OPSUM.<sup>384</sup>
- (g) He had an opportunity to give reply evidence if there was any matter arising from the Respondents' case that he wished to reply to. He chose not to take up that opportunity.

495. Mr Roberts-Smith now complains that he was not expressly asked whether he retained and used the ICOM from the Helmand River killing as a throwdown (see BRS [22.6]). However, he did not recall finding any such ICOM. No prejudice can rationally flow from not being asked what he did with an ICOM that he did not recall possessing. He also complains that he was not cross-examined about the inconsistency in the OPSUM about the number of ICOMs versus the number of items returned to Tarin Kowt. That complaint should also be rejected. Mr Roberts-Smith had myriad opportunities to explain where the ICOM came from and how it came to be on Ali Jan's body. It was expressly put to him that the ICOM was a throwdown, he rejected the proposition, and provided a positive alternative explanation. In those circumstances, Mr Roberts-Smith's reliance on *Bale v Mills* (2011) 81 NSWLR 498 at [85] is inapt. That was a case where there was

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<sup>379</sup> T.508/24 (BRS).

<sup>380</sup> T.386/10 (BRS).

<sup>381</sup> T.414/19-26 (BRS).

<sup>382</sup> T.5678/33-36 (P11); T.5679/28-30 (P11).

<sup>383</sup> T.2879/43-2882/45 (P4).

<sup>384</sup> J [1303].

no cross-examination *at all* on a central allegation. It would be akin, in this case, to Mr Roberts-Smith not being asked *at all* whether the ICOM was a throwdown. The suggestion there any relevant lack of cross-examination, or that Mr Roberts-Smith was deprived in any way of an opportunity to refute the Respondents' case about the ICOM, should be firmly rejected.

496. *Fifth*, the trial judge correctly used the evidence of Mr Roberts-Smith's pre-deployment instruction to Person 4 in assessing whether the ICOM in Darwan was a throwdown. His Honour did not wrongly use that evidence for a tendency purpose (cf BRS [22.1], [26.5] and [26.6]). He properly directed himself to take a cautious approach "to avoid an unintended tendency use".<sup>385</sup> His Honour made clear that the evidence may be relevant as preparatory conduct but not as tendency evidence.<sup>386</sup> That was correct. It was orthodox for his Honour to find that an instruction by a military commander for his patrol to carry throwdowns was relevant to an assessment of whether a throwdown was *in fact* used on a subsequent occasion. That is not tendency reasoning. Tendency reasoning in this context would have required (1) a finding that the patrol *in fact* used throwdowns on other occasions; (2) the characterisation of that use of throwdowns as a tendency; then (3) the use of that tendency to support a finding that the use of a throwdown was more likely at Darwan. The trial judge did not engage in any such exercise or error. But in any event, as the trial judge made clear at J [932], his findings were made out irrespective of the pre-deployment instruction.
497. *Sixth*, the trial judge considered and correctly rejected Mr Roberts-Smith's submission at trial that the fact that no-one saw him or Person 11 carrying a throwdown made it less likely that they in fact did so.<sup>387</sup> The submission on appeal is equally flawed.
- (a) First, the reliance on Person 56 at BRS [22.8] (as a person who did not see Mr Roberts-Smith or Person 11 carrying a throwdown) is misplaced. As outlined above at paragraph 482, Person 56 declined to answer the question of whether he or any member of the patrol carried throwdowns on the grounds of self-incrimination.
  - (b) Next, the trial judge correctly found that the instruction during pre-deployment training was relevant in this respect. Person 4's evidence that Mr Roberts-Smith said the patrol "needed" to carry items to validate engagements - a finding that is unchallenged on appeal - was plainly relevant to assessment of whether a member of the patrol did *in fact* subsequently carry a throwdown.
  - (c) Finally, the suggestion that carrying an ICOM radio as a throwdown would inevitably be obvious to others (for example, due to the size of the ICOM) should be readily rejected. Mr Roberts-Smith's own evidence was that the ICOM was concealed in the spotter's clothing and was only found on a search. The suggestion that on the one hand a spotter could successfully conceal an ICOM in his clothing, yet an Australian soldier was

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<sup>385</sup> J [932].

<sup>386</sup> J [931].

<sup>387</sup> J [1334]-[1335].

incapable of doing the very same thing, need only be stated to be rejected.

498. *Seventh*, one final factor provides powerful support for the trial judge's rejection of Mr Roberts-Smith's case on the ICOM. That is, Mr Roberts-Smith and Person 11 gave materially inconsistent evidence about the ICOM and Person 11 changed his account multiple times about when it was first seen and the role it played in his decision-making.

(a) Person 11's first account appeared in his outline of evidence. He said he approved the outline reading it carefully to ensure it accurately conveyed his recollection of the engagement.<sup>388</sup> Paragraph 27 clearly conveyed that the ICOM was only discovered during a search of the spotter's body during the SSE process.<sup>389</sup> The outline of evidence stated, "in accordance with procedure, we conducted an SSE of his body and found a radio on him". In other words, the first time it was seen was during SSE and *after* the man in the cornfield was already dead.

(b) However, on the first day of his evidence-in-chief, Person 11 said when he entered the cornfield, he saw a person "moving in a very suspicious manner". He said he "saw this person was carrying a radio which led me to make the assessment that this was a spotter that was come to ... to try and report on our dispositions and movements. ... I assessed this person posed a direct threat to our extraction and our friendly forces and so I engaged."<sup>390</sup> In other words, seeing the ICOM radio in the spotter's hand was an essential part of Person 11's account and indeed the very reason (on his account) why the alleged spotter was assessed as a threat and then killed.

(c) Person 11 evidently recognised this inconsistency after his first day of evidence. The next morning, he tried to correct paragraph 27 as it could be "misinterpreted".<sup>391</sup> He then changed position again and suggested there was no inconsistency at all.<sup>392</sup>

499. Person 11's ultimate position was irreconcilable with Mr Roberts-Smith's evidence. Mr Roberts-Smith repeatedly stated that the ICOM was discovered during the SSE process<sup>393</sup> and he disavowed the suggestion that the ICOM played a role in his conclusion that the individual was a spotter (it was merely confirmatory).<sup>394</sup> The inconsistent accounts given by Mr Roberts-Smith and Person 11, coupled with the material change in Person 11's evidence, destroys any remaining credibility in Mr Roberts-Smith's alternative hypothesis that the ICOM radio suggests Ali Jan was a spotter.

500. In conclusion: the trial correctly considered the whole of the evidence and concluded that the

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<sup>388</sup> T.5710/40-41 (P11).

<sup>389</sup> T.5704/38-47, 5710/32 (P11).

<sup>390</sup> T.5676/26-42 (P11).

<sup>391</sup> T.5704/38-47 (P11).

<sup>392</sup> T.5712/20-26 (P11).

<sup>393</sup> T.244/4; 245/17; 379/15-20; 414/22-23; 415/8-12 (BRS).

<sup>394</sup> T.415/22-27 (BRS).

man in the cornfield was Ali Jan, he was not a spotter, and he did not have an ICOM radio.<sup>395</sup> The trial judge also correctly rejected Mr Roberts-Smith and Person 11's alternative hypothesis that the ICOM was found in the hand, or on the body during SSE, of a spotter. When the ICOM photographed on Ali Jan's body is considered in the context of the evidence as a whole, the trial judge plainly made no error in finding that the ICOM was a throwdown. Particular 22 of the Notice of Appeal should therefore be dismissed.

***Mr Roberts-Smith falsely reported EKIA 4 was a "spotter"***

501. Towards the end of the mission, Person 7 and his patrol were at the Stream 6 HLZ waiting for extraction.<sup>396</sup> Person 7 started to hear calls over the radio of "Helos 15 minutes out", then 10 minutes out, five minutes out, three minutes out and 1 minute out.<sup>397</sup> The timing notifications were accompanied by a "cherry/ice" call. An "ice" call meant there was no threat, and everything was safe; "cherry" means there was a possible or certain threat around an HLZ. The call was made by the Apache pilots who were providing situational awareness along with the Heron drone.<sup>398</sup> All the calls Person 7 heard that day were "ice".<sup>399</sup>

502. About 10 seconds after the "3-minute call", Person 7 heard a number of shots. He then heard Mr Roberts-Smith on the radio say "Alpha, this is 2-1. That's one EKIA. We've just engaged a spotter".<sup>400</sup> The trial judge found that Mr Roberts-Smith's report on the radio was false.<sup>401</sup>

***1121DE: the SASR extracted from Darwan***

503. After finishing SSE, Persons 4 and 11 and Mr Roberts-Smith moved to the HLZ.<sup>402</sup> As they arrived, the big soldier came towards Shahzada and Amir Jan Aka and said "Until our planes come, none of you should move".<sup>403</sup> Shahzada's evidence was that the big soldier spoke in Pashto.<sup>404</sup> The trial judge found at J [1191] that it was possible something more basic was said given the evidence that Mr Roberts-Smith could speak some basic Pashto words, but Shahzada's evidence could not strictly be correct. We return to this point when addressing Mr Roberts-Smith's submissions on Shahzada's credit.

504. Shortly after that, the helicopters came. One "plane" passed Shahzada's land and landed on his son's land, while two "planes" passed by.<sup>405</sup> Hanifa saw four "planes" come in; two passed by and one landed less than 50 metres from Ali Jan.<sup>406</sup> Shahzada and Hanifa's description of the extraction matched the Australian extraction plan exactly in two respects. *First*, their descriptions

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<sup>395</sup> J [1306].

<sup>396</sup> T.3612/25-26 (P7).

<sup>397</sup> T.3613/1-4 (P7).

<sup>398</sup> T.3613/1-34 (P7).

<sup>399</sup> T.3613/42-43 (P7).

<sup>400</sup> T.3613/45-3614/5 (P7).

<sup>401</sup> J [1368(13)].

<sup>402</sup> J [1061]; T.2630/33-34 (P4). Person 4 marked the extraction point with a dot and letter H on Ex R-126. See T.2630/36-37 (P4).

<sup>403</sup> J [1083]; T.1151/9-16 (SF).

<sup>404</sup> T.1183/36-1184/1 (SF).

<sup>405</sup> J [1084]; T.1151/20-36 (SF).

<sup>406</sup> T.961/42 -962/1 (MH) (the helicopter landed at "G" on page 4 of Ex R-87).

match the location of the HLZs. One helicopter landed at Eudoros 1 (on the field in front of where Shahzada was detained and around 50 metres from Ali Jan's body). Two other helicopters landed at Stream 6 (in the dry riverbed in front of compound 40) which required them to "pass by" Hanifa and Shahzada's locations.<sup>407</sup> *Secondly*, the Turn 2 helicopters approached from the south.<sup>408</sup> That required them to pass by Shahzada's land before landing at Eudoros 1 or Stream 6,<sup>409</sup> just as Shahzada and Hanifa described.

505. At or about 11:21DE, Mr Roberts-Smith's patrol extracted on the Turn 2 helicopter<sup>410</sup> from the Eudoros 1 HLZ.<sup>411</sup> Once the helicopters landed, Person 56 married up with the patrol.<sup>412</sup> The interpreter also travelled back on Mr Roberts-Smith's patrol to Tarin Kowt.<sup>413</sup>

***Person 56 was told about the murder immediately on arrival back at Tarin Kowt***

506. On returning to Tarin Kowt,<sup>414</sup> Persons 4, 11 and 56 went to the ready room to replenish food, water, and ammunition supplies, to be prepared to go out again.<sup>415</sup>

507. The trial judge found that in the ready room, either Person 4 or Person 11 told Person 56 that during the mission a man had been kicked off a cliff and subsequently shot.<sup>416</sup> The trial judge accepted Person 56's unchallenged account of that conversation.<sup>417</sup> The account was also corroborated by Person 4. Person 4 said he could not recall the exact words used, but he said Person 11 "went into a bit more of a description...of what happened at that point"<sup>418</sup>

508. The trial judge found that the conversation with Person 56 was important, and weight should be given to Mr Roberts-Smith's failure to challenge it.<sup>419</sup> The trial judge also concluded that whether or not Person 56's evidence was challenged, his Honour accepted the conversation.<sup>420</sup> That important finding is not challenged on appeal.

***Mr Roberts-Smith made another false report***

509. The trial judge found that after Mr Roberts-Smith's initial false report that Ali Jan was a spotter, he continued to falsely assert that Ali Jan was a spotter who had been engaged in the cornfield.<sup>421</sup> The next false report came as soon as the patrol returned to Tarin Kowt.

510. On arrival, Mr Roberts-Smith did not go to the ready room with Person 4, 11 and 56; he went to

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<sup>407</sup> Ex A-10, tab 43 (a closed court exhibit); Ex R-1, page 2.

<sup>408</sup> See paragraph B8 of the Respondents' Closed Court Submissions.

<sup>409</sup> See the cardinal points on Ex R-1.

<sup>410</sup> Ex R-10 Same time chat for Darwan mission (page 4); Ex R-11 OPSUM for Darwan mission (page 4).

<sup>411</sup> T.5685/6-10 (P11); Ex A-227.

<sup>412</sup> T.2630/38-40 (P4).

<sup>413</sup> T.4790/22 (P56).

<sup>414</sup> J [1087]; T.4754/24-25 (P56).

<sup>415</sup> J [1086]-[1087]; T.2631/5-18 (P4); T.4754.25-27 (P56).

<sup>416</sup> J [1086]-[1087]; T.4754/29-4755/3 (P56).

<sup>417</sup> J [1158].

<sup>418</sup> J [1086]-[1087]; T.2631/20-35 (P4).

<sup>419</sup> J [1158].

<sup>420</sup> J [1158].

<sup>421</sup> J [1368(13)].

the troop debrief.<sup>422</sup> Person 31 was at the debrief; he gave evidence that Mr Roberts-Smith reported that the EKIA was a spotter.<sup>423</sup> Person 7 was also at the debrief. He too said that Mr Roberts-Smith said, "we killed one spotter".<sup>424</sup> That information was then inputted into an OPSUM by the operations officer.<sup>425</sup>

511. The trial judge found that Persons 4, 56, and 11 then reunited with Mr Roberts-Smith after the post-op debrief,<sup>426</sup> back in their patrol accommodation.<sup>427</sup> Mr Roberts-Smith came back into their patrol room and said, "This is what the story is ... The story is that we engaged a spotter whilst moving to our HLZ."<sup>428</sup>

### **E. The identification of Ali Jan**

512. At trial, one of the challenges Mr Roberts-Smith made to the evidence of Mangul, Hanifa and Shahzada was that the man in the cornfield was not Ali Jan.<sup>429</sup> The trial judge rejected that finding at J [1368(11)], finding that the man shot in the cornfield was Ali Jan. None of the particulars of appeal, nor the written submissions filed for Mr Roberts-Smith, challenge that finding. It does, however, appear to surface in Mr Roberts-Smith's closed court submissions.

513. Hanifa, Mangul and Shahzada knew Ali Jan well and recognised him both on the day. Hanifa expressly rejected a question concerning whether EKIA was a different man named Amir Jan from Ruyan.<sup>430</sup> Mangul and Hanifa both gave evidence that Amir Jan from Ruyan was killed in a raid in another village.<sup>431</sup> The fact that the Afghan witnesses were accepted to have known Ali Jan, by reason of their lives spent in Darwan, further reinforced the implausibility of the challenge to their very presence in their own homes on the day of the raid.

### ***The Afghans found Ali Jan's body in the cornfield***

514. At about the time the helicopters were leaving, Hanifa went inside Mangul's house and asked Mangul's daughter to untie his hands.<sup>432</sup> Mangul could still see soldiers on the mountain,<sup>433</sup> so he said, "what are you doing? There are still soldiers. They might fire at you."<sup>434</sup> But at that moment, a helicopter landed and took those soldiers who were on the mountain too.<sup>435</sup>

515. Mangul's evidence on this point was consistent with the Australian forces' extraction plan.<sup>436</sup> See, also, paragraph B24 – B26 of the Respondents' Closed Court Submissions. In cross-

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<sup>422</sup> T.2631/22-23 (P4); T.4754/40-43 (P56).

<sup>423</sup> T.4645/10-15 (P31).

<sup>424</sup> T.3614/27-30 (P7).

<sup>425</sup> T.250/21-32 (BRS); Ex R-11.

<sup>426</sup> T.2632/9-10 (P4).

<sup>427</sup> T.2883/45 -2884/4 (P4).

<sup>428</sup> T.2632/12-27; 2884/24-31 (P4).

<sup>429</sup> T.16/8, 37/4-12 (BRS opening statement).

<sup>430</sup> T.967/14-23 (MH).

<sup>431</sup> T.1090/37-1098/8 (MR).

<sup>432</sup> J [1071]; T.962/17-19 (MH).

<sup>433</sup> J [1076]-[1079]; T.1093/14-20 (MR).

<sup>434</sup> J [1076]-[1079]; T.1083/43-45 (MR).

<sup>435</sup> J [1076]-[1079]; T.1093/14-39 (MR).

<sup>436</sup> Ex R-1 and location of Bottle 3.



examination, it was put to Mangul that he could not have seen the soldiers as the top of the mountain "was over a kilometre away".<sup>437</sup> The premise of the question was wrong: from Mangul's compound to the Bottle 3 HLZ is no more than 450m.<sup>438</sup> The overwatch photos also show that people were visible from that distance.<sup>439</sup>

516. Mangul then asked his daughter to bring a knife to cut off the wires that Hanifa's hands were tied with.<sup>440</sup> Mangul also asked Hanifa where Ali Jan was. Hanifa said the soldiers kicked him and "he went down to the river, and they dragged him toward the trees."<sup>441</sup> Hanifa said from there "I could not see him".<sup>442</sup> Hanifa did not tell Mangul that he had seen Ali Jan shot.<sup>443</sup>
517. Hanifa then went back outside and saw Mohammed Shah, who was tied up next to the well in Shahzada's house.<sup>444</sup> After that, Hanifa, his sister and Mangul went to where Ali Jan was.<sup>445</sup> Hanifa took one path to the riverbed from the guesthouse side.<sup>446</sup> Mangul went down a different path toward the riverbed, at which point he saw some blood.<sup>447</sup> Hanifa and his sister walked down a path to the bottom of the cliff<sup>448</sup> where he too saw drops of blood, like a "line of blood", which he followed to the tree where Ali Jan's body was.<sup>449</sup>
518. As he followed the line of blood across the riverbed, Hanifa saw Shahzada coming from the shed.<sup>450</sup> Mangul also saw Shahzada came from Amir Jan's hut.<sup>451</sup> Shahzada was walking towards his house to look for Ali Jan.<sup>452</sup> Shahzada met up with Hanifa and Hanifa's sister in the river when Hanifa came down from the house.<sup>453</sup> Mangul walked towards the cornfield and met Hanifa and Hanifa's sister under the berry tree.<sup>454</sup> Then everybody came together where Ali Jan's body was,<sup>455</sup> in the cornfield where the berry tree is.<sup>456</sup>
519. Each of the Afghan witnesses gave evidence of injuries and the orientation of Ali Jan's body that was consistent with the SSE photos.<sup>457</sup>
- (a) Hanifa observed that Ali Jan was lying on his back with one hand behind his back and one on his side.<sup>458</sup> Hanifa saw that Ali Jan's right jaw had been hit and his tooth was broken.

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<sup>437</sup> J [1076]-[1079]; T.1093/36 (MR).

<sup>438</sup> See Ex R-1, which has a 1:5000 scale (i.e. each grid square is 100 metres).

<sup>439</sup> T.232/18-21 (BRS); page 1 and 3 of Ex R-2.

<sup>440</sup> J [1076]-[1079]; T.1083/45-47 (MR).

<sup>441</sup> J [1076]-[1079]; T.1084/8-15 (MR).

<sup>442</sup> J [1076]-[1079]; T.21/45-47 (29/07/2021) (MR).

<sup>443</sup> J [1076]-[1079]; T.12/31-35 (29/07/2021) (MR).

<sup>444</sup> J [1071]; T.962/ 23-37 (MH) (marked "H" on page 4 of Ex R-87).

<sup>445</sup> J [1071]; T.962/43-44 (MH).

<sup>446</sup> J [1076]-[1079]; T.1084/39 (MR).

<sup>447</sup> J [1076]-[1079]; T.1084/19-44 (MR) (marked E on page 4 of R88).

<sup>448</sup> Marked "I" on page 4 of Ex R-87.

<sup>449</sup> J [1071]; T.963/27 (MH).

<sup>450</sup> J [1071]; T.963/33 (MH).

<sup>451</sup> J [1076]-[1079]; T.1085/18-35 (MR).

<sup>452</sup> J [1076]-[1079]; T.1152/35 (SF).

<sup>453</sup> J [1076]-[1079]; T.1153/1-4 (SF).

<sup>454</sup> J [1076]-[1079]; T.1085/5-16 (MR).

<sup>455</sup> J [1076]-[1079]; T.1085/20-30 (MR).

<sup>456</sup> J [1084]-[1085]; T.1153/10-20 (SF).

<sup>457</sup> Ex R-13.

<sup>458</sup> J [1071]; T.963/36-44 (MH).

He was shot in his left skull and in his belly area.<sup>459</sup> Hanifa recalled that Ali Jan had dust on his face and his beard.<sup>460</sup>

(b) Mangul saw one of Ali Jan's hands was behind under his body and one hand was a bit extended.<sup>461</sup> He was laying on his back.<sup>462</sup> He was shot on the right side of his jaw and left skull.<sup>463</sup> He was shot in the chest area.<sup>464</sup> There was a lot of dirt on his face.<sup>465</sup>

(c) Shahzada observed that Ali Jan was laying on his back.<sup>466</sup> He had a bullet shot on his right jaw and on his chest.<sup>467</sup> He had bullets or shards on his arm and some of the flesh on his arm was gone.<sup>468</sup> One of his arms was behind his body.<sup>469</sup> There was dust on his face and things in his beard.<sup>470</sup>

520. Hanifa cleaned the dust off Ali Jan's face and his beard.<sup>471</sup> After Ali Jan's face was cleaned, they moved his body under the shade of the berry tree and put a shawl over it.<sup>472</sup>

### ***The identification of Ali Jan***

521. Hanifa was shown one SSE photograph of EKIA 4 and recognised the deceased individual as Ali Jan.<sup>473</sup> He said he did not see either the ICOM or the SSE bag that appear in the photos, when Hanifa saw Ali Jan's body on the day they were not there.<sup>474</sup> Hanifa said Ali Jan was not carrying a radio, he had nothing with him and Hanifa had never seen him with a radio.<sup>475</sup>

522. Mangul was shown two photos of EKIA 4 and recognised Ali Jan in both.<sup>476</sup> Mangul said that Ali Jan was not carrying a radio like the one in the photograph, and that he did not know how to work a watch, let alone a wireless device.<sup>477</sup> Ali Jan only had the clothes on his body.<sup>478</sup>

523. Shahzada was shown an SSE photograph of EKIA 4 and recognised him as Ali Jan.<sup>479</sup> Shahzada was shown page 2 of the NPO joint bundle and gave evidence that the individual was also Ali Jan.<sup>480</sup> Shahzada gave evidence that Ali Jan did not have a wireless device, and he had never

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<sup>459</sup> J [1071]; T.964/22-27 (MH).

<sup>460</sup> J [1071]; T.963/39-41 (MH).

<sup>461</sup> J [1078]; T.1086/47 (MR).

<sup>462</sup> J [1078]; JT.1087/3 (MR).

<sup>463</sup> J [1078]; T.1087/3-5 (MR).

<sup>464</sup> J [1078]; T.1087/9-15 (MR).

<sup>465</sup> J [1078]; T.1087/20 (MR).

<sup>466</sup> J [1085]; T.1153/25 (SF).

<sup>467</sup> J [1085]; T.1153/26-27 (SF).

<sup>468</sup> J [1085]; T.1153/27-29 (SF).

<sup>469</sup> J [1085]; T.1153/37 (SF).

<sup>470</sup> J [1085]; T.1153/37 (SF).

<sup>471</sup> J [1071]; T.963/39-41 (MH).

<sup>472</sup> J [1078]; T.1087/10-22 (MR).

<sup>473</sup> J [1072]; T.964/30-45 (MH).

<sup>474</sup> J [1072]; T.965/14-16 (MH).

<sup>475</sup> J [1072]; T.964/37-45 (MH).

<sup>476</sup> J [1079]; T.1088/1-5 (MR).

<sup>477</sup> J [1079]; T.1088/9-17 (MR).

<sup>478</sup> J [1079]; T.1088/9-11 (MR).

<sup>479</sup> J [1085]; T.1154/17-26 (SF).

<sup>480</sup> J [1085]; T.1154/37-42 (SF).

seen Ali Jan with a radio like the one in the photograph.<sup>481</sup>

### ***The burial of Ali Jan***

524. Later on, people came and Ali Jan's body was taken to the graveyard.<sup>482</sup> Mangul went to the graveyard where he found out that soldiers had killed Haji Nazar Gul and Yaro Mama Faqir in compound 31 as well.<sup>483</sup> Hanifa, Mangul and Shahzada identified photographs of the two deceased in compound 31 as Haji Nazar Gul and Yaro Mama Faqir.<sup>484</sup> Ali Jan, Haji Nazar Gul and Yaro Mama Faqir were buried in the graveyard in Darwan.<sup>485</sup>

525. Hanifa and Mangul said the man killed on the other side of the river (whose body Mr Roberts-Smith falsely claimed he pushed or kicked down an embankment) was named Mullah Gafur. He was Taliban.<sup>486</sup> Mullah Gafur was not buried in Darwan.<sup>487</sup>

### **F. Mr Roberts-Smith's account was false**

526. The trial judge summarised Mr Roberts-Smith's account at J [1062] to [1070] and [1209] to [1230]. Mr Roberts-Smith said that after his patrol received the call to extract, the patrol moved out of the end compound (where according to Mr Roberts-Smith they had found no people) and moved across the dry riverbed. Person 11 was in front, Mr Roberts-Smith was in the middle, and Person 4 was in the rear. Mr Roberts-Smith said they started to move up an embankment, and as they did, Person 11 started firing at something. As Mr Roberts-Smith reached the top of the embankment, he started firing as well. Mr Roberts-Smith then said at that point, they searched the individual and found an ICOM radio. He then reported the engagement over the radio, stating that his patrol had "just engaged a spotter".<sup>488</sup>

527. Mr Roberts-Smith's radio report that his patrol had "just engaged a spotter" was a lie. He told the same lie to the trial judge as the final step in a series of falsehoods designed to cover-up the murder of Ali Jan. The trial judge correctly rejected his explanation, finding that it contained multiple improbabilities, an unsatisfactory account of why the patrol was in the cornfield, deliberate lies, and contamination of both his and Person 11's account; all against a backdrop of other credit findings.

528. As noted in the introduction to the Darwan section, Mr Roberts-Smith does not seek to overturn the trial judge's rejection of his case. Nevertheless, we have pointed out above that in various respects, he does challenge aspects of the trial judge's findings for no apparent purpose other than to seek to rehabilitate his own rejected account. We now turn to deal with various other

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<sup>481</sup> J [1085]; T.1154/41-47 (SF).

<sup>482</sup> J [1085]; T.1154/14-15 (SF).

<sup>483</sup> J [1078]; T.1087/32-34 (MR).

<sup>484</sup> J [1073], [1080]; T.965/33 -966/39 (MH); T.1088/19-1090/18 (MR).

<sup>485</sup> J [1075]; T.967/25-39 (MH).

<sup>486</sup> J [1074], [1081]; T.967/1-6 (MH); T.1107/22-47 (MR).

<sup>487</sup> J [1075]; T.967/25-39 (MH).

<sup>488</sup> J [1065]; T.243/30-244/29 (BRS).

challenges directly relevant to his own account.

***Mr Roberts-Smith's evidence concerning the interpreter and the MWD was improbable***

529. The trial judge correctly found that there were a number of “improbabilities” in Mr Roberts-Smith’s account.<sup>489</sup> The first two improbabilities were:

- (a) That Person 56 would be away from Mr Roberts-Smith’s patrol for an hour and half.<sup>490</sup> We address this at paragraphs 425 to 433 above. That finding is unchallenged. No challenge is made to Person 56’s evidence either.
- (b) That Person 47 and the military working dog would not be with Mr Roberts-Smith’s patrol during clearance of the southern compounds.<sup>491</sup> We address this at paragraphs 427 and 428 above. That finding too is unchallenged.

***It was unlikely that a spotter remained undetected (Notice of Appeal particular 24)***

530. At J [1233(3)], the trial judge found it was also improbable that a spotter either entered the cornfield during the mission and was not observed or remained undetected in the cornfield for a period of five hours.<sup>492</sup> This is the subject of particular 24 to the Notice of Appeal.

531. The trial judge’s finding concerning the improbability of a spotter remaining undetected in the cornfield was correct. We address the evidence in our closed court submissions at B3 – B9. On Mr Roberts-Smith’s account, the spotter managed to evade detection by any of the electronic warfare assets – twice – in the space of half an hour. Once is unlikely. Twice is highly unlikely.

532. In addition to the aerial assets, the overwatch position had a clear view of the cornfield in which the spotter was allegedly engaged, as well as the surrounding areas.<sup>493</sup> The functions of the overwatch included keeping eyes on the area in which the mission was conducted, where extraction would take place, and to look out for any enemy combatants or movement, including spotters.<sup>494</sup> Further, both sides of the valley had also been cleared by large numbers of soldiers; all of whom would have been looking for squinters and spotters.<sup>495</sup> Mr Roberts-Smith said that to his knowledge, no suspicious movements in or around the cornfield were reported.<sup>496</sup> These matters further supported the trial judge’s finding.

***Mr Roberts-Smith told deliberate lies***

533. The trial judge correctly found that Mr Roberts-Smith lied about the height of the embankment on the other side of the dry river bed, and about using his foot to move the body of an insurgent near the Helmand River with a view to possibly explaining evidence that was unfavourable to

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<sup>489</sup> J [1233].

<sup>490</sup> J [1233(1)].

<sup>491</sup> J [1233(2)].

<sup>492</sup> J [1233(3)].

<sup>493</sup> T.494/26-38 (BRS).

<sup>494</sup> T.494/40-495/3 (BRS).

<sup>495</sup> T.492/5-15 (BRS).

<sup>496</sup> T.495/8-9 (BRS).

him.<sup>497</sup> We addressed the Helmand River lie at paragraphs 406 to 409 above. We explain the embankment lie below. Both of these findings are unchallenged.

534. Mr Roberts-Smith said after the patrol left the final compound and crossed the dry riverbed, they had to climb an embankment of 1.5 metres or more in height on the opposite side of the dry riverbed.<sup>498</sup> Mr Roberts-Smith said you had to “physically climb” it “on your hands and knees to pull yourself up”.<sup>499</sup> Mr Roberts-Smith, of course, knew that the body of EKIA 4 was on the edge of the cornfield, which raises the obvious issue of how the spotter was not seen at any earlier point in the day, or at the very least, from further back in the dry riverbed. The trial judge found that Mr Roberts-Smith’s story of a 1.5 metre (plus) embankment was a lie.<sup>500</sup> It was contrary to the evidence of Hanifa,<sup>501</sup> Mangul,<sup>502</sup> Shahzada<sup>503</sup> and Person 56.<sup>504</sup> The photographic and video evidence from 2019 was inconsistent with the existence of any substantial embankment.<sup>505</sup> No embankment can be seen in the overwatch photographs.<sup>506</sup> Not even Person 11 described an embankment.<sup>507</sup> The finding is unchallenged and was correct.

#### ***Mr Roberts-Smith’s “unsatisfactory” evidence as to why the patrol was in the cornfield***

535. The trial judge correctly found that Mr Roberts-Smith’s evidence as to the path he took from the compound to the creek bed was “unsatisfactory”.<sup>508</sup> We address this in our closed court submissions at B19 – B21. The trial judge’s finding is unchallenged.

#### ***Mr Roberts-Smith’s discussions with Person 11 and other credit findings***

536. The trial judge found that Mr Roberts-Smith discussed his evidence “at length” with Person 11.<sup>509</sup> We summarise these findings in Section III above. These findings are unchallenged.

537. The trial judge also took into account the other adverse credit findings made against Mr Roberts-Smith, including those at Section 12 of the judgment (which we summarise in Section III above) as well as the credit findings in other parts of the judgement.<sup>510</sup> Again, none of these adverse credit findings are challenged.

#### ***Mr Roberts-Smith’s motive (Notice of Appeal particulars 26-28)***

538. Particulars 26 to 28 of the Notice of Appeal, and BRS [26.1] to [26.6] alleged that the trial judge

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<sup>497</sup> J [1233].

<sup>498</sup> T.410/46-411-3 (BRS).

<sup>499</sup> T.411/5-10 (BRS).

<sup>500</sup> J [1234].

<sup>501</sup> T.930/1-932/32; 938/10-32 (MH). Ex R-12 is a montage of three photos of the edge of the cornfield taken in 2019, which show no embankment. Hanifa said between 2012 and 2019, the area has gone down a little bit; he could not say whether it was one or one and a half hand-lengths.

<sup>502</sup> T.1058/42-1061/35 (MR).

<sup>503</sup> T.1147/43 -1148/29 (SF).

<sup>504</sup> T.4753/36-46 (P56).

<sup>505</sup> Ex R-19.

<sup>506</sup> See, for example, Ex R-2, page 3.

<sup>507</sup> J [1266].

<sup>508</sup> J [1234]; Closed Court Reasons at [82]-[88].

<sup>509</sup> J [1235].

<sup>510</sup> J [1235].

erred at J [1300] by finding that Mr Roberts-Smith had a motive to kill Ali Jan. The submission should be rejected.

539. *First*, the evidence established that Mr Roberts-Smith was suspicious that Ali Jan, Hanifa and Mangul had Taliban links (cf BRS [26.3(a)]).<sup>511</sup> Ali Jan, Hanifa and Mangul were questioned at length about being Taliban, Hanifa was expressly accused of being Taliban,<sup>512</sup> Hanifa was repeatedly asked where Hekmatullah was, and Hanifa was asked where he was going when he attempted to leave the village that morning.<sup>513</sup> Mangul was similarly asked whether Hanifa and Ali Jan were Taliban".<sup>514</sup> Person 4's evidence went even further: he said EKIA 4 (that is, Ali Jan) was by the patrol deemed to be the "primary concern".<sup>515</sup>

540. *Second*, the trial judge did not engage in impermissible tendency reasoning. The trial judge did not find that the mock execution in pre-deployment training – which is unchallenged on appeal – was evidence of a tendency that made the execution of Ali Jan more likely. Rather, the trial judge observed that the pre-deployment disclosed a possible motive for killing Ali Jan, namely, he was suspected to be Taliban. That is a different reasoning process and is consistent with the evidence at paragraphs 438 to 443 and 449 .

541. *Third*, the trial judge did not “cherry pick” the findings concerning pre-deployment training. His Honour made clear at [1300] that he considered the *whole* of the findings in pre-deployment training, as well as the two murders at W108, in support of a finding that Mr Roberts-Smith had a motive to kill Ali Jan because he was thought to be Taliban or likely to be Taliban. Again, that is consistent with Mr Roberts-Smith's state of mind at the time.<sup>516</sup>

542. *Fourth*, the trial judge made no finding that Mr Roberts-Smith had a “tendency” to use throwdowns (cf BRS [26.5-[26.6]). We addressed this point at paragraph 496 above.

543. *Finally*, the point ultimately goes nowhere given the trial judge's finding at J [1301]. There, his Honour said that "even if I am wrong and the respondents are precluded from advancing the “motive”, their case is established in the absence of proof of motive”.

544. For these reasons, Notice of Appeal particulars 26-28 should be dismissed.

#### **G. Person 11's account was false (Notice of Appeal particular 29)**

545. Particular 29 of the Notice of Appeal and BRS [27.1] contend that the trial judge erred by rejecting Person 11's evidence on Darwan in total. That submission should be rejected. To explain why, we first briefly summarise Person 11's account and the trial judge's findings..

546. Person 11's account, at a high level, was similar to Mr Roberts-Smith's. Person 11 denied that

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<sup>511</sup> See paragraphs 438 to 443 and 449 above.

<sup>512</sup> J [1049]-[1051]; T.953/42-45 (MH).

<sup>513</sup> J [1049]-[1051]; T.954/34 (MH).

<sup>514</sup> J [1049]-[1051]; T.1076/27-36 (MR).

<sup>515</sup> J [1047]; T.2623/7-10 (P4).

<sup>516</sup> See paragraphs 438 to 443 and 449 above.

there were any Afghan males in the end compound.<sup>517</sup> He denied that Mr Roberts-Smith kicked a PUC off a cliff, and he denied entering into an arrangement or understanding with Mr Roberts-Smith to kill the PUC.<sup>518</sup> Like Mr Roberts-Smith, Person 11 gave a positive account that EKIA 4 was a spotter engaged while the patrol was en route to the HLZ.<sup>519</sup>

547. At J [1283], the trial judge rejected Person 11's account for three broad reasons. *First*, his Honour accepted the Respondents' case, which necessarily led to the rejection of Person 11's evidence. *Second*, his Honour found that Person 11's account involved improbabilities of the same kind identified in Mr Roberts-Smith's account (see paragraphs 529 to 532 above). *Third*, the trial judge took into account 13 additional factors on which he either rejected Person 11's account or found that it should be "noted" in light of other evidence. For these reasons, the trial judge correctly found that generally, he was not an honest or reliable witness.

548. At BRS [27.1], Mr Roberts-Smith submits that the matters summarised by the trial judge are "insufficient to justify the wholesale rejection of [Person 11's] evidence", particularly where it was uncontradicted or corroborated by the evidence of other witnesses or documents. The submission should be rejected. It misstates the evidence and fails to engage in any meaningful analysis of the trial judge's findings.

549. *First*, Mr Roberts-Smith has identified no error of principle. The trial judge in his role as the finder of fact was entitled to reject or accept some or all of Person 11's account when his account was assessed as part of the evidence as a whole.<sup>520</sup>

550. *Second*, Mr Roberts-Smith has not analysed *any* of the matters identified by his Honour at J [1283], including the improbabilities identified at [1233] or the 13 matters identified at J [1265] to [1282]. He has not identified a single error in his Honour's reasoning in respect of any of the items identified, let alone why his Honour's conclusion was an error having regard to the evidence taken as a whole.

551. *Third*, the fact that three of the matters identified by the trial judge were not express findings of dishonesty does not displace the fact that, when the evidence was taken as a whole, Person 11's account was plainly dishonest and unreliable. The three matters cited by Mr Roberts-Smith at BRS [27.1] were not obvious mistakes in any event. The trial judge said that one was either a mistake or a lie; one was "suggestive" because he had a clear memory on only favourable matters; and the third had an "element of implausibility".<sup>521</sup>

552. *Fourth*, contrary to BRS [27.1], the trial judge did not "accept the evidence of Person 11 and compare it favourably with that of Mr Roberts-Smith". The paragraph cited in support of this submission is J [1265], which appears to be an error. The relevant reference appears to be J

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<sup>517</sup> J [1068];-[1070]; T.5676/26-41 (P11).

<sup>518</sup> J [1068];-[1070]; T.5676/26-41 (P11).

<sup>519</sup> J [1068];-[1070]; T.5676/26-41 (P11).

<sup>520</sup> See above at B. Principles of fact-finding.

<sup>521</sup> J [1269], [1274] and [1277]. The reference to J [1264] in at BRS [27.1] appears to be an error; we have assumed the reference was intended to be to [1274].

[1266], where the trial judge “noted” that Person 11 did not give evidence that there was an embankment and his position on approach does not suggest that there was one. That is by no means an endorsement of Person 11’s credit; it is simply an observation that Mr Roberts-Smith’s lie about the embankment was unsupported even by his own witness.

553. *Fifth*, Mr Roberts-Smith has not identified a single matter on a matter of controversy on which Person 11’s evidence was either uncontradicted or corroborated by a witness or a document that was not itself impugned (for example, Mr Roberts-Smith’s own evidence, or the Darwan OPSUM which contained an early account of Mr Roberts-Smith’s lie).

554. No error in the trial judge’s approach has been shown. His Honour’s assessment of Person 11’s credit was plainly correct. Notice of Appeal particular 29 should be dismissed.

#### **H. Reporting and procedures (Notice of Appeal particulars 21 and 25)**

555. In this next section, we address two particulars of the appeal which may be characterised as alleged departures from proper procedures. The first concerns post-mission reporting. The second concerns PUC-handling procedures.

##### ***Post-mission reporting (Notice of Appeal particular 21)***

556. At BRS [23.1] to [23.4], Mr Roberts-Smith raises two distinct points concerning post mission reporting. First, he submits that it is “improbable” that he could have given an unchallenged false account of killing a spotter in front of the other patrol commanders and the Troop Commander. Second, he submits that the significance of this issue is compounded by the evidence that multiple Australian witnesses were present, the majority of whom “must have been in a position to easily view the assault and the engagement”.

557. Yet again, this submission represents a departure from Mr Roberts-Smith’s framing of his appeal as not challenging the trial judge’s rejection of his, and his witnesses’, account. It squarely challenges the trial judge’s finding at J [1368(11)] that Mr Roberts-Smith’s report was false. In any event, the submission should be rejected for multiple reasons.

558. *First*, Mr Roberts-Smith was the exclusive source of the information in the OPSUM (see paragraph 510 above). The trial judge considered his account of engaging a spotter in the cornfield in detail and found it to be false. The trial judge expressly found at J [1368(11)] that Mr Roberts-Smith was disseminating false reports of the engagement. Mr Roberts-Smith has not challenged that finding of falsity, either in respect of the engagement itself or the subsequent reporting. In those circumstances, a prior record of Mr Roberts-Smith’s account in the OPSUM has no independent credibility or probative value.

559. *Second*, the account is inconsistent with Mr Roberts-Smith’s evidence at trial. The OPSUM states that an individual was spotted “moving through a thickly vegetated cornfield and was using



an ICOM radio” and that he ignored “clear and repeated warnings” to stop”.<sup>522</sup> Yet in evidence at trial, Mr Roberts-Smith repeatedly stated that the ICOM was discovered during SSE<sup>523</sup> and he disavowed the suggestion that the ICOM played any role in his conclusion that the individual was a spotter (it was merely confirmatory because it was only found during SSE).<sup>524</sup> There was no hint from either Mr Roberts-Smith or Person 11 that they gave the alleged spotter any warning, let alone “clear and repeated warnings”. In those circumstances, even on Mr Roberts-Smith’s case, the OPSUM is factually wrong.

560. *Third*, the attempt to link Mr Roberts-Smith’s false report of a spotter with the ICOM traffic on the day is contrary to the objective evidence of whether and where the ICOM traffic was detected on the day (cf BRS [23.1]). The trial judge correctly held that a particular place (not the cornfield) was identified as a source of the ICOM traffic, and that other important evidence did not indicate any ICOM traffic at all in the vicinity of the cornfield that day.<sup>525</sup>

561. *Fourth*, the submission at BRS [23.2] and [23.4] that it was “improbable” that he could provide an unchallenged false account in front of the other patrol commanders should be rejected. Mr Roberts-Smith speculates that it was “highly improbable” that at least one patrol commander did not know. Yet he overlooks the *actual* evidence from patrol commanders who were present who said they did not know of the cliff kick at that point. Person 7, for example, gave evidence that he queried the legitimacy of the killing to himself at the time but did not say anything.<sup>526</sup> Person 7 did not find out concretely about the murder until 2013.<sup>527</sup> Person 31 – another patrol commander at the meeting – similarly said he did not hear about the cliff kick until late 2012 or 2013.<sup>528</sup> So far from being improbable, it is readily apparent that Mr Roberts-Smith was able to make a false report immediately upon return to Tarin Kowt because the patrol commanders present did not know enough to challenge it.

562. *Fifth*, a submission is made at BRS [23.3] that at least 20 SASR soldiers remained in Darwan at the time of the cliff kick and “a majority of those must have been in a position to witness the assault and the engagement”. The submission on the shooting itself is inconsistent with the evidence. It took place in a cornfield into which there was limited visibility. For example, Hanifa and Shahzada both said they did not see the shots.<sup>529</sup> Shahzada said from his position, near the Eudoros 1 HLZ, the shooting was behind the berry trees.<sup>530</sup> Further, not everyone heard firing. Person 56 was at Eudoros 1, yet he said he heard nothing.<sup>531</sup> Thus, the killing in the field was difficult to see, and even some close by did not necessarily hear it.

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<sup>522</sup> Ex R-11 page 4.

<sup>523</sup> T.244/4; 245/17; 379/15-20; 414/22-23; 415/8-12 (BRS).

<sup>524</sup> T.415/22-27 (BRS).

<sup>525</sup> J [1325].

<sup>526</sup> T.3613/1-3614/16; T.3997/45-3998/3 (P7).

<sup>527</sup> T.3614/45-3616/29; 3641/3-6 (P7).

<sup>528</sup> T.4645/10-30 (P31).

<sup>529</sup> J [1054]; T.968/15-44, 973/23-37 (MH); J [1082]; T.1150/38-45 (SF).

<sup>530</sup> See paragraph 471 above.

<sup>531</sup> T.4754/10-20 (P56).

563. As for the cliff kick, the submission fails to consider precisely where the Australian soldiers were or what they were doing at the moment of the kick. It is important to establish the timing first. Person 7 said his patrol was at the Stream 6 HLZ, which was in the dry creek bed opposite the middle compound set.<sup>532</sup> He said he heard shots about 10 seconds after the 3-minute “helos out” call, which places the cliff kick approximately 1-2 minutes earlier.<sup>533</sup>
564. A number of Mr Roberts-Smith’s witnesses were in Darwan. He asked where they extracted from, but then avoided asking whether they could see the end compound from that location or were looking in that direction in the period 3-5 minutes before extraction. For example:
- (a) Person 38 was in Person 7’s patrol at Darwan. He was asked to mark his extraction location with the letter “D” on Ex 241.<sup>534</sup> Yet he was not asked what he could see, or where he was looking, in the period 3-5 minutes before extraction.
  - (b) Person 35 said his patrol (which included Person 32) extracted from the Bottle 5 HLZ.<sup>535</sup> He was not asked what he could see, or where he was looking, in the period 3-5 minutes before extraction.
  - (c) Person 32 was asked to mark his location with the letter “E” on Ex A-237. Yet he was not asked a single question about whether he could see the end compound, or where he was looking, in the period 3-5 minutes before extraction.
565. Mr Roberts-Smith made a forensic decision not to ask his witnesses whether they could see the final compound from their extraction locations, or whether they were looking in that direction in the period 3-5 minutes before extraction. The Court would infer that the answers would not have assisted him. At the very least, no inferences can be drawn in favour of Mr Roberts-Smith when he refrained from asking what are (on his case) crucial questions.<sup>536</sup> The inference would also be contrary to the unchallenged evidence of one witness who was close by. Person 56 was at the Eudoros 1 HLZ. He did not see the cliff kick, but he was told about it immediately upon return to Tarin Kowt. Person 56’s account is compelling proof that mere proximity to the cliff just before extraction does not mean the kick was inevitably seen.
566. There was no evidence that any member of the overwatch team was looking at the end compound or the cornfield at the time of the cliff kick or the engagement. It would be expected that in the time period 3-5 minutes before extraction they would have packed up and have been making preparations for extraction. Mr Roberts-Smith made no attempt to call any members of the overwatch team to give evidence about what, if anything, they saw. Given the matters at paragraphs 564-565, no inference can be drawn in Mr Roberts-Smith’s favour.

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<sup>532</sup> T3612/25-26 (P7).

<sup>533</sup> T.3613/45-3614/5 (P7).

<sup>534</sup> T.5955/39-43 (P38).

<sup>535</sup> T.5205/35-5206/10 (P35).

<sup>536</sup> *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418.

***PUC handling procedures (Notice of Appeal particular 25)***

567. The gravamen of particular 25 of the Notice of Appeal is that there was “ample time” for the Applicant and his patrol to have complied with the “standard PUC handling practice”. This is yet another example of the fact that, contrary to the overarching framing of his appeal, Mr Roberts-Smith does challenge the trial judge’s rejection of his account. It is impossible to consider the significance of standard PsUC handling procedures without considering the evidence of and concerning those found not to have complied with them. Obviously enough, Mr Roberts-Smith wishes to submit that the Respondents have not established the presence of PUCs in the final compound. That engages directly with Mr Roberts-Smith’s failed case and the failed challenges he put to Hanifa and Mangul and his contentions concerning the reliability of Persons 4 and 56. In any event, the submission is flawed for other reasons.
568. *First*, the submission misstates the evidence. Mr Roberts-Smith was the *only* witness who gave evidence of a “typical practice” whereby PUCs were returned to a centralised area. Person 35 and Person 32’s evidence said nothing of a “typical” practice. Their evidence was specific to the Darwan mission, where they said they took PUCs then dropped them off elsewhere during clearance. Person 7 was equally silent about a typical “practice”; his evidence was limited to what happened on the Darwan mission. The trial judge made no error in not relying on Mr Roberts-Smith’s uncorroborated evidence of a “typical” practice.
569. *Second*, the reliance on Person 14’s evidence is equally misplaced. Person 14 gave evidence that at Chinartu, several PUCs were taken to a tactical questioning area.<sup>537</sup> However, Person 14 also gave evidence that later in the mission, Mr Roberts-Smith had custody of a PUC in a *different* compound to the TQ area who he ultimately directed to be murdered. So far from assisting Mr Roberts-Smith on this point, the example of Chinartu is on all fours with the Respondents’ case. That is, late in the mission, Mr Roberts-Smith had a PUC in a *different* compound to the centralised holding area, who was murdered minutes before extraction and whose murder was then sought to be covered up with a throwdown.
570. *Third*, the criticisms at BRS [24.4] are misplaced. The trial judge did not “ignore the evidence of Person 32 and Person 7”. The trial judge was summarising Mr Roberts-Smith’s own submission, which did not refer to Person 7 at all. The summary was otherwise accurate. Next, the trial judge did not ignore Mr Roberts-Smith’s submission that other PUCs on the mission were consolidated around compound 43. Rather, the evidence viewed as a whole established that PUCs were *also* detained in the end compound. It inexorably followed that to the extent Mr Roberts-Smith *should* have sent PUCs back to a centralised holding area, the evidence was that he did not do so.
571. Lastly, the trial judge afforded appropriate weight to Mr Roberts-Smith’s submission that the killing of Ali Jan involved a departure from the usual practice of photographing and centralising PUCs. The trial judge properly took into account the conventional perception that members of

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<sup>537</sup> T.1658/5-35 (P14).

society do not ordinarily engage in criminal conduct (including, in this case, departures from military standard operating procedures) and was satisfied that Mr Roberts-Smith murdered Ali Jan. His Honour expressly directed himself to the principles in *Neat Holdings Pty Ltd v Karakan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 (see J [108], [114] and [1297]) and said that the “improbability of the applicant behaving in the way alleged by the respondents is clearly a matter to be taken into account and that is done as part of the Court’s obligation to apply s 140 of the Evidence Act and the Briginshaw principle”. No error has been shown in his Honour’s recognition or application of those principles.

#### **I. The credibility of Person 56**

572. At trial, there was no challenge to the honesty of Person 56. There was no suggestion he was motivated by personal animus.<sup>538</sup> The challenges centred around vulnerability, suggestibility, and alleged memory issues. None of those matters are pressed on appeal. Indeed, Mr Roberts-Smith does not challenge *any* of the trial judge’s findings about Person 56. That means that the following important aspects of Person 56’s evidence, which were accepted by the trial judge, stand unchallenged: (a) there were fighting aged males in the end compound; (2) the interpreter was in the end compound; and (3) in the ready room after the mission, Person 56 was told by Person 4 or Person 11 that “an individual had been kicked off a cliff and subsequently shot”.<sup>539</sup>

#### **J. The credibility of Person 4 (Notice of Appeal particulars 20(b) and 23)**

##### ***Overview of the challenge to Person 4’s credit***

573. Mr Roberts-Smith’s case at trial was not that Person 4 was being deliberately dishonest in his evidence. The core challenge to his credit was that he had “come to believe” that the “story” he told is true, but he is in fact “delusional” about those events.<sup>540</sup> The challenges to his evidence centred around mental health,<sup>541</sup> memory,<sup>542</sup> suggestibility<sup>543</sup> and an alleged “obsession” with Mr Roberts-Smith.<sup>544</sup> On appeal, Mr Roberts-Smith makes four narrower submissions. These appear at BRS [22.1] to [22.20.] In summary:

- (a) The first challenge concerns Person 4’s assumption that the ICOM throwdown placed on Ali Jan’s body came from the insurgent killed at the Helmand River. We dealt with this at paragraphs 476-500 above.
- (b) The second challenge concerns the logistics of the interpreter’s arrival at the end compound. We dealt with this at paragraphs 434 to 435 above.
- (c) The third challenge concerns the timing of Ali Jan’s arrival in the end compound. We dealt

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<sup>538</sup> T.4785/35-4786/10 (P56).

<sup>539</sup> J [1366].

<sup>540</sup> T.2822/4-22 (P4).

<sup>541</sup> T.2715/18-2729/8 (P4).

<sup>542</sup> T.2710/7-8 (P4).

<sup>543</sup> T.2771/35-2772/18 (P4).

<sup>544</sup> T.2822/4-22 (P4).

with this at paragraphs 445-452 above.

574. The fourth challenge concerns the timing of Person 4's initial disclosure of the cliff kick. At trial, Person 4 said he thought he first disclosed it in 2016. However, the evidence from four other witnesses placed it earlier, in late 2012 or 2013. It was not suggested to Person 4 that he did not disclose it at all; rather, the challenge to Person 4's evidence on this point was part of a larger submission on Person 4's memory. The trial judge said at J [1100] that this needed to be "considered carefully" and his Honour did so at J [1125] to [1144]. His Honour concluded that Person 4's memory was faulty as to the timing of his initial disclosure and that was a matter to be taken into account when assessing his evidence. His Honour ultimately accepted Person 4's evidence, other than matters on which he was mistaken (including this particular point on the timing of his first disclosure). No error has been shown in the trial judge's careful consideration of this issue. We deal with this further immediately below.

### ***The timing of Person 4's initial disclosure (Notice of Appeal particular 23)***

575. To answer this ground of appeal, it is necessary to briefly recap what each witness said.

#### Person 4's initial disclosure

576. Person 56's unchallenged evidence was he was told about the cliff kick (by Person 4 or in his presence) immediately on return to Tarin Kowt on the day of the incident. That evidence was not challenged at trial and the finding is not challenged on appeal.<sup>545</sup> So the first time Person 4 disclosed the cliff kick, or was present when it was disclosed, was on the very day it happened.

577. The next disclosure occurred in late 2012. Person 18 gave evidence that at a function at the Gratwick Club on base, after the squadron had returned from Afghanistan, Person 4 broke down to Person 18 and said words to the effect of, "Something very bad happened on the last job<sup>546</sup>...I was doing something. I turned around. I saw one of my teammates have hold of a detainee. I then saw Ben Roberts-Smith kick him off the cliff."<sup>547</sup> Person 4 said Ben Roberts-Smith then told him to go down and sort it out.<sup>548</sup> The trial judge accepted Person 18 to be honest and reliable (J [1130]) and that finding is not challenged on appeal.

578. Person 18 then said that in 2013, he spoke to Person 6, Person 7, his team commander, and Person 31 about the cliff kick.<sup>549</sup> Person 7 recalled this conversation. He said they were speaking about the Hekmatullah series of missions, and Person 18 told him "Ben Roberts-Smith kicked a man off a cliff."<sup>550</sup> Initially, Person 7 did not believe it and asked him to repeat what he had said. Person 18 said "well, if you don't believe me, go and ask Person 4".<sup>551</sup>

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<sup>545</sup> J [1366].

<sup>546</sup> T.3021/1-11 (P18).

<sup>547</sup> T.3023/22-25 (P18).

<sup>548</sup> J [1126]; T.3023/29-30 (P18).

<sup>549</sup> T.3023/39-41; T.3024/18-19 (P18).

<sup>550</sup> T.3615/4-16 (P7).

<sup>551</sup> T.3615/15-23 (P7).

579. Person 7 did just that. He spoke to Person 4 later that day or the next and Person 4 said:<sup>552</sup>

[Person 4 said] RS grabbed one of the PUCs, that he was walking around by – had him by the shoulder, walked him around, walked him to the edge of a cliff, and then he took a couple of paces away. He told me that he didn't know what was going on: "What's – what's this all about?" And then he said that RS then turned around and did a kick and kicked the man in the – in the chest and kicked him off the cliff.

I said to him, "Was this man detained? Was he bound? Were – were his hands bound?" He said, "Yes. They were." And I asked him, "Were they in front or behind his back?" And he said, "They were behind his back." He also told me that he got a wave of – or a wave of panic come across his – across his body, and he saw the man's – the Afghan man's head hit a rock, and a tooth flew out.

580. Person 7 stressed to Person 4 the seriousness of the allegation and asked him a couple of times "is this 100% accurate? Are you telling the truth?" Person 4 replied "yes bro, I am". Person 7 told Person 4 the allegation could not just be left. Person 4 just nodded his head.<sup>553</sup>

581. Person 31 gave unchallenged evidence that the trial judge said provided "clear corroboration" for Person 7's account.<sup>554</sup> Person 31 said in late 2012 or early 2013, Person 7 told him "he had just heard from Person 4 that Mr Roberts-Smith had words to the effect of 'kicked a – a PUC off the – off the cliff whilst we were on that job'."<sup>555</sup> Person 7 said "that the detainee was at the top where the patrol was, and that he was – he was kicked off the cliff."<sup>556</sup> Mr Roberts-Smith does not refer to this evidence anywhere in his submissions.

582. Andrew Hastie also gave unchallenged evidence that corroborated Person 7's evidence that he learned about the cliff kick before 2016.<sup>557</sup> Mr Hastie said that in the second half of 2014, he had a conversation with Person 7 and the Troop Sergeant about Mr Roberts-Smith.<sup>558</sup> During that conversation, Person 7 said "A PUC had been kicked off a cliff".<sup>559</sup> That was a "fairly well-established rumour" at the time and Mr Hastie had heard it independently.<sup>560</sup> Mr Roberts-Smith again does not refer to this evidence anywhere in his submissions.

583. At trial – and again on appeal – Mr Roberts-Smith points to two documents which he says support his case that Person 7 did not know of the cliff kick before 2016 (see BRS [22.13]).

- (a) The first is a complaint letter written by Person 6 in 2014 and signed by Person 7 about a commendation given to Mr Roberts-Smith for distinguished leadership. As Person 7 repeatedly said, he understood that the document was a response to the particular matters contained in Mr Roberts-Smith's citation (which is supported by the terms of the document

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<sup>552</sup> T.3615/25-3616/25 (P4).

<sup>553</sup> T.3616/19-25 (P7).

<sup>554</sup> J [1134]; T.4654/45-4655/12 (P31).

<sup>555</sup> T.4645/28-30 (P31).

<sup>556</sup> T.4673/37-38 (P31).

<sup>557</sup> T.4245/2-46 (AH).

<sup>558</sup> T.4244/43-4245/42 (AH).

<sup>559</sup> T.4245/41-47 (AH).

<sup>560</sup> T.4245/41-47; 4294/22-30; 4316/34-35 (AH).

itself).<sup>561</sup> The absence of any reference to the allegation concerning Darwan does not mean that Person 4 and Person 18 had not already told Person 7, or that Person 31 and Andrew Hastie's unchallenged evidence was wrong.

- (b) The second document is Chris Masters' summary notes of a conversation with Person 7. Person 7 was adamant that he told Mr Masters of the allegations.<sup>562</sup> The fact that Mr Masters did not record that allegation in writing does not prove that Person 7 did not tell him. And certainly does not prove that Person 4 and Person 18 had not told Person 7. The unchallenged evidence of Person 31 and Mr Hastie makes clear that Person 7 knew of the allegation long before 2016.

584. On Person 4's account, he first disclosed the cliff kick to Person 7 in 2016 when Person 7 asked about the mission to Darwan. Person 4 "found that odd, because it was common knowledge."<sup>563</sup> Pausing there, Person 4 was not disputing that the cliff kick was widely known by this time – his point was a narrower one. It was simply about the timing of his conversation with Person 7. Person 4 said he "recalled or retold the story to him" and Person 7 was visibly shocked.<sup>564</sup> Person 4 also said that he had a conversation with Person 18 about the mission to Darwan in 2019. Person 18 reached out and Person 4 went to his home and told him about Darwan.<sup>565</sup>

585. The trial judge made no error in finding that Person 4 was mistaken on the timing of his initial disclosures to Person 7 and Person 18. The trial judge heard evidence from five different people who heard of the cliff kick either directly or indirectly from Person 4 or in his presence, well before 2016. Three of those witnesses – Person 56, Person 31 and Andrew Hastie were unchallenged. Even Person 4 said that the cliff kick was "common knowledge" by 2016. The Court also heard unchallenged evidence that Person 7 was not in even in Australia in 2016, which indicates the conversation cannot have occurred then.<sup>566</sup> The evidence, taken as a whole, plainly supported his Honour's finding that Person 4 was mistaken, and the initial disclosure happened consistent with the evidence of Persons 7 and 18, in 2012 and 2013.

#### The evidence of Person 100

586. Person 7 gave evidence that after hearing this account, he went to three other sergeants and said "you won't believe what I've just been told. I've just been told that RS has kicked a bloke off a cliff".<sup>567</sup> Person 44 said, "There's a number of incidences from the 2009 trip".<sup>568</sup>

587. Person 7 said that group of sergeants subsequently went to the RSM, Person 100, to put the allegations forward.<sup>569</sup> At that meeting, the allegations raised included the cliff kick at Darwan

<sup>561</sup> See, e.g., T.3674/38-3675/2, T.3923/1-3 (P7).

<sup>562</sup> T.3667/13-20; 3691/3-5; 3693/6-13; 3697/8-10 (P7).

<sup>563</sup> T.2775/23-2777/24; 2792/15-17 (P4).

<sup>564</sup> T.2775/23-2777/24 (P4).

<sup>565</sup> T.2795/2799 (P4).

<sup>566</sup> T.3641/10-14 (P7).

<sup>567</sup> T.3617/3-11 (P7).

<sup>568</sup> T.3617/24-48 (P7).

<sup>569</sup> T.3672/38-3673/2 (P7).

and issues from the 2009 deployment.<sup>570</sup> Person 7 said the RSM's response was "What are you hoping to get out of this?" Person 7 replied, "It's not what I want to get out of this. It's what needs to be done".<sup>571</sup> Person 100 then wrapped up the meeting.<sup>572</sup>

588. Person 18 gave evidence that there was a second meeting with Person 100 in late 2013 attended by Persons 4, 8, 18 and 32. The meeting was arranged by Person 7. Person 4 spoke about what happened on the Darwan mission and said he watched Mr Roberts-Smith kick a detainee off a cliff.<sup>573</sup> Person 18 said the RSM was not very receptive.<sup>574</sup> The RSM said that it was out of his hands, it was way above his head, and he honestly did not know what to do with it.<sup>575</sup>

589. Person 31 gave unchallenged evidence corroborating the existence and content of this meeting. Person 31 said Person 7 told him that he had arranged a meeting with the RSM and members of Mr Roberts-Smith's team. Person 31 understood that part of the discussion was about the cliff kick.<sup>576</sup> Mr Roberts-Smith does not refer to this unchallenged evidence in his submissions.

590. Person 100 gave evidence for Mr Roberts-Smith. He denied being told about the cliff kick. The trial judge found that Person 100 did not have a good memory of the meeting, including who was present and what was said. It was also plain that Person 100 had "reinforced his memory" of the meeting by discussing it with a non-witness, Person 51.<sup>577</sup> In contrast, the evidence clearly established that Person 7 knew about the cliff kick by 2013 (see paragraphs 576 to 585 above). The trial judge said he had "no doubt that if Person 7 knew of the allegation he would have raised it".<sup>578</sup> Given the powerful evidence (and in the case of Person 31 unchallenged evidence) that Person 7 knew at the time, it inexorably followed that he reported it to Person 100.

591. The trial judge made no error in preferring the evidence of Person 7 to that of Person 100. His Honour found that Person 7 was an honest and reliable witness whose account was corroborated by Person 4, Person 18, Mr Hastie and the unchallenged account of Person 31. In contrast, Person 100 had a poor memory, and his evidence was contaminated by discussions with Person 51. His Honour made no error in this finding; it is plainly correct.

#### The trial judge's assessment of Person 4's mistake

592. For the reasons outlined above, trial judge correctly found that Person 4 was mistaken on the timing of his disclosure. When the evidence was assessed as a whole, it was clear that Person 4 had disclosed the kick cliff earlier than he thought. His Honour said at J [1100] that this was a matter that needed to be "considered carefully" and his Honour did so at J [1125] to [1144]. After considering the evidence as a whole, his Honour accepted Person 4's evidence, other than

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<sup>570</sup> T.3889/24-43; T.3876/35-38 (P7).

<sup>571</sup> T.3618/45-3619/2 (P7).

<sup>572</sup> T.3619/4-5 (P7).

<sup>573</sup> T.3025/4-13 (P18).

<sup>574</sup> T.3025/23-26 (P18).

<sup>575</sup> T.3025/26-27 (P18).

<sup>576</sup> T.4672/23-44 (P31).

<sup>577</sup> J [1142].

<sup>578</sup> J [1142].



matters on which he was mistaken (including on the timing of his first disclosure). No error has been shown in the trial judge's careful consideration of this issue.

593. The ultimate submission Mr Roberts-Smith seeks to make on this point appears at BRS [22.14]. There, Mr Roberts-Smith embraces Person 4's mistaken account that he did not tell Person 7 until 2016 (i.e., for "some years"). He then says the inference from the delay is that the alleged incident did not happen. That inference does not logically follow and should be rejected. Even if the trial judge was wrong and Person 4 did not tell Person 7 until 2016, that is no answer to the rest of the Respondents' case. It is no answer to Person 56's unchallenged evidence that he was told by Person 4 or Person 11 on the day. It is no answer to the evidence of Mangul, Shahzada and Hanifa. And it ignores Person 4's explanation for the timing of the conversation. He said that he found Person 7's question odd "because it was common knowledge."<sup>579</sup> Thus, even if Person 4 did not tell Person 7 until 2016, the inference is not that he "delayed" disclosure until that point and then invented a story. Rather, he understood that everyone already knew.

#### **Conclusion on Person 4**

594. The trial judge's approach to the evidence of Person 4 was principled and correct. His Honour considered Person 4's account with great care and in great detail at J [1090] to [1144]. Given the nature of the very personal and extensive attacks on his mental health and motivations, the trial judge recorded specific findings on his observations of Person 4 in the witness box.<sup>580</sup> The trial judge recorded that there was no medical evidence explaining how he could possibly have an innocent yet false memory of the cliff kick.<sup>581</sup> His Honour said there was no medical evidence that could explain how he could have innocently forgotten certain events and substituted those forgotten events with an elaborate and relatively intricate false account.<sup>582</sup> Further, his Honour noted that even if Person 4's evidence of having told Person 7 in 2016 was correct, that was before any media reporting of the incident so innocent corruption by the media was no answer.
595. At J [1367], his Honour properly had regard to the whole of the evidence in assessing Person 4's credit. He noted that Person 4's evidence was corroborated in material respects by the Afghan witnesses. At J [1367], his Honour also correctly took into account that there was "no evidence of any communication between Person 4 and the Afghan witnesses or any suggestion that they had some form of common motive to fabricate a story to harm or injure the applicant". The evidence of Person 56 materially corroborated Person 4's account that there were Afghan males in the end compound, and through his unchallenged evidence that he was told about the cliff kick and execution immediately on return to Tarin Kowt that day.
596. After taking all these matters into account, considering Person 4's evidence in the context of the evidence as a whole, the trial judge correctly accepted it. His Honour concluded that "Person 4

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<sup>579</sup> T.2775/23-2777/24; 2792/15-17 (P4).

<sup>580</sup> J [1102].

<sup>581</sup> J [1102].

<sup>582</sup> J [1102].

was an honest witness. I do not consider that any of his evidence was driven by ill will or professional jealousy against the applicant. I accept his evidence, except in relation to those matters where I have found his memory to be faulty or he is mistaken”.<sup>583</sup>

597. Nothing raised on appeal comes close to displacing the correctness of his Honour’s findings on Person 4. Particulars 20(b), 22 and 23 of the Notice of Appeal should be dismissed.

**K. Credibility of Mangul, Hanifa and Shahzada Fatih (Notice of Appeal particular 20)**

598. We turn next to deal with Mr Roberts-Smith’s submissions on Mangul, Hanifa and Shahzada. At trial, Mr Roberts-Smith submitted that these witnesses were dishonest liars who fabricated their very presence in the southern compounds of Darwan that day. This is the case put to them:

(a) **Mangul:** it was put to Mangul that “you’ve made up everything you’ve said about events on that day”;<sup>584</sup> neither Mangul nor his family were “present in the group of compounds at the time the soldiers got there that day”;<sup>585</sup> and the man Mangul “saw in the cornfield was not Ali Jan”.<sup>586</sup> Consistent with that challenge, it was put to Mangul that he did not see an interpreter,<sup>587</sup> he did not see a big soldier and he did not see a dog that day.<sup>588</sup>

(b) **Hanifa:** it was put to Hanifa that everything he said “is a fabrication”; he did not recall what Ali Jan looked like; he never saw any soldiers at Mangul’s compound; he never saw a dog on the day ; he never saw an interpreter in the end compound; and in fact, “neither you nor any members of your family were in the southern compounds on that day”.<sup>589</sup>

(c) **Shahzada:** it was put to Shahzada that his account was “a complete fabrication”.<sup>590</sup>

599. Within the overarching theme, specific lines of attack were pursued. The misguided attack on their credit concerning the presence of Mohammed Shah was one. We dealt with that at paragraph 414 above. The claim that there was no interpreter in the end compound was another. We dealt with that at paragraphs 429 to 435 above. The claim that there was no military working dog in the end compound was yet another. We dealt with that at paragraphs 427 to 428 above.

600. All of these challenges were comprehensively rejected by the trial judge. His Honour carefully considered the evidence of each witness and each of the challenges raised. His Honour then then assessed their evidence with all the other evidence as a whole and concluded that key aspects of their evidence formed part of a strong, consistent and coherent body of evidence called by the Respondents, including each of the other Afghan witnesses and Person 4 and

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<sup>583</sup> J [1365].

<sup>584</sup> T.1130/24-25 (MR).

<sup>585</sup> T.1130/43-44 (MR).

<sup>586</sup> T.1130/30 (MR).

<sup>587</sup> T.1109/8-15 (MR).

<sup>588</sup> CCT 29.7.21, p.18/40-41 (MR).

<sup>589</sup> T.1047/38-1038/36 (MH).

<sup>590</sup> T.1177/26-27 (SF).

Person 56.<sup>591</sup> Based on that holistic analysis, his Honour accepted their evidence.<sup>592</sup>

601. The truth of Mangul, Hanifa and Shahzada's evidence is unmistakable in much of the granular detail. We have outlined the evidence above in some detail about to illustrate this point. They correctly described the number of helicopters, the insertion and extraction sites, the direction from which they came and departed, and the location of the overwatch. They correctly described the scheme of manoeuvre. These details match ADF defence documents.<sup>593</sup> They gave details about the terrain, the inhabitants, the compounds, the fields and crops, and the complex familial and social relationships between the residents of Darwan that could only be given by people who lived there. Mangul and Hanifa correctly described an interpreter and an SASR dog in the end compound. They could not have known that Mr Roberts-Smith had a dog handler attached to his patrol that day. They correctly described Mr Roberts-Smith's height and his wet uniform. All of them accurately described injuries on Ali Jan's body, including the injury to his teeth.
602. Mr Roberts-Smith now challenges those findings. His submissions are divided across open and closed court submissions. In this section, we deal with the open court submissions concerning Hanifa, Mangul and Shahzada. Additional submissions are made in closed court concerning Hanifa and Mangul. Our submissions should be read together across both.
603. We make four overarching submissions before turning to the substance of the appeal.
604. *First*, it is unclear whether the positive overarching attack has been abandoned on appeal. The matters raised in both open and closed court submissions are narrower than at trial, but the overarching point appears to be the same. In any event, whether the challenge is narrow or broad, none of the matters still pressed even come close to displacing the trial judge's carefully reasoned conclusions on their evidence.
605. *Second*, this Court should approach the trial judge's findings in respect of Hanifa, Mangul and Shahzada with great deference. The trial judge had the significant advantage of seeing each witness give evidence from Afghanistan, via video-link, through an interpreter. He saw each of them respond to an extremely robust cross-examination when each of them was accused repeatedly of fabricating events and outright dishonesty. The questions were translated from English to Pashto; then answers were translated from Pashto back into English via a remote interpreter in Canada. His Honour was uniquely positioned to assess what was confusion or imprecision on the part of the two-step translation process versus the witness. For the closed-court challenges, his Honour had the additional complexity of assessing one interpreted account against another interpreted account, and whether apparent inconsistencies between the two accounts were (a) inconsistencies at all; and (b) if so, whether the cause was confusion or translation issues during one or the other of the two interpreted accounts, or something else. In

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<sup>591</sup> J [1176]; J [1187]; J [1200].

<sup>592</sup> J [1367].

these circumstances, this Court would be very slow to depart from the trial judge's detailed assessment of the credit and the reliability of Hanifa, Mangul or Shahzada, which ultimately took place in the context of the evidence as a whole including the evidence of Persons 4 and 56.

606. *Third*, it is important to bear in mind the absolute nature of the attack on their credit at trial. When Mr Roberts-Smith complains, for example, that Hanifa or Mangul were wrong that the interpreter was using a pistol, that must be assessed against a backdrop where Mr Roberts-Smith's case at trial was that neither the interpreter, Hanifa nor Mangul were there *at all*.

607. *Fourth*, Mr Roberts-Smith has dealt with the "Afghans" as a rolled-up group by topic rather than as individuals (as he has done with every other witness). That rolled-up approach obscures the proper analysis of the individual witness and their distinct evidence and perspectives. We therefore consider the matters raised on appeal by witness, not by topic.

### ***Mohammed Hanifa***

608. This section addresses five submissions directed at Hanifa. They should be read with our closed court submissions and the five challenges made to Hanifa there. The trial judge made no error in assessing these matters, individually or collectively or together with the whole of the evidence.

609. The *first* submission concerns Hanifa's evidence that he saw three soldiers shooting in the air at the same time that Ali Jan was being dragged by two soldiers across the dry riverbed (see particular 20(d)(ii), BRS [21.3]). Mr Roberts-Smith submits that is "a reckless act contrary to training and not corroborated by anyone else", and that is a matter sufficient to cast doubt on Hanifa's evidence. That submission has no evidentiary basis. Mr Roberts-Smith led no evidence of any relevant SASR training. It is not a matter of common knowledge. Nor did Mr Roberts-Smith lead any evidence from any of his witnesses to contradict Hanifa's evidence. Mr Roberts-Smith had four witnesses give evidence who were present at Darwan; Persons 11, 32, 35 and 38. He did not ask any of them about relevant training or whether they saw or heard anyone firing into the air shortly before extraction. Mr Roberts-Smith made a forensic decision not to ask these questions. No inferences can be drawn in favour of Mr Roberts-Smith when he refrained from asking questions on what he now says are important matters.<sup>594</sup>

610. The trial judge treated this evidence correctly. He found it was a matter to be taken into account, but rightly observed that the situation must have been "very frightening and fast-moving" from Hanifa's perspective.<sup>595</sup> It is also evident that Hanifa felt unable to articulate precisely what he saw. He said: "One thing that I forgot is that, when they were dragging Ali Jan, the shots were not loud as if you are shooting into the ground. And then the other shots I told you about, those were shots being fired into the – the air. **I didn't have a tape to record the shots or make a video of them so I can explain it to you.**" He felt frustrated that he could not communicate

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<sup>594</sup> *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418.

<sup>595</sup> J [1163].

precisely what he saw. There was no error in the trial judge's consideration of that issue.

611. The *second* submission concerns Hanifa's evidence that he saw helicopters firing at about the time of extraction (BRS [21.7]). The trial judge made no error in determining that this was a matter to be taken into account. The evidence is partly corroborated by Mangu (see below). The fact that no Australian witness gave evidence – one way or another – on this topic is not to the point. Mr Roberts-Smith did not ask his witnesses – Persons 11, 32, 35 and 38 about this issue. The inference is that he was afraid to do so. At the very least, no inference can be drawn in his favour about the likelihood or not of this occurring. The submission that the trial judge engaged in speculation on this issue is also wrong. He did no more than observe that the Respondents' submission was a possible explanation concluded that Hanifa's evidence on this point was a matter to take into account. Indeed, senior counsel for Mr Roberts-Smith suggested the very same explanation in cross-examination.<sup>596</sup> No error has been shown in that approach.<sup>597</sup>
612. The *third* submission concerns Hanifa's alleged motive to lie. At trial, Mr Roberts-Smith put forward two suggested motives to lie. The first was that Hanifa disliked Australian soldiers and thought Afghans killed were martyrs. The second concerned payment of witness fees. The trial judge considered each of the alleged motives and correctly rejected them, finding that they were not "strong motives" to lie.<sup>598</sup>
613. The first alleged motive went nowhere. Hanifa candidly agreed that he did not like Australian soldiers, regarded them as infidel, and called those killed by them martyrs.<sup>599</sup> But he made no suggestion that all Australians were bad, or all engagements were illegitimate. In other words, there no rational basis to infer that dislike for Australian soldiers had manifested itself in a motive to fabricate a false allegation against them.
614. The absence of a motive to fabricate allegations against Australians for killing a member of the Taliban was underscored by the fact that Hanifa was equally critical of the Taliban. Hanifa said he harboured no sympathy for the Taliban (or indeed, any side of the conflict that had wrecked his country) saying simply that he was "the public".<sup>600</sup> His criticism of the Taliban was plain when he readily acknowledged the legitimacy of the engagement at the Helmand River and that the insurgent killed there was Taliban.<sup>601</sup> The suggestion that Hanifa would on the one hand give positive evidence that assisted Mr Roberts-Smith about the death of one Taliban insurgent shot at the Helmand River, yet on the other invent a very intricate lie to cover up the death of a second Taliban insurgent shot by Person 11 in the cornfield, made no sense.
615. The suggestion that Hanifa was motivated by obtaining witness expenses was equally implausible and unsupported by evidence. He, like every other witness in the case, was entitled

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<sup>596</sup> T.1032/1-2 (MH).

<sup>597</sup> J [1169], [1181].

<sup>598</sup> J [1174], [1184].

<sup>599</sup> T.1005/1-30 (MH).

<sup>600</sup> T.1006/25-26 (MH).

<sup>601</sup> T.1033/32-37 (MH).

to payment of accommodation, food, and transport in connection with their evidence. The length of the trial, and the length of time he was obliged to be away from his homes, was a matter beyond his control. The veiled suggestion that, as a rural villager, the lure of spending several months in Kabul or Kandahar was a sufficient basis to infer a motive to lie has no evidentiary basis. The trial judge correctly concluded that this motive to lie advanced by Mr Roberts-Smith was not a strong motive for Hanifa to lie.<sup>602</sup>

616. The *fourth* submission was the extraordinary suggestion that the trial judge erred by disregarding the “reasonable likelihood” that Hanifa’s evidence was, in part, confused or was influenced by other raids to Darwan (BRS [21.13]). That submission was never put to Hanifa. He was accused of deliberate dishonesty; not mistake. The submission also disregards all the minute details of the day and the raid that could only be given by someone who was there. There can be no doubt – as the judge found<sup>603</sup> – that Hanifa was there on the day. For example:

- (a) Before the raid, Hanifa said that foreign forces distributed letters which said a reward would be given for any information about Hekmatullah.<sup>604</sup> There was no evidence of any other raid looking for Hekmatullah, other than the 11 September 2012 raid.
- (b) He correctly described seeing a big soldier who was wet up to his chest area.<sup>605</sup> There is no evidence that this peculiar event ever occurred on any other occasion.
- (c) He identified it was the same day that Yaro Mama and Nazir Gul were killed (the killings in compound 31).<sup>606</sup> That obviously was a one-off event.
- (d) He correctly described the presence of an interpreter in the end compound.<sup>607</sup>
- (e) He correctly described seeing a black dog in the end compound.<sup>608</sup>
- (f) He correctly gave evidence that Mohammed Shah was there.<sup>609</sup> Mohammed Shah was arrested in a different raid, so he cannot have confused those two.
- (g) He correctly identified the number and formation of the turn 1 helicopters.<sup>610</sup>
- (h) He correctly identified the location of the overwatch team (on a mountain on the east side of the village).<sup>611</sup>
- (i) He correctly described the arrival of the turn 2 helicopters.<sup>612</sup> Curiously, it was put to

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<sup>602</sup> J [1174]; J [1184].

<sup>603</sup> J [1367].

<sup>604</sup> J [975].

<sup>605</sup> See paragraph 77.

<sup>606</sup> T.997/26-27 (MH).

<sup>607</sup> See paragraph 79.

<sup>608</sup> See paragraph 59.

<sup>609</sup> T.945/3-6 (MH).

<sup>610</sup> See paragraph 17.

<sup>611</sup> See paragraph 29.

<sup>612</sup> See paragraph 31.

Hanifa that his evidence about seeing four more helicopters arrive was “not true”.<sup>613</sup> His evidence, however, was consistent with the operational documents and SASR witnesses that the troop inserted with two turns and that four Blackhawks landed on each turn.<sup>614</sup>

- (j) He correctly described the SASR and Commando scheme of manoeuvre.<sup>615</sup>
- (k) He said two soldiers dragged Ali Jan to the cornfield, consistent with Person 4.<sup>616</sup>
- (l) He correctly identified the location of and injuries on Ali Jan’s body.<sup>617</sup>
- (m) He correctly described aspects of the FE’s helicopter extraction plan.<sup>618</sup>

617. The *fifth* submission Mr Roberts-Smith raises is that there is no evidence the interpreter was armed with a pistol, contrary to the evidence of Hanifa (BRS [21.14]). The submission is wrong. Hanifa’s evidence is corroborated by Mangul. The submission also overlooks the photographic evidence that Person 13 (the interpreter) carried a pistol. There was only one full-length picture of Person 13 in evidence; and he was armed with a pistol.<sup>619</sup> The judge made no error in not referring to this specific submission when it was plainly wrong and contrary to unchallenged photographic evidence. Further, even if for some reason Person 13 was not carrying his pistol on the Darwan mission, that was still no answer to Hanifa’s corroborated evidence. The interpreter still had access to a pistol at the time. Mr Roberts-Smith himself always carried one,<sup>620</sup> and he participated in the questioning of Hanifa, Mangul and Ali Jan.<sup>621</sup> Thus, if did not bring his own, Person 13 had ready access to a pistol if one was considered necessary to question potential Taliban members about the whereabouts of the objective, Hekmatullah.

618. The trial judge made no error in his assessment of Hanifa. His Honour had the significant advantage in assessing his oral evidence given through an interpreter, in assessing all the complexities of cultural differences and translation issues and assessing the attacks upon his credit in that context. The trial judge correctly found that Hanifa’s evidence should be scrutinised with care given the matters identified at J [1159]-[1176] and in closed court.<sup>622</sup> However, his Honour accepted Hanifa’s evidence because it forms part of a “strong, consistent and coherent body of evidence... including the other Afghan witnesses and Persons 4 and 56”.<sup>623</sup>

619. Importantly, the trial judge further concluded that even if one discounted the corroboration from Mangul and Shahzada, the strong consistency and coherence with the evidence of Person 4, and to a lesser extent Person 56, was evident.<sup>624</sup> There was not a shred of evidence of collusion,

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<sup>613</sup> T.992/24-25 (MH).

<sup>614</sup> Ex R-11; T.3609/8-10; 3609/34-35 (P7); see also, Ex R-29, pages 26 and 35.

<sup>615</sup> See paragraph 49.

<sup>616</sup> See paragraph 105.

<sup>617</sup> See paragraph 106.

<sup>618</sup> See paragraph 140.

<sup>619</sup> Ex R-231.

<sup>620</sup> T.255/42 (BRS).

<sup>621</sup> T.2622/43-2623.5 (P4).

<sup>622</sup> J [1176].

<sup>623</sup> J [1176].

<sup>624</sup> J [1176].

contamination, or any connection between Person 4, Person 56 and Hanifa.<sup>625</sup> Nor was there any evidence of a common motive to fabricate a story or harm Mr Roberts-Smith.<sup>626</sup> The possibility that the SASR witnesses innocently but mistakenly invented a story of a cliff kick, and Hanifa dishonestly invented the exact same story without any contact or contamination or collusion, is fanciful. It is obvious he was telling the truth. In all the circumstances, the trial judge made no error in accepting his evidence.

### ***Mangul Rahmi***

620. This section addresses four submissions directed at Mangul. They should be read with our closed court submissions and the four challenges made to Mangul there. As with Hanifa, the trial judge made no error in assessing these matters, individually or collectively.

621. The *first* submission concerns Mangul's evidence that he heard helicopter fire at the time of the extraction. The trial judge correctly adopted the same approach to this evidence as he did with Hanifa's evidence that he saw the helicopters firing.<sup>627</sup> No error has been shown in that approach, for the reasons we identify above at paragraph 611.

622. The *second* submission Mangul's alleged motive to lie. At trial, Mr Roberts-Smith put forward the same two alleged motives that were put to Hanifa. A third motive was also put to Mangul: the outrageous proposition that Muslims believe themselves entitled to lie to infidels. That was rejected by Mangul with a simple: "No, I haven't seen anything like that. One should not tell a lie".<sup>628</sup> That third alleged motive rightly does not appear to be pressed in any way on appeal.

623. The first alleged motive went nowhere for the same reason it failed with Hanifa. Mangul candidly acknowledged that he hated the foreign soldiers.<sup>629</sup> However, he made no suggestion that all engagements were illegitimate. There was no rational basis to infer that dislike for Australian soldiers had manifested itself in a motive to fabricate a false allegation against them. As with Hanifa, Mangul readily acknowledged the legitimacy of the engagement at the Helmand River and that the insurgent killed there was Taliban.<sup>630</sup> There was no basis to think that Mangul would tell the truth about the river killing, yet fabricate a lie about a spotter in the cornfield.

624. The suggestion that Mangul was motivated by obtaining witness expenses is equally implausible and unsupported by evidence for the same reasons outlined in respect of Hanifa. Mangul made it clear that it was his intention, if possible, to return to Darwan after giving evidence.<sup>631</sup> There was no basis to conclude that money, compensation, or relocation provided any incentive to lie or embellish. The trial judge correctly rejected this submission.<sup>632</sup>

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<sup>625</sup> J [1376].

<sup>626</sup> J [1376].

<sup>627</sup> J [1181].

<sup>628</sup> T.1103/40-1104/12 (MR).

<sup>629</sup> T.1109/35-38 (MR).

<sup>630</sup> T.1107/35-47 (MR); T.1033/32-37 (MH).

<sup>631</sup> T.1021/31 (MH).

<sup>632</sup> J [1174]; J [1184].



625. The *third* submission is that the trial judge erred by disregarding the “reasonable likelihood” that Mangul was confused with another raid (BRS [21.13]). That submission was baseless. His evidence contained numerous details that reasonably could only have been observed by a person present on the day. For example:

- (a) He identified it was the same day that Yaro Mama and Nazir Gul were killed.
- (b) He correctly identified that a dog was with Mr Roberts-Smith’s patrol that day.<sup>633</sup> When it was suggested he may have seen dogs on other occasions, Mangul gave an unassailable response: “Of course I may have seen the dogs before, but this one I remember very well because it bit me”.<sup>634</sup>
- (c) He correctly identified that there was an interpreter in the end compound.<sup>635</sup>
- (d) He correctly identified that there was “big soldier” in the end compound.<sup>636</sup>
- (e) Mangul correctly identified the number and landing areas of the turn 1 Blackhawks.<sup>637</sup>
- (f) He correctly observed soldiers in the location of the overwatch.<sup>638</sup>
- (g) He correctly identified aspects of the turn 2 extraction, notably, that the overwatch was picked up last.<sup>639</sup>
- (h) He described injuries on Ali Jan’s body that were consistent with the SSE photographs.<sup>640</sup>
- (i) He correctly identified the location of Ali Jan’s body.<sup>641</sup>

626. The *fourth* submission concerns the interpreter’s pistol. We repeat our submissions at paragraph 617 where we considered the same submission in respect of Hanifa.

627. The trial judge made no error in accepting Mangul’s evidence having regard to the matters addressed above and in closed court. His Honour considered that his evidence should be scrutinized with care but accepted it for the same reasons he accepted Hanifa’s evidence.<sup>642</sup> As with Hanifa, his Honour had the significant advantage in assessing Mangul’s evidence, given through an interpreter, and assessing the various attacks on his credit. Again, the trial judge considered that even if one discounted the corroboration of Mangul’s evidence from Hanifa and Shahzada, the strong consistency and coherence with the evidence of Person 4 and Person 56 was evident.<sup>643</sup> There was not a shred of evidence of collusion, contamination, or any connection

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<sup>633</sup> See paragraph 30.

<sup>634</sup> CCT 29.07.21, p.19/5-9 (MR).

<sup>635</sup> See paragraph 76

<sup>636</sup> See paragraph 80.

<sup>637</sup> See paragraph 20.

<sup>638</sup> See paragraph 29.

<sup>639</sup> See paragraph 143.

<sup>640</sup> See paragraph 147.

<sup>641</sup> See paragraph 106.

<sup>642</sup> J [1185]-[1187], [1376].

<sup>643</sup> J [1176], picked up by [1187].

between Person 4, Person 56 and Mangul.<sup>644</sup> Nor was there any evidence of a common motive to fabricate a story or harm Mr Roberts-Smith.<sup>645</sup> In all of the circumstances, the trial judge made no error in accepting his evidence.

***Shahzada's evidence (Notice of Appeal particulars 20(d)(iii)-(v))***

628. This section addresses six submissions directed at Shahzada. No submissions are made about Shahzada in closed court. Below is the entirety of Mr Roberts-Smith's attack on his credit and reliability. The trial judge made no error in assessing these matters, individually or collectively.

629. The *first* challenge is to Shahzada's evidence that he observed "many soldiers" at the hut where he was detained, and soldiers near "our houses" and "at the creek over the riverbed" (BRS [21.4]). There cannot be any serious dispute that there were, in fact, Australian soldiers at each of those locations at various points in the mission. The complaint is no more than Shahzada was imprecise. As the trial judge said, that is hardly a basis for concluding that he invented the whole account. It is also important to recall the challenge to Shahzada's evidence. As outlined above, it was out to him that his account was "a complete fabrication".<sup>646</sup> The trial judge was correct to view this evidence through that lens.

630. The submission at BRS [21.6] (that many soldiers in the riverbed increases the improbability of Mr Roberts-Smith engaging in unlawful conduct) raises the same issues addressed above in connection with Person 4. We dealt with this at paragraphs 561 to 566 above.

631. The *second* challenge concerns Shahzada's evidence about shooting earlier in the day (BRS [21.8]). The trial judge agreed that this aspect of his evidence was confusing, and it was a matter to be taken into account.<sup>647</sup> There was no error in that approach. As for the second matter – that Shahzada was confused about the timing of the arrival of further planes – the criticism is unwarranted. Shahzada was plainly referring to the turn 2 insertion, which took place shortly after Hanifa and Ali Jan had returned to the end compound after being shot at. The trial judge expressly addressed this at J [991] and observed that Ali Jan and Hanifa's failed attempt to leave the village must have occurred sometime before the arrival of Turn 2 at 0623DE.<sup>648</sup>

632. *Third*, Mr Roberts-Smith makes the sweeping submission that Shahzada appeared to be "deeply confused – repeatedly" on the basis that there was a momentary lack of clarity about precisely when the shots that killed Ali Jan were fired. The evidence was as follows:<sup>649</sup>

MR OWENS: Okay. And then a moment ago, you talked about shots that you heard near the berry tree. When did you hear those shots?

THE INTERPRETER: That was probably maybe 10 minutes or something like that when that soldier started coming down, but we could – **I could not see him anymore. That's**

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<sup>644</sup> J [1376].

<sup>645</sup> J [1376].

<sup>646</sup> T.1177/26-27 (SF).

<sup>647</sup> J [1195].

<sup>648</sup> J [991].

<sup>649</sup> T.1156/4-29 (SF).

**when those shots were fired.**

MR OWENS: You mean when – which soldier came down from where?

THE INTERPRETER: When the – the soldier came, that – what I mean is the – the – the big soldier. **When he was coming down, the shot – he – he fired the shots.**

MR OWENS: Coming down from where?

THE INTERPRETER: Soldier?

MR OWENS: Yes. The soldier. You said - - -

THE INTERPRETER: Soldier – soldier from where?

MR OWENS: You said it was after the big soldier came down, and I want to know, came down from where? Where was he coming down from?

THE INTERPRETER: From our – from our – the witness didn't mention our what. **From our – when he came from our, he came down, and that's when the shots were fired. Yes.**

633. In this evidence, Shahzada was explaining that after Ali Jan was kicked from the cliff, the big soldier came down from the end compound and disappeared behind the berry trees and that is when shots were heard. Shahzada made clear in other answers that he could hear light firing, but he could not see it because of the berry trees.<sup>650</sup> In the middle of the passage, there is momentary confusion in the translated evidence where it appears that Shahzada was saying that shots were fired as the big soldier was coming down from the end compound into the dry riverbed, but then he reiterates that the shots were fired *after* he came down. This is, at worst, momentary confusion in translated evidence rather than the material change in position that Mr Roberts-Smith suggests. The trial judge made no error in his treatment of this passage. The regrettable submission that this one passage suggests that Shahzada was “deeply confused – repeatedly” should be firmly rejected.
634. *Third*, Mr Roberts-Smith submits that Shahzada's evidence about Mr Roberts-Smith speaking in Pashto was “fanciful” and “nonsensical” (BRS [22.11]). Yet again, no error in the trial judge's assessment of the evidence has been shown. Mr Roberts-Smith overlooks the trial judge's finding that Australian soldiers, including him, could speak basic Pashto words and it was possible Mr Roberts-Smith said something more basic than Shahzada recalled. In other words, his Honour plainly considered it was possible that Mr Roberts-Smith *did* speak to the PUCs, but it was unlikely to be as complex as Shahzada recalled. That is why his Honour found that Shahzada's evidence could not be “strictly correct”, and correctly considered it was a matter to be considered in the overall assessment of his evidence.
635. *Fourth*, BRS [21.12] makes a submission about Shahzada's eyesight which rests on a false premise. At trial, senior counsel for Mr Roberts-Smith put to Shahzada the erroneous proposition that he was located 250 metres from the end compound. It was in fact around 100 metres as the

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<sup>650</sup> J [1082]; T.1150/38-45 (SF).

trial judge rightly found.<sup>651</sup> From that location, 100 metres away, Shahzada had a clear line of sight to the end compound.<sup>652</sup> Shahzada said he was sitting on the closest side of the hut; the hut wall was open and there was a gap in the trees through which he could see Mangul's compound.<sup>653</sup> The gaps he described are evident on the overwatch photographs taken on the day. There was no reason to doubt his evidence on this basis. Moreover, Shahzada confirmed that his eyesight was not weak.<sup>654</sup> There was no error in the trial judge's finding that the distance was much less than Mr Roberts-Smith's counsel had submitted, and that Shahzada's eyesight was no impediment to him seeing the cliff kick.

636. BRS [21.12] makes the repetitive submission that if Shahzada saw the cliff kick, it "beggars belief" that others did not also. Mr Roberts-Smith was afraid to ask this very question of his witnesses. No inference can be drawn in his favour in those circumstances. As for Shahzada, unlike the Australian soldiers, he had a very powerful reason to be watching the end compound: his son and brother-in-law were there. Shahzada said he could see Ali Jan and Hanifa sitting near the wall at Mangul's compound with their hands tied<sup>655</sup> and their heads lowered.<sup>656</sup> Shahzada could also see Hanifa's dark clothes.<sup>657</sup> A well-founded fear for the safety of his son and his brother-in-law readily explains why Shahzada was fixated on that location.
637. *Fifth*, as with both Hanifa and Mangul, Shahzada's evidence contained numerous details that reasonably could only have been observed by a person present on the day. He correctly identified the number and landing areas of the turn 1 Blackhawk helicopters.<sup>658</sup> He correctly identified the location of the overwatch team.<sup>659</sup> He correctly identified the presence of a tall soldier and an interpreter present during the clearance of the southern compounds.<sup>660</sup>
638. *Sixth*, as for motive, we repeat our submissions above in respect of Hanifa and Mangul. Shahzada made clear that he felt no obligation to Dr Sharif (the intermediary with the Respondents).<sup>661</sup> The trial judge correctly rejected this submission.<sup>662</sup>
639. At J [1200], the trial judge concluded that in light of the matters outlined above, he accepted Shahzada's evidence with "considerable caution".<sup>663</sup> However, as with Hanifa and Mangul, the corroboration from Person 4 and Person 56 was a powerful reason to accept the key aspects of his evidence. There was no error in that finding. No aspect of Shahzada's evidence warranted

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<sup>651</sup> The scale on Ex R-1 shows that the distance from the hut to Mangul's compound was in fact no more than 100 metres.

<sup>652</sup> T.1164/41-43 (SF).

<sup>653</sup> T.1163/25-1169/25 (SF).

<sup>654</sup> T.1181/104 (SF).

<sup>655</sup> J [1057]; T.1149/19-30 (SF).

<sup>656</sup> J [1057]; T.1149/36 (SF).

<sup>657</sup> J [1057]; T.1171/29-31 (SF).

<sup>658</sup> See paragraph 20.

<sup>659</sup> See paragraph 29.

<sup>660</sup> See paragraph 50.

<sup>661</sup> T.1021/31 (MH).

<sup>662</sup> J [1174]; J [1184].

<sup>663</sup>

the wholesale rejection of his powerfully corroborated account.

### ***Conclusion on the Afghan witnesses***

640. The trial judge made no error in his assessment of Hanifa, Mangul or Shahzada. This Court should afford significant defence to the trial judge's findings, for the reasons outlined above. In circumstances where Mr Roberts-Smith failed to mention, let alone analyse, much of the relevant evidence, the glib submission at BRS [21.15] that the trial judge failed to undertake "any holistic analysis of the evidence to assess its reliability" is plainly wrong and should be firmly rejected.
641. The peculiar details described by the Afghan witnesses unquestionably shows they were there on the day of the raid. Equally as importantly, their evidence was corroborated by Person 4 and the unchallenged evidence of Person 56. The possibility that the SASR witnesses innocently but mistakenly invented a story of a cliff kick, and the Afghan witnesses dishonestly invented the exact same story, is fanciful. It is obvious they were telling the truth. The trial judge made no error in accepting their evidence. Notice of Appeal particular 20 should be dismissed.

### **L. Conclusion (Notice of Appeal particular 30)**

642. It was only after the trial judge had carefully considered all of the Respondents' evidence and Mr Roberts-Smith's evidence as a whole, and had considered Mr Roberts-Smith's criticisms of the Respondents' witnesses in detail, that his Honour made definitive factual findings. These appear at J [1364] to [1368]. They were based on a comprehensive and detailed analysis spanning more than 400 paragraphs of the judgment (J [933] to [1370]).
643. BRS [28.1] identifies five matters in conclusion which he says mean the murder finding could not be justified. Each matter is wrong or materially overstated. Mangul, Hanifa, Shahzada, Person 4 and Person 56 were honest and reliable witnesses whose evidence, taken as a whole, was a compelling, coherent and reliable account of the murder of Ali Jan. It stood in stark contrast to the deliberately dishonest accounts of Mr Roberts-Smith and Person 11. The handful of cherry-picked matters identified on appeal go nowhere near displacing those findings. The continued reliance on the contemporaneous records – in which Mr Roberts-Smith planted his false story – is equally inapt. Those records have no greater credibility than the dishonest account that the trial judge rejected at trial, and which is not appealed.
644. The final submission Mr Roberts-Smith makes at BRS [28.1] does no more than restate the standard of proof. The improbability of citizens committing criminal offences is one of the core matters that informs the application of s 140 of the Evidence Act. His Honour considered the relevant principles in depth at J [95] to [116]. No error has been identified in either the identification or application of those principles.
645. In conclusion: the murder of Ali Jan by Mr Roberts-Smith and Person 11 was categorically established by the evidence. No error in the trial judge's reasoning or findings has been shown. Grounds 5 to 9 of Mr Roberts-Smith's appeal should be dismissed.

## **SECTION V: THE MURDER OF AN AFGHAN MALE AT CHINARTU ON 12 OCTOBER 2012**

### **A. Overview**

646. The evidence of the murder at Chinartu adduced at trial was extraordinary. The account in the OPSUM was falsified. A rifle found earlier in the mission was falsely attributed to the EKIA in the official reports. Mr Roberts-Smith colluded with witnesses to present a false positive case (the Person 12 lie). A range of other falsehoods were put forward to discredit the evidence of Person 14, an eyewitness and the Respondents' main witness to the events in Chinartu. And the evidence of Person 14 matched the contemporaneous documents to an extent that simply could not be falsified. In all those circumstances, the trial judge's finding was plainly correct.
647. As with the other parts of the appeal, the advantages enjoyed by the trial judge in respect of the evidence given on Chinartu warrants significant deference. That is so in at least three respects.
- (a) The *first* is the Person 12 lie. The trial judge had the advantage of watching the Person 12 lie first be told and then exposed, over the course of the trial. His Honour's subtle analysis of the state of mind of each of the witnesses involved, and the consequences for their credibility, is the product of that observation.
  - (b) The *second* is that the trial judge was able to reflect on and study each of the official records as the long trial went on and as they were addressed by witnesses. His Honour was able to consider at length the interaction between the two inconsistent timing records, and the interaction of multiple pieces of evidence to determine which one was correct.
  - (c) The *third* concerns his Honour's analysis of the honesty and reliability of Person 14, an eyewitness. Despite a multipronged attack by Mr Roberts-Smith, the trial judge accepted Person 14's evidence on Chinartu. He did so having observed Person 14 give evidence for five full days, including four days of cross-examination, across Chinartu and W108.<sup>1</sup> The trial judge's findings on Person 14 should be treated with significant deference.
648. Mr Roberts-Smith's appeal on Chinartu is narrow. He does not seek to disturb key findings on the military records, such as the time when the Afghan male was killed. Nor does he challenge the presence of Person 12. He only has a minor quibble with the findings about the credit consequences of the Person 12 lie. The case is almost wholly focused on Person 14's credibility.
649. However, the challenge to Person 14's credit rests on a confusing analysis of the evidence and the trial judge's findings. The confusion is caused in part by moving between accurate and falsified documents without distinction. But once the evidence is properly understood – including the timing of events and which documents are accurate and which are not – the evidence of a murder is compelling and each of the grounds of appeal fall away.

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<sup>1</sup> T.1386-1803 (P14).

## **B. The killing of an Afghan male PUC at Chinartu**

650. This section analyses the relevant events of the mission to Chinartu in chronological order, with reference to the official records, identifying those facts in dispute below and on appeal. The timing of events is particularly significant to the fact-finding exercise on Chinartu.

651. Two types of official documents are important to understanding the story of the Chinartu mission:

- (a) **The “Sametime chat record”**: a live or real time record of events during a mission.<sup>2</sup>
- (b) **The OPSUM**: the operational summary prepared after a mission which contains a summary of “timings and events” and other information relevant to the mission. After a mission, the troop commander, troop sergeant and patrol commanders would meet and the patrol commanders would provide a debrief on what each team did on a particular mission. After-action reports were then prepared. The operations staff at headquarters would then prepare the OPSUM based on those after-action reports.<sup>3</sup>

652. Other records are dealt with in the closed Court submissions. As will be seen, there was a key difference between the OPSUM and Sametime chat record for the mission to Chinartu. The Sametime chat record was accepted to be correct. The false entry was in the OPSUM.

### ***The first part of the mission to Chinartu***

653. The events of the early part of the mission to Chinartu are not in contention. However, they form important context for the factual findings which Mr Roberts-Smith seeks to challenge.

654. 2 Squadron carried out the mission to Chinartu. It consisted of G Troop and E Troop. There were four patrols in G Troop. Mr Roberts-Smith was a patrol commander in G Troop. In his patrol (on this day) were Persons 4 (2IC), 11, 14 and 27.<sup>4</sup> Person 57 was commander of another patrol in G Troop. E Troop had three patrols. Person 35 was commander of one patrol, which consisted of Person 32 (2IC) and a number of Afghan Partner Force or NDS-Wakunish soldiers.<sup>5</sup>

655. At 1329DE, the helicopter carrying Mr Roberts-Smith and his patrol (part of Turn 1) was wheels down at Chinartu.<sup>6</sup> After disembarking, Person 14 said that he and Person 27 separated from their patrol. They cleared a compound while the patrol ran on to the compound where Objective Stolen Idea was thought to be.<sup>7</sup> Person 14 and 27 detained a number of PUCs, who were taken to the pre-designated tactical questioning (**TQ**) room by another soldier.<sup>8</sup>

656. Person 14 then chatted with Person 13, an interpreter.<sup>9</sup> There was a request over the radio for

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<sup>2</sup> J [1383]; for the Sametime chat for the mission to Chinartu, see Ex R-36 (sensitive version is Ex A-10 (Tab 51) (a closed court exhibit)).

<sup>3</sup> J [1431].

<sup>4</sup> J [1373].

<sup>5</sup> J [1374].

<sup>6</sup> J [1387].

<sup>7</sup> J [1397].

<sup>8</sup> J [1397].

<sup>9</sup> J [1397].

Person 14 to go to the TQ room. When he arrived, he noticed a number of PUCs and Mr Roberts-Smith, who appeared to be leading the questioning. Mr Roberts-Smith and Person 14 had a brief conversation.<sup>10</sup> Person 14 then walked back down the hill to the area where he had been chatting with Person 13, though Person 13 was no longer there.<sup>11</sup>

### ***The first key divergence between the OPSUM and the Sametime chat record***

657. The first critical divergence in the records occurs at this point. We turn first to the OPSUM.

- (a) The OPSUM records that at 1405DE, an Afghan Partner Force member engaged an insurgent while attempting to clear a compound.<sup>12</sup> This is the entry which the trial judge found was false. We will return to it in the next section.
- (b) The OPSUM records a second engagement happening at approximately 1410DE. The engagement was of an insurgent armed with an AK-47. He was killed by a fragmentation grenade.<sup>13</sup> (This was established to be Objective Stolen Idea.<sup>14</sup>)

658. The Sametime chat record, however, only records a single engagement at around this time. It has a single entry for an EKIA at 1414DE.<sup>15</sup> It reads: “1414DE: FE advise 1 x EKIA (NFI ATT)”. The OPSUM entry for 1410DE and the Sametime chat entry at 1414DE were the same engagement.<sup>16</sup> Mr Roberts-Smith gave unchallenged evidence that Person 57’s patrol was responsible for that engagement.<sup>17</sup>

### ***Events up to the extraction radio call***

659. Following the initial clearance of the compounds, there was a period of over an hour during which the SSE process and tactical questioning were carried out. There is no record of any engagements during this period.<sup>18</sup> At 1512DE, the Force Element requested extraction.<sup>19</sup>

660. At 1530DE, there is another relevant departure between the two records:

- (a) At 1530DE, the Sametime chat record contains an entry to the effect that there would be “POI” (Persons of Interest) coming from Chinartu, that numbers were “still TBC, planning on 3-4 ATT” (TBC means “to be confirmed”; ATT means “at this time”).<sup>20</sup>
- (b) According to the OPSUM, at 1530DE, the Force Element detained two “POI”.<sup>21</sup>

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<sup>10</sup> J [1398].

<sup>11</sup> J [1398].

<sup>12</sup> J [1402].

<sup>13</sup> J [1404].

<sup>14</sup> J [1432].

<sup>15</sup> J [1406].

<sup>16</sup> J [1435].

<sup>17</sup> J [1407].

<sup>18</sup> J [1408].

<sup>19</sup> J [1408].

<sup>20</sup> J [1412].

<sup>21</sup> J [1413].



661. At 1534DE, the helicopters on Turn 1 left Tarin Kowt.<sup>22</sup> Person 14 recalled a radio call saying the helicopters on Turn 1 had left Tarin Kowt and it was necessary to prepare for extraction. At this point, he was situated in the same location as his previous chat with Person 13.<sup>23</sup> He knew the patrols would then start to collapse in from their positions and moving to the extraction point, so he sought to re-join his patrol so he could extract with them.<sup>24</sup> He headed back to the TQ room. When he arrived, he was told that Mr Roberts-Smith had gone up the hill, to a compound about 80 to 100 metres away.<sup>25</sup> He walked there.

### ***The killing of the Afghan male***

662. When Person 14 arrived at the compound on the hill, he stood outdoors but within the perimeter wall. He could see Mr Roberts-Smith, Persons 11, 12, 13, and about four Afghan Partner Force members in the room. With him outside were Persons 32, 34 and a combat engineer.<sup>26</sup> The soldiers inside the room were questioning a middle-aged Afghan male.<sup>27</sup> Person 14 expected that they would “wrap ... up” the questioning so they could go to the helicopters.<sup>28</sup>

663. Person 14 then looked at the perimeter wall of the compound. He noticed a “massive discolouration in the wall like it had recently been plastered with mud”.<sup>29</sup> He kicked it. He discovered a cache. Inside, there were bags of bullets, binoculars, RPG warheads with boosters and rifles. He started pulling items out. Then the combat engineers took over.<sup>30</sup>

664. Person 14 said he then went back to the window. He observed that the mood in the room had changed. Mr Roberts-Smith said to Person 13, while pointing at Person 12: “Tell him to shoot him or I will.”<sup>31</sup> Person 13 looked at Mr Roberts-Smith as if to say: “What?” Mr Roberts-Smith repeated: “Tell him to shoot him or I will.”<sup>32</sup>

665. Person 13 said something to Person 12 in an Afghan dialect. Person 12 asked something “very short” of Person 13. Person 13 spoke again. Person 12 turned to his soldiers and said something. There was a “small” discussion. One of the soldiers, whose face was covered with a balaclava or a recon wrap, stepped out of the group of soldiers. He trained his suppressed M4 on the Afghan man. He fired five to eight rounds into the man’s torso, and the man dropped to the ground. The Afghan soldier then fired at least another two rounds into the man’s head area.<sup>33</sup> The passage of time meant that it was now close to the time of extraction.<sup>34</sup>

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<sup>22</sup> J [1410].

<sup>23</sup> T.1435/19 (P14).

<sup>24</sup> T1435/21-31 (P14).

<sup>25</sup> J [1411].

<sup>26</sup> J [1414].

<sup>27</sup> J [1415].

<sup>28</sup> T1440/43-44 (P14).

<sup>29</sup> T.1441/6-7 (P14).

<sup>30</sup> J [1416].

<sup>31</sup> J [1416].

<sup>32</sup> J [1417].

<sup>33</sup> J [1418].

<sup>34</sup> T.1443/17-18 (P14).

### ***The second key divergence between the OPSUM and the Sametime chat record***

666. The next important divergence in the records occurs at this point.

- (a) At 1539DE, the Sametime chat recorded a second EKIA: “1539DE: FE reports 1 x (additional) EKIA. Total now 2 for the msn.”<sup>35</sup>
- (b) The OPSUM is silent. It says nothing about a killing anytime after 1410DE. The only other EKIA referred to in the OPSUM (and the only EKIA attributed to a member of the Afghan partner force) was said to have occurred at 1405DE *before* Person 57’s patrol’s EKIA.

### ***The change in the PUC count***

667. Person 14 said the soldiers then moved out of the compound, back to the Objective compound area. The engineers had finished their work. Person 14 saw the troop sergeant, Person 26, who was not happy. He said: “What happened – what happened to the fucking PUC?”. No one answered. Person 26 said something like: “The PUC count has already gone in and the helos are – helos are coming in.”<sup>36</sup>

668. At 1551DE, the Turn 1 helicopters left Chinartu for Tarin Kowt with two POIs.<sup>37</sup> Despite the earlier estimate of three to four, these two were the only PUCs taken back to Tarin Kowt.<sup>38</sup>

### **C. The official records**

669. It was the Respondents’ case – which the trial judge accepted – that the OPSUM entry recording an engagement 1405DE was false, and that the Sametime chat entry recording a killing at around 1539DE was correct.

670. At trial, Mr Roberts-Smith defended the 1405DE entry in the OPSUM. He also argued that a number of other records supported an engagement in terms of the entry in the OPSUM for approximately 1405DE.<sup>39</sup> We deal with these other records in closed Court submissions.

671. The trial judge’s finding that the OPSUM entry at 1405DE is false is not challenged on appeal. Nor is the finding that the timing in the Sametime chat record is accurate. Those findings are significant when it comes to evaluating the other evidence about events at Chinartu. Here, we explain why those findings were correct.

### ***The uncontroversial grenade engagement at around 1410DE***

672. There was no dispute that two Afghan males were killed on the mission to Chinartu. Photographs of the two males were tendered as Ex R-101. The injuries on the face of the man on the second page of the photographs suggested he was the male killed by a fragmentation grenade.<sup>40</sup> He

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<sup>35</sup> J [1421].

<sup>36</sup> J [1420].

<sup>37</sup> J [1423].

<sup>38</sup> J [1420].

<sup>39</sup> J [1430].

<sup>40</sup> J [1432].

was the man labelled Objective Stolen Idea.<sup>41</sup>

673. The trial judge found that the man was engaged by Person 57's patrol. That engagement, involving the use of a fragmentation grenade, happened in the way described in the OPSUM. His Honour found that it was the same incident involving an EKIA reported in the Sametime chat record at 1414DE.<sup>42</sup> In other words, the 1410DE OPSUM entry and the 1414DE Sametime chat entry referred to the same engagement.

#### ***The OPSUM entry recording an engagement at 1405DE is false***

674. The photograph of the second man killed is on page 1 of Ex R-101. The circumstances of this man's death was the decisive issue in this part of the case. The critical question was this: was he killed legitimately during a compound clearance at approximately 1405DE, as reported in the OPSUM? Or was he killed just before 1539DE, as recorded in the Sametime chat record, shortly before extraction and in the circumstances described by Person 14?

675. The OPSUM entry at 1405DE read:<sup>43</sup>

**APPROX 12 1405DE OCT 12.** FE APPROACHED A COMPOUND OF INTEREST IVO MGRS **42S TB 3763 1521** IOT CONDUCT A CLEARANCE. NDS-W CONDUCTED A CALL-OUT OF THE COMPOUND WITH NO RESPONSE. AN NDS-W TEAM THEN MADE ENTRY TO THE COMPOUND. THE LEAD NDS-W MEMBER IMMEDIATELY PID 1 X INS ARMED WITH AN AK47. DUE TO THE IMMEDIATE THREAT TO FORCE, THE NDS-W MEMBER ENGAGED THE INS WITH SAF RESULTING IN 1 X EKIA. BDA OF THE COMPOUND RECOVERED 1 X AK47, 1 X BINOCULARS, 3 X RPG-7 ROCKETS AND 4 X RPG-7 ROCKET MOTORS. ALL ITEMS WERE RECOVERED TO MNB-TK FOR TECHNICAL EXPLOITATION.

676. "NDS-W" is a reference to "NDS-Wakunish", the name given to the Afghan partner force.

677. The trial judge found that there was no engagement at 1405DE as stated in the OPSUM.<sup>44</sup> That was primarily for three reasons. Three further matters added to that conclusion but were not necessary for it. None of these foundations for the conclusion that there was no engagement at 1405DE is challenged on appeal. Nor is the finding itself. The findings are plainly correct when the evidence is considered as a whole.

#### The three primary reasons why the OPSUM was false

678. *First*, on any view, the engagement was not reported until 1539DE.<sup>45</sup> That meant, if it happened at around 1405DE as recorded in the OPSUM, that there was a delay in reporting it of over an hour and a half.<sup>46</sup> Mr Roberts-Smith's evidence was that any EKIA's would be reported to troop commanders promptly, unless a threat or task got in the way.<sup>47</sup> There was no evidence of any

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<sup>41</sup> J [1432].

<sup>42</sup> J [1434]-[1435].

<sup>43</sup> Ex R-192 (Tab 3).

<sup>44</sup> J [1438].

<sup>45</sup> J [1436].

<sup>46</sup> J [1439].

<sup>47</sup> T.380/9-18 (BRS).

emergency or other obstacle that delayed the reporting in this instance, including in the running log of events on the mission in the Sametime chat.<sup>48</sup> To the contrary, by about 1408DE, when the main target compound was declared secure, the risk would have diminished.

679. At that point, the Australian soldiers started SSE. The Force Element requested extraction around half an hour before the EKIA was reported. Just under 10 minutes before the EKIA was reported, the estimate of three or four persons of interest to be taken to Tarin Kowt by helicopter was given.<sup>49</sup> The trial judge found that these calls “strongly impl[ied]” that the Ground Force Commander had spoken to all patrol commanders – and that any EKIA to that point in time would have been reported.<sup>50</sup> In short: there was no reason why the killing would not have reported well over an hour earlier, shortly after 1405DE, if that was when it occurred.

680. *Second*, an official document (tendered in closed Court) identified the NDS-Wakunish soldier who shot an Afghan male that day.<sup>51</sup> He was in Person 35’s patrol. The unchallenged evidence of Person 35 and his 2IC Person 32 was that there were no engagements by their patrol during the clearance of compounds – which is the stage at which the 1405DE engagement was described as taking place.<sup>52</sup> Thus, not only was the timing in the OPSUM false; the description of the circumstances of the killing was *also* false.

681. *Third*, Person 14’s evidence was that the killing in the compound happened shortly before, or at the time, the Task Force was preparing for extraction and “the helicopters were close”.<sup>53</sup> That precisely matches the timing in the Sametime chat record. It was consistent with an earlier account he gave to Chris Masters, in February 2018.<sup>54</sup> There was no suggestion that Person 14 had seen any Australian Defence Force documents, such as the Sametime chat or the OPSUM for the mission, at that time.<sup>55</sup> His clear evidence as to the timing and the Sametime chat were stunningly accurate and mutually corroborating. Any suggestion that Person 14 had an innocent false memory, or dishonestly fabricated a story, of a killing on this mission just minutes out from extraction which just happened to match the contemporaneous real-time reporting of the mission may be readily put to one side.

#### The three supporting reasons why the OPSUM was false

682. The trial judge found that three further matters add to – but were not essential for – his conclusion that the entry at 1405DE was false.

683. The *first* matter was the late reduction in PUC numbers. His Honour observed that the killing of a POI between 1530DE and 1551DE would explain the difference between the initial estimate

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<sup>48</sup> J [1440].

<sup>49</sup> J [1436].

<sup>50</sup> J [1441].

<sup>51</sup> Ex R-34, page 20 (a closed court exhibit).

<sup>52</sup> J [1442].

<sup>53</sup> J [1443].

<sup>54</sup> J [1428].

<sup>55</sup> J [1443].

of three to four POIs to be taken to Tarin Kowt given at 1530DE, and the *actual* number of two who were taken off target a short time later, at 1551DE.<sup>56</sup> The evidence did not disclose any other explanation for the late reduction in these numbers. Mr Roberts-Smith's appeal submissions refer to Person 14's evidence on this topic, as part of his attack on the trial judge's assessment of Person 14's credit: BRS [32.1]-[32.2]. Those submissions are addressed in Section E below. At this point, it is convenient to note that the trial judge expressly said his finding that the killing recorded at 1405DE did not happen *did not depend* on the difference in numbers of people travelling back to Tarin Kowt.

684. The *second* additional matter concerns two oddities in the photographic records of the killing. There are two relevant photographs: one of the body of the EKIA, and one of the weapon he was supposedly carrying. Each of them contains important clues to the coverup.
685. The photograph of the dead male appears in Ex R-101. This is the only photograph of his body. No weapon or binoculars are visible in that photograph, despite the OPSUM entry indicating he was armed with an AK-47 and found with binoculars. The usual practice in 2012 was for insurgents to be photographed with any weapon found in the vicinity.<sup>57</sup> There was no evidence explaining why, in this instance, the usual practice would be departed from and the weapon would have been taken away from the EKIA and photographed separately. The trial judge noted too that the SSE report referred to "limitations in time". That would make no sense if the engagement happened at 204DE, nearly two hours before extraction.<sup>58</sup> We deal with this issue in more detail at paragraphs C13 of our closed court submissions.
686. The trial judge accepted that the most probable explanation is that a cache was found, with all the items photographed between 1524DE and 1528DE. An AK-47 rifle and binoculars were found in that cache and then (falsely) attributed to the EKIA in the OPSUM.<sup>59</sup> Of course, the timing of the photographs posed a problem if the killing was recorded at its real time (just before 1539DE). Altering the timing of the killing to 1405DE cured this inconvenient detail.
687. The *third* additional matter was that there was possible motive for a false entry in the OPSUM as to the time of the killing. Bringing the killing forward in time had two benefits. An engagement would more readily be expected to happen earlier, during the clearance of compounds, rather than minutes before extraction when the clearances were long over and the area had been secured for an extended period of time. Placing it earlier in time also meant it fell outside the time period when it could be connected to the reduction in the number of POIs to be returned to Tarin Kowt; that reduction having made the troop sergeant, Person 26, very angry.<sup>60</sup>
688. The trial judge's finding that the engagement recorded in the OPSUM was false – both as to its timing and the circumstances described in the OPSUM - were fatal to Mr Roberts-Smith's

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<sup>56</sup> J [1445].

<sup>57</sup> T.449/11-16 (BRS).

<sup>58</sup> J [1446].

<sup>59</sup> J [1446].

<sup>60</sup> J [1447].

positive case on the death of the Afghan male at Chinartu. It was also an “important conclusion” which provided “clear and strong support for the account by Person 14.”<sup>61</sup>

689. It is important to recall when coming to the other evidence that the OPSUM entry was not just a mistake, or wrong, or false. It was falsified. The trial judge did not find this explicitly, but it must follow. The entry was entirely wrong, and nothing but dishonesty can explain that.

690. At BRS [33.3], Mr Roberts-Smith remarks that the trial judge did not make findings as to how the operational reporting came to be falsified. However, he does not challenge the finding that it was falsified. It was not necessary for the trial judge to make findings about the means by which it came to be falsified. The trial judge could be satisfied it was false without having evidence of the chain of events that led to the creation of the false entry.

#### ***The Sametime chat record is accurate***

691. The corollary of the finding that the OPSUM entry at 1405DE is false is that the entry in the Sametime chat recording an EKIA at 1539DE is accurate.<sup>62</sup> This is an important finding which informs the analysis of the rest of the evidence.

#### ***No reference to execution of PUC in official records***

692. Mr Roberts-Smith makes the point that no contemporaneous record referred to the execution of a PUC: BRS [29.3]. So much may be accepted. It is hardly to be expected that those involved in war crimes would record those war crimes in official documents. But they do contain an obvious coverup in any event, which is almost as powerful as a direct reference to the execution itself.

#### ***SSE material of the dead Afghan male***

693. Person 14 identified the deceased male shown on the first page of Ex R-101 as the man he witnessed being shot in the compound.<sup>63</sup> The trial judge accepted Person 14’s identification evidence, although it was not necessary for his ultimate factual findings.<sup>64</sup>

#### **D. The Person 12 lie**

694. Central to Mr Roberts-Smith’s case on Chinartu was a false narrative propounded by him and four of his witnesses: that Person 12, an Afghan Commander who received Mr Roberts-Smith’s instruction to shoot the PUC, was not on the mission because he had been stood down months earlier for an incident involving shooting a dog. The story was that on 31 July 2012, while on a mission, Person 12 shot at a dog and shrapnel from the bullet injured Person 57, an Australian soldier. The incident allegedly led to Person 12 being stood down or removed from working with the SASR from then on. Person 123 then supposedly took over as Commander of the NDS-Wakunish forces.

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<sup>61</sup> J [1536].

<sup>62</sup> J [1536].

<sup>63</sup> J [1422].

<sup>64</sup> J [1433].

695. Obviously enough, if Person 12 had been removed from the rotation for shooting a dog on 31 July 2012, one would not expect to see any photographs of him on base or on missions after that point. Nor would one expect to find any subsequent references to him in the official records. Instead, one would have expected to see references to Person 123 in the records as the replacement commander, and photographs of Person 123 out on missions instead of Person 12. The records showed neither thing. Records produced by the Department of Defence comprehensively showed that Person 12 continued to lead the NDS-Wakunish forces, he never stepped down as commander, and he was not replaced by Person 123.
696. That story was exposed as a deliberate lie, told by Mr Roberts-Smith, Persons 27, 32, 35, and 39. Mr Roberts-Smith colluded with Person 35 to advance the Person 12 lie, in a failed attempt to destroy the Respondents' case on Darwan and/or Chinartu. The collective lie was fatal to the credit of each of the soldiers who spread it.
697. On appeal, Mr Roberts-Smith does not try to resurrect the Person 12 lie. He does not attack the finding that Person 12 was on the mission to Chinartu. He does not impugn the trial judge's findings that the Person 12 lie had very serious consequences for the credibility of each of the soldiers who, one way or another, lied to the Court about it. Instead, Mr Roberts-Smith's approach to the Person 12 lie is to try to put it to one side and focus exclusively on the Respondents' case, while trying to argue that it should not have been fatal to the credit of one of the witnesses involved in it.
698. The Full Court should reject that submission. The trial judge's findings on the Person 12 lie, and the devastating consequences for the credit of Mr Roberts-Smith and his witnesses, were plainly correct. These were not mere mistakes, or inconsistent statements, or faulty recollections. This was a deliberate and calculated attempt to deceive the Federal Court to advance his interests in the proceeding. We explain why below.

***The Person 12 lie was false***

699. The Person 12 lie was clearly false. It was rebutted by at least four categories of evidence.
- (a) Objective evidence of Person 12's involvement in the Force Element after he was allegedly removed from the unit, including photographs.<sup>65</sup>
  - (b) Contemporaneous administration documents maintained by E Troop, recording attendances on base, at training, and on missions. Person 12 was recorded as being present on the 12 October 2012 mission.<sup>66</sup>
  - (c) The recollection of Person 31 (a "straightforward" witness), that in 2012 Person 12 took over as Commander of the NDS-Wakunish soldiers from Person 123. They were the only

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<sup>65</sup> See, eg, Ex R-34, page 24; Ex R-41; Ex R-42; Ex R-172; Ex R-41; and Ex's R-168 through R-171 inclusive (closed court exhibits).

<sup>66</sup> Ex R-35 and Ex R-264 (both closed court exhibits).

two officers in that position. He was located on the base at Tarin Kowt. Person 31 identified Person 12 in video of the helicopter journey on 12 October 2012.<sup>67</sup> Video evidence of Person 12 in a helicopter with SASR soldiers on the *actual day* of the Chinartu mission was the definitive end of the Person 12 lie.

- (d) Positive evidence as to the identity of the person who *did* shoot the dog, and who was removed in consequence (that person not being Person 12).<sup>68</sup>

700. It is unnecessary to repeat that evidence here: it is set out in detail at J [1465]-[1511] and at CCJ [165]-[198] and his Honour's findings are unchallenged.

***How Mr Roberts-Smith and his witnesses advanced the Person 12 lie***

701. The presence of Person 12 was an essential part of the Respondents' case.<sup>69</sup> That was because Person 14, who knew Person 12 and identified him in a photograph, remembered him being on the mission, and involved in the killing of the Afghan male.<sup>70</sup> As initially particularised in October 2018, the Respondents' case on Darwan also had Person 12 involved in the murder of Ali Jan on 11 September 2012 in Darwan.<sup>71</sup> Therefore, if the trial judge accepted that Person 12 was stood down from the NDS-Wakunish on or around 31 July 2012 and he could not have been present on the mission to Darwan or the mission to Chinartu, the Respondents' case on both Darwan and Chinartu would have been dealt a serious, probably fatal, blow.

702. The Person 12 lie first appeared in outlines of evidence filed by Mr Roberts-Smith in July 2019.<sup>72</sup> Those included outlines of Mr Roberts-Smith and Persons 35, 32, 27 and 39. Each of them said that Person 12 had been stood down or removed from the SASR because of his involvement in an incident involving the shooting of a dog on or around 31 July 2012.

703. In May 2020, the Respondents applied to amend their Defence, including to delete reference to the presence of Person 12 in relation to the alleged murder of Ali Jan at Darwan.<sup>73</sup> The Amended Defence was filed on 8 September 2020.<sup>74</sup>

704. The Person 12 lie became untenable in the first half of 2021, when the Department of Defence produced documents in response to a subpoena which showed that Person 12 was involved in the Force Element after he was supposedly removed.<sup>75</sup>

705. For that reason, no doubt, when Mr Roberts-Smith opened his case in June 2021 the story on Person 12 had changed. He still maintained that Person 12 was not on the mission to Chinartu. However, his senior counsel said "the reason why he wasn't there expressed in my client's

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<sup>67</sup> J [1466].

<sup>68</sup> J [1462]; CCJ [165]-[198].

<sup>69</sup> J [1449], [1451].

<sup>70</sup> J [1448].

<sup>71</sup> J [1450].

<sup>72</sup> J [1450].

<sup>73</sup> See *Roberts-Smith v Fairfax Media Publications Pty Limited (No 5)* [2020] FCA 51067 at [30]-[48].

<sup>74</sup> J [1450].

<sup>75</sup> J [1450], [1452]; Ex A-10 (Tab 66) (a closed court exhibit).



outline and some of the other outlines needs modification.”<sup>76</sup> The need for “modification” was an understatement. The truth was that the lie that appeared in five separate outlines of evidence, and in sworn answers to interrogatories, had been exposed. And each of the five witnesses now needed to explain how the lie came to form part of his outline of evidence.

706. In oral evidence, each of Mr Roberts-Smith and his four witnesses dealt with the shifting story on Person 12 slightly differently.

707. **Mr Roberts-Smith’s** outline of evidence asserted that he did not see Person 12 on the mission to Chinartu, and that he had previously been informed at a command group meeting on 31 July 2012 that Person 12 had been stood down after he shot a mongrel dog and shrapnel wounded an Australian Patrol Commander.<sup>77</sup> He gave further details about the command group meeting in answers to interrogatories, including the identity of the soldier he recalled telling him Person 12 had been stood down.<sup>78</sup> Then in oral evidence, Mr Roberts-Smith said he had never heard of Person 12 before in his life and his outline of evidence had been based on what he had been told by Person 35 and Person 68.<sup>79</sup> On his own evidence, the outline of evidence and the sworn answers to interrogatories were false.

708. **Person 35** gave a direct eyewitness account of the dog-shooting incident in his outline of evidence.<sup>80</sup> He described being four to five metres away from Person 12 when he saw him shoot a dog. He recounted Person 12 being escorted off base. He repeated all of that in evidence-in-chief.<sup>81</sup> In oral evidence, he agreed he worked closely with the NDS-Wakunish and knew who Person 12 and the other officers were. He denied that a series of photographs of Person 12 were actually of Person 12.<sup>82</sup> He refused to accept the Department of Defence documents were accurate, advancing a “completely fanciful” conspiracy theory about them.<sup>83</sup> Only when shown two closed Court documents<sup>84</sup> did he admit he was wrong about Person 12 having shot the dog.<sup>85</sup> Person 35 and Mr Roberts-Smith agreed that they spoke about this issue at around the time they prepared their outlines of evidence.<sup>86</sup>

709. **Person 32** said in his outline of evidence that he recalled that, at the end of July 2012, Person 12 was stood down as Commander of the NDS soldiers after an Australian soldier was hit by shrapnel from a bullet fired by Person 12. He repeated that in evidence in chief. He did not witness the incident, but said he heard about it soon after.<sup>87</sup> Person 32 worked closely with the NDS-Wakunish soldiers. He had a clear recollection of what Person 12 looked like.<sup>88</sup> He correctly

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<sup>76</sup> J [1453].

<sup>77</sup> J [1467]; Ex R-14.

<sup>78</sup> J [1468].

<sup>79</sup> J [1469]-[1470].

<sup>80</sup> J [1477].

<sup>81</sup> J [1479].

<sup>82</sup> J [1480]-[1481].

<sup>83</sup> J [1482]; Ex A10.66.

<sup>84</sup> Ex R-222 and Ex R-223.

<sup>85</sup> J [1482].

<sup>86</sup> J [1484].

<sup>87</sup> J [1489].

<sup>88</sup> J [1488]-[1489].

identified Person 12 in photos, all of which were taken after 31 July 2012.<sup>89</sup> Even after being confronted with “overwhelming evidence” including the Department of Defence documents which caused Person 35 to finally admit he was wrong, Person 32 maintained his story.<sup>90</sup> He never conceded he was wrong.

710. **Person 39**’s outline of evidence recounted a meeting he attended on or about 31 July 2012 at which Person 6 or Person 31 reported that Person 12 had been removed from command that today because of an incident on mission.<sup>91</sup> Around a week later, Person 12 was replaced by a younger NSD-Wakunish soldier. He said Person 12 never returned to Tarin Kowt or accompanied the SASR on missions after that time.<sup>92</sup> In oral evidence, the story shifted.<sup>93</sup> Now, Person 6 told the meeting about the incident, but did not say that Person 12 actually shot the dog or instead ordered it to be shot.<sup>94</sup>

711. **Person 27** said in his outline that he recalled that in July or August 2012, Person 12 was removed from participating in missions with the SASR after shooting a dog.<sup>95</sup> In evidence-in-chief, he admitted he did not know who shot the dog.<sup>96</sup> In cross-examination, he admitted he was not even present at the incident when the dog was shot. He confirmed he had never met Person 12. He confirmed he had no direct knowledge of who shot the dog. The first time he heard any suggestion that it was Person 12 who shot the dog was when he received an outline of evidence prepared by Mr Roberts-Smith’s lawyers that had that claim in it, or something like it. After the outline had been filed, he contacted Person 57, who said it was not Person 12. Person 27 told Mr Roberts-Smith that it was not Person 12 and that Person 57 was happy to speak to him about it. Person 27 said he sought to confirm the identity of the soldier who shot the dog with Person 57 “to help out Ben. Get his – get my witness statement correct in his defence.”<sup>97</sup> Yet despite expressly telling Mr Roberts-Smith that Person 12 did *not* shoot the dog, a contradictory outline of evidence was filed on his behalf. The circumstances in which an outline of evidence that the witness had positively disavowed came to be filed were never explained.

#### The trial judge’s findings

712. The trial judge made the following findings.<sup>98</sup> Person 12 did not shoot the dog. The NDS-Wakunish soldier who did shoot the dog is identified at CCJ [167]. Person 12 was not stood down or removed on 31 July 2012. Person 12 was not present at the time; he did not become the NDS-Wakunish Commander until 21 September 2012. Person 12 was part of the mission to Chinartu on 12 October 2012 (and, to the extent the helicopter load plan or manifest suggested

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<sup>89</sup> J [1491]-[1492].

<sup>90</sup> J [1492], [1495].

<sup>91</sup> J [1496].

<sup>92</sup> J [1497].

<sup>93</sup> T.6085/17-44 (P39).

<sup>94</sup> J [1498] ; T.6095/34-40 (P39).

<sup>95</sup> J [1503].

<sup>96</sup> J [1503].

<sup>97</sup> J [1505].

<sup>98</sup> J [1462].

otherwise, that document was wrong).<sup>99</sup> The witnesses who said that Person 12 shot the dog and was stood down as a result either lied or put forward the account without any proper basis.

713. The trial judge made the following findings on witness collusion:

- (a) Mr Roberts-Smith colluded with Person 35 to put forward the false account;<sup>100</sup>
- (b) Person 35 made up the story about Person 12 shooting the dog and being stood down;<sup>101</sup>
- (c) Mr Roberts-Smith and Person 35 colluded following discussions between themselves with a view to Mr Roberts-Smith defeating the Respondent's case on Chinartu and Darwan;<sup>102</sup>
- (d) Person 32 was deliberately dishonest about the identity of the first of the NDS-Wakunish officers in Rotation 18;<sup>103</sup>
- (e) Person 39's evidence that Person 12 had been stood down on 31 July 2012 was incorrect and had no proper basis;<sup>104</sup> and
- (f) Person 27 made a statement he should never have made because it did not reflect his recollection, failed to correct evidence he knew was wrong, and was prepared to sacrifice accuracy to a point to assist his friend, Mr Roberts-Smith.<sup>105</sup>

714. The trial judge concluded that these findings "clearly" had an adverse impact on the credit of Mr Roberts-Smith, Person 35, Person 27, Person 32 and Person 39.<sup>106</sup> That finding was plainly correct. Mr Roberts-Smith does not challenge any of these findings on appeal.

***The consequences of the Person 12 lie and the credibility of Persons 11, 32 and 35 (Notice of Appeal particular 34)***

715. By focusing almost entirely on Person 14's credit, Mr Roberts-Smith tries to wipe the slate clean on the Person 12 lie. He mentions it just once in his written submissions, at BRS [33.4], to caution the Court against entertaining a consciousness of guilt submission in relation to the lie. The Respondents do not make any such submission on appeal.

716. However, that does not mean the Person 12 lie falls by the wayside as an historical aspect of the trial that has no bearing on the issues before this Court. The Person 12 lie has terrible consequences for the credit of Mr Roberts-Smith and his witnesses. A significant part of Mr Roberts-Smith's case on Chinartu was exposed to be a lie. The witnesses he brought along to give evidence to support his case on Chinartu were, by and large, involved in that lie, which was on a material matter. Person 35 also gave evidence on W108 and Darwan. Person 27 gave

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<sup>99</sup> J [1511].

<sup>100</sup> J [1476].

<sup>101</sup> J [1487].

<sup>102</sup> J [1509].

<sup>103</sup> J [1495].

<sup>104</sup> J [1502], [1509].

<sup>105</sup> J [1507].

<sup>106</sup> J [1510].

evidence on W108. Person 32 gave evidence on Darwan. The Person 12 lie has ramifications for their evidence on those topics, as well as Chinartu.

717. Four of the people who Person 14 said were present when Mr Roberts-Smith gave the instruction to murder the PUC at Chinartu ultimately gave evidence. Two of them were Person 14 and Mr Roberts-Smith. The other two were Person 32, who was a close friend of Mr Roberts-Smith and who was deliberately and stubbornly dishonest about Person 12; and Person 11, who is a long-time close personal friend of Mr Roberts-Smith,<sup>107</sup> who was the subject of very adverse credit findings,<sup>108</sup> who murdered Ali Jan at Darwan,<sup>109</sup> and who in any event did not claim to have a detailed recollection of the mission.<sup>110</sup>
718. This brings us to Particular 34 of the notice of appeal and BRS [33.1]-[33.3], by which Mr Roberts-Smith submits that the primary judge erred in making global findings about the credibility of Persons 11, 32 and 35 in relation to Chinartu. Mr Roberts-Smith says the primary judge erred by approaching the fact-finding process on the basis that because Mr Roberts-Smith's witnesses were unreliable about some specific matters, that they were unreliable about all matters concerning Chinartu. (The written submissions do not address the credibility of Person 35, so he may be put to one side and may be accepted to be irremediably discredited). Mr Roberts-Smith does not attack the findings about *his own* credibility. This submission does not withstand any meaningful analysis of the trial judge's findings. It should be rejected for four reasons.
719. *First*, Mr Roberts-Smith has identified no error of principle. The trial judge in his role as the finder of fact was entitled to reject or accept some or all of Persons 11 and 32's accounts when those accounts were assessed as part of the evidence as a whole.
720. *Second*, Mr Roberts-Smith does not say how the matters relied upon by the primary judge for his adverse credit findings as to Person 32 and for Person 11, "even if accepted", are insufficient to justify the wholesale rejection of their evidence. Those findings are not challenged, so they must be accepted. They are very serious, involving dishonesty about a centrally important matter in relation to a critical allegation before the Court. As submitted above at [554], Person 11 was dishonest and unreliable. Person 32 was deliberately dishonest. The decision to reject their evidence was clearly open to the trial judge.
721. *Third*, Mr Roberts-Smith has failed to identify which aspect of the evidence of Person 11 and Person 32 he says the trial judge should not have rejected. Despite what is said at BRS [33.3], he does not identify any evidence of either Person 11 or Person 32 that was "uncontradicted or corroborated by the evidence of other witnesses ... or documents" and was wrongly rejected. It appears Mr Roberts-Smith is suggesting the trial judge should have overlooked the very serious problems with both witnesses' credibility and accepted their evidence on *the key issue* about the

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<sup>107</sup> J [1242].

<sup>108</sup> J [910], [1030], [1235], [1265]-[1283], [1535], [2371], [2385], [2420].

<sup>109</sup> J [1368]-[1369].

<sup>110</sup> J [1399].

moments when the PUC was murdered – the very subject on which they have the greatest reason to be dishonest (and concerning one aspect of which they were found to have given deliberately dishonest evidence about), given the implications of Person 14’s evidence for Mr Roberts-Smith’s case and their complicity in, and silence on, the execution.

722. *Fourth*, there was no error in referring to the evidence of Persons 32 and 35 at J [1292], J [1400] or J [1442]. It is odd that Mr Roberts-Smith criticises the trial judge for accepting evidence of witnesses whom he says the trial judge was mistaken to reject wholesale. Putting that to one side, it is not a mistake to accept evidence which is adverse to Mr Roberts-Smith, for whose benefit they lied. The evidence is akin to admissions against interest. The fact that even they, witnesses aligned with Mr Roberts-Smith who were prepared to lie for him, did not suggest that there was an engagement during clearance was highly probative of the fact that the OPSUM entry that described such a clearance was wrong.

723. At this point of his submissions, Mr Roberts-Smith criticises the trial judge for accepting the evidence that Person 35’s patrol had no engagements during clearance as assisting the Respondents’ case, “despite the fact that there was another NDS patrol on this mission”: BRS [33.2]. That was not in error. As explained above, there was no dispute between the parties as to the identity of the NDS soldier who shot an Afghan male that day. The identity was disclosed in a Department of Defence document tendered in closed Court.<sup>111</sup> That soldier was in Person 35’s patrol. It was highly relevant, therefore, that even that patrol’s members said they did not have an engagement while clearing compounds. It was probative of the fact that the OPSUM entry at 1405DE was wrong.

724. His Honour’s assessment of the credit of Person 11, 32 and 35 was plainly correct. Notice of Appeal particular 34 should be dismissed.

#### **E. The credibility of Person 14**

725. Against the backdrop of the official documents the trial judge came to assess the credibility of Person 14’s evidence. Mr Roberts-Smith’s appeal on Chinartu is almost wholly focused on this issue. Mr Roberts-Smith argues that Person 14 is dishonest, and in any case, unreliable.

726. Overturning the trial judge’s credit finding in respect of Person 14 is critical to Mr Roberts-Smith’s appeal on Chinartu. Accepting as he now does that there was no engagement at or about 1405DE, that there was instead an engagement shortly before wheels-up at 1539DE, and there was no evidence to suggest positively that the Afghan male was killed in any circumstances other than those described by Person 14, Mr Roberts-Smith must show that the trial judge should not have accepted Person 14’s account in order to disturb the finding that Mr Roberts-Smith ordered the PUC to be shot. For the reasons explained above, great deference should be shown by this Court to the trial judge’s findings on Person 14’s credit.

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<sup>111</sup> Ex R-34, page 20 (a closed court exhibit).

727. There were many attacks on the credibility of Person 14's evidence about the mission to Chinartu at trial. The trial judge considered Person 14's credit in respect of Chinartu at J [1519]-[1536]. Most of the challenged advanced at trial are now abandoned. For example:

- (a) Person 14 used the acronym "VRI" (Very Reliable Information) in recounting a conversation in the helicopter en route to Chinartu. Mr Roberts-Smith initially ran a case theory that the term "VRI" was unknown and therefore Person 14's account was discredited. That theory was properly rejected as having no proper basis.<sup>112</sup>
- (b) Person 14 recalled that Person 27 was on the mission with him. Mr Roberts-Smith's initial case theory was that Person 27 was not present, so again, Person 14's recollection was either false or mistaken. That submission was abandoned.<sup>113</sup>
- (c) Alleged inconsistencies between Person 14's evidence and the account he gave Mr Masters in 2018 were found not to have any significance.<sup>114</sup> To the contrary, his Honour considered that there were multiple consistencies between the accounts, including that Mr Roberts-Smith was questioning a PUC, the discovery of the cache, the presence of the Commander of the NDS-Wakunish soldiers, Person 13 and Person 32, the circumstances of the alleged execution and the fact that the PUC count had already gone in.<sup>115</sup> Thus, far from undermining Person 14's account, the consistencies in the prior statement assisted him.
- (d) Mr Roberts-Smith argued there were "significant" gaps in Person 14's memory about events on the mission – for example, he could not remember the identity of the soldier who told him that Mr Roberts-Smith was up the hill.<sup>116</sup> The trial judge took Person 14's imperfect memory into account.<sup>117</sup> However, sensibly, the trial judge found it unsurprising that Person 14 was unable to remember some details of events which occurred some years ago. He took into account also that some matters which are more likely to be remembered than others.<sup>118</sup> The close-range execution of an unarmed prisoner is one of those. He also found that under cross-examination, Person 14 did not attempt to evade questions or fabricate answers.<sup>119</sup>

728. His Honour was ultimately satisfied that Person 14's evidence met the rigorous standard of proof.

729. Three attacks on Person 14's credit, which the trial judge rejected, are resurrected on appeal. They are: (1) Mr Roberts-Smith's argument that it is unlikely that two caches would be discovered on the same mission; (2) the suggestion that the timing of Person 14's account is unlikely; and

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<sup>112</sup> J [1394]-[1395].

<sup>113</sup> J [1373].

<sup>114</sup> J [1530].

<sup>115</sup> J [1529].

<sup>116</sup> J [1532].

<sup>117</sup> J [1533].

<sup>118</sup> J [1533].

<sup>119</sup> J [1533].

(3) evidence about the number of POIs to be return to Tarin Kowt.

730. Though not particularised in the Notice of Appeal, Mr Roberts-Smith's submissions also raise two further points in relation to Person 14's credit: (1) Person 14's failure to report the execution until he spoke to Mr Masters in 2018; and (2) Person 14's credit in respect of W108.

731. Each of these should be rejected. The correct approach is to consider the whole of Person 14's evidence, in the context of all of the evidence. When considered in light of the timing in the contemporaneous records, the falsification of the OPSUM, the false attribution of a rifle to the EKIA, and the Person 12 lie, the trial judge made no error in accepting Person 14's account of the execution at Chinartu.

***The discovery of the second cache (Notice of Appeal particular 31(a)-(e))***

732. Particular 31 in the notice of appeal and BRS [30.1]-[30.8] attack the trial judge's finding that two caches were discovered on the mission to Chinartu. Mr Roberts-Smith alleges that finding was "glaringly improbable" or based on insufficient evidence. The trial judge dealt with Mr Roberts-Smith's submissions on this topic at J [1522]-[1524]. They did not persuade his Honour that Person 14's account of events at Chinartu should not be accepted. This Court should reject Mr Roberts-Smith's attack on those findings.

733. To understand the trial judge's findings about the discovery of the cache, it is necessary to revisit what the evidence was on this question. In summary, that was:

- (a) **The OPSUM:** As identified above, the false OPSUM entry for 1405DE recorded that an NDS soldier engaged an insurgent while clearing a compound, who had an AK-47.<sup>120</sup> The entry states that an AK-47, a pair of binoculars, three RPG-7 rockets and four RPG-7 rocket motors were recovered from the compound. The entry states those items were recovered to Tarin Kowt for technical exploitation.
- (b) **Photographs of cache contents:** A series of photographs of the contents of a cache, taken between 1524DE and 1528DE,<sup>121</sup> were tendered as Ex R-100.
- (c) **SSE report:** An SSE report for the cache was tendered in closed Court.<sup>122</sup> It is dealt with in closed Court submissions. It contained the photographs of the contents of the cache.
- (d) **Evidence of Person 14:** Person 14's evidence was that he discovered a cache at the compound up the hill shortly before extraction, and that this was the trigger for the change in mood that led to the murder he witnessed. He was adamant that the photos of the cache photographed between 1524DE and 1528DE were not of the cache he discovered.<sup>123</sup> He said he had never seen photos of the items that were in the cache he discovered, and that

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<sup>120</sup> Ex R-192 (Tab 3).

<sup>121</sup> Ex R-100. The closed court version is Ex R-38.

<sup>122</sup> Ex A-10 (Tab 50) (a closed court exhibit).

<sup>123</sup> T.1444/30-45 (P14).

he did not believe there are photos of it.<sup>124</sup>

734. The short point is this. There was – without doubt – a first cache discovered at some point before 1524DE. It was photographed. But this was *not* the cache discovered by Person 14. Person 14 himself said it was not the cache, based on the photographs of the items.<sup>125</sup> The cache he found contained rice bags, with bullets, binoculars, RPG warheads with boosters, and rifles.<sup>126</sup>
735. The timing was also different. The first cache was discovered before 1524DE. Yet the killing described by Person 14 (and the associated discovery of the second cache) did not occur until sometime between 1534DE (when the helicopters left Tarin Kowt) and 1539DE (when the killing was reported in the Sametime chat record).
736. Mr Roberts-Smith's challenge to the finding about the caches is largely that it is unlikely that two caches would be discovered in a single mission, with one photographed and the other not, and so Person 14 invented the story of the second cache. This submission should be rejected. It is premised on an alleged improbability which is not established by the evidence.

The alleged unlikelihood of finding two caches and photographing only one (Particular 31(a))

737. There is no evidentiary or logical basis as to why the discovery of one cache on a mission makes the discovery of a second less likely. cf BRS [30.4]. Yet that is the unjustified and illogical factual premise of Mr Roberts-Smith's submission on this topic. If anything, the discovery of a first cache supports the possibility (even the probability) of a second one being found in a nearby compound. In W108 there were multiple caches in the same compound. At Darwan there were multiple insurgent-related items found at different compounds in the village. But the Full Court need not go that far. There is simply no logical reason why the discovery of one cache makes Person 14's evidence of a second cache any less likely.
738. Mr Roberts-Smith's next submission is that the second cache was not photographed, unlike the first. That is unsurprising given the timing of their respective discoveries. The first cache was photographed between 1524DE and 1528DE, and necessarily discovered at some time before that. The second cache was discovered shortly before 1539DE, when the killing was reported on the Sametime chat record. The helicopters had already left Tarin Kowt – 10-15 minutes away<sup>127</sup> – at 1534pm. At 1539DE, they were only 10 minutes away from the village. That is borne out by the fact that the soldiers ultimately extracted at 1551DE. In the 12-odd minutes between discovery of the second cache shortly before 1539DE and the extraction at 1551DE, Mr Roberts-Smith's patrol needed to head down the hill to prepare to extract. Indeed, the need to extract with his patrol is what brought Person 14 to the compound on the hill in the first place.<sup>128</sup> His anticipation was that they would be leaving the compound imminently.<sup>129</sup> It is unsurprising that

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<sup>124</sup> T.1669/11-16 (P14).

<sup>125</sup> T.1444/30-45 (P14).

<sup>126</sup> T.1441/9-14 (P14).

<sup>127</sup> J [1387].

<sup>128</sup> T.1435/21-38 (P14).

<sup>129</sup> T.1440/42-45; 1443/17-18 (P14).



the engineers had no time to photograph the second cache before leaving the compound and proceeding to the HLZ for extraction.

739. The very late discovery of the second cache and the second EKIA is the obvious explanation for the reference in the SSE report to “limitations in time”.<sup>130</sup> That comment cannot relate to the first cache, which was fully photographed by 15.28DE. Nor can it relate to the grenade engagement, which occurred at 14.10DE and which was also fully photographed. It can only relate to the very late discovery of the second cache and the late EKIA. The reference to “limitations in time” in performing SSE is further powerful corroboration for Person 14’s account and the undocumented nature of the second cache.

740. Finally, Mr Roberts-Smith seems to level against Person 14’s credit the fact that the cache in the photographs was similar to, but not the same as, the cache found by Person 14: BRS [30.2]. That point goes nowhere. Mr Roberts-Smith does not suggest that Person 14 is honest but mistaken. There was no suggestion at trial, and none on appeal, that Person 14 discovered the first cache and mistakenly bifurcated that into two different caches. Person 14 adamantly denied that the items in the two caches were the same. Instead, Mr Roberts-Smith’s submission is that the second cache is a dishonest invention: BRS [30.5]. Thus, despite some similarities between the contents of the two caches, the contest at trial and on appeal is clear. Person 14 unequivocally gave evidence of a second, different cache. He was not confused. An important question for the trial judge was whether Person 14 dishonestly invented the second cache as part of a fabricated account of the murder of a PUC, or whether, having regard to the evidence as a whole including the various attempts to conceal the true circumstances of the death of this EKIA, his account should be accepted.

741. The trial judge made no error. His Honour gave close attention to Mr Roberts-Smith’s submission on this point. He found that it was “an unexplained feature” of Person 14’s evidence that the cache that he said that he discovered was not documented or referred to in the ADF documents. That was a matter that the trial judge said he took into account, by inference, weighing against the acceptance of Person 14’s account.<sup>131</sup> Ultimately, having regard to the evidence as a whole, including the consistency of Person 14’s account with the timing in the Sametime chat record, combined with the multiple obvious attempts to falsify the true circumstances of this killing, the trial judge correctly concluded that Person 14’s evidence should be accepted.

742. The foregoing means that Mr Roberts-Smith’s submission at BRS [30.4] that the trial judge failed to properly assess the significance of the Respondents’ case involving two caches, one of which was photographed, should be rejected.

#### The invention allegation (Particular 31(d))

743. At BRS [30.5], Mr Roberts-Smith submits that Person 14 invented the story about the second

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<sup>130</sup> J [1446].

<sup>131</sup> J [1536].

cache after he understood that there was evidence to suggest the cache in the photographs was discovered in different circumstances. That submission must be rejected.

744. Person 14 has been consistent since 2018 that he discovered a cache shortly before Mr Roberts-Smith instructed an Afghan soldier to execute an Afghan male.<sup>132</sup> There was no “shift in position” from Person 14. Person 14’s clear, adamant evidence was that the cache in the photographs was not the cache he discovered.<sup>133</sup> He never wavered on that. There was no evidence that Person 14 had ever seen the metadata of the first cache photographs. Nor was it put to Person 14 that he fabricated the account of a second cache after realising the metadata did not support his account, or after seeing the SSE report.

745. Mr Roberts-Smith’s submission that Person 14’s position shifted does not rely on any inconsistency in accounts given by Person 14. Oddly, it relies on the cross-examination of Mr Roberts-Smith by the Respondents’ counsel (which happened *after* the Department of Defence produced records containing the metadata of the photographs of the first cache) and imputes that to Person 14. The Respondents’ counsel suggesting to Mr Roberts-Smith that the cache in the photographs was the one discovered by Person 14 does not detract from Person 14’s consistent evidence. Mr Roberts-Smith also complains that the trial judge failed to deal with this argument. The argument was blunted when his counsel realised Person 14 had not previously represented that the cache he found was the one in the photographs.<sup>134</sup> In any case, the trial judge did not need to deal explicitly with an argument about invention that had no foundation.

#### Particular 31(b), (c)

746. Mr Roberts-Smith raises at BRS [30.6] three more issues relating to the OPSUM entry attributing an AK-47 to the insurgent killed at 14.05DE. These submissions are deeply confused in circumstances where (1) the timing in the Sametime chat record is accepted to be accurate; and (2) a necessary consequence of accepting the accuracy of the timing in the Sametime chat record is that the AK-47 that was supposedly being wielded by the EKIA was in fact *already* in the hands of Australian soldiers at the time the killing occurred.

747. *First*, Mr Roberts-Smith says the primary judge’s finding at J [1446] – that the most probable explanation for the body of the Afghan male being photographed without a weapon, but the OPSUM describing the EKIA at 14.05DE as having a weapon, was that “in one way or another, in the OPSUM the AK-47 rifle and the binoculars have been attributed to the EKIA” – is “speculative”. It is not. It is an irresistible inference arising from three matters: (a) the finding that timing and description in the OPSUM is false; (2) on the true timing of the engagement shortly before 1539DE, those items *cannot* have been found in the possession of an Afghan combatant because they had already been photographed in the custody of Australian soldier; and (3) the photographs of the weapon were part of a sequence of other photographs taken in the cache.

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<sup>132</sup> J [1428].

<sup>133</sup> T.1444/30-45; T.1669/11-20; T.1755/38-1756/11 (P14).

<sup>134</sup> CCT.21/10-19 (26 July 2022) (closing submissions).

His Honour's conclusion as to the "probable explanation" was obviously correct.

748. *Second*, Mr Roberts-Smith says it is improbable that an AK-47 from a cache discovered much earlier in some different place would later come to be attributed to the relevant EKIA, rather than the AK-47 discovered right outside the compound at the very time he was killed. That submission might hold water if it were actually photographed *with the body*. It would make less sense to carry a rifle from elsewhere and use it as a throwdown, when there was another one right there. But there is nothing inherently improbable about drawing inspiration from a *photograph* of a rifle and binoculars taken earlier than the time of the killing to use in a hasty cover-up.
749. *Third*, Mr Roberts-Smith says the finding at J [1446] "ignores a critical problem for the Respondents and that is the undisputed existence of the actual photographed and reported upon cache". Here again, the spectre of Mr Roberts-Smith's abandoned case resurfaces in his submissions. He suggests the cache may have come from the circumstances described in the OPSUM as the 1405DE engagement and/or those (very similar ones) described in the SSE report. But it needs to be accepted (because the findings are not challenged) that there was no engagement at 1405DE as described in the OPSUM. We address the SSE Report in our closed court submissions at C17 – C22. And even if Mr Roberts-Smith had formally put those matters in issue on appeal, they would inevitably fail. The evidence was overwhelming that the second killing occurred shortly before 1539DE.
750. Once those matters are accepted, it makes no sense to suggest the first cache was found in the circumstances described in the OPSUM or the SSE report. The first cache cannot have been found in the course of an engagement at 1405DE which never occurred. While evidence does not fully explain the circumstances in which the first cache was discovered, what is clear is that it was discovered before 1524DE, and not in the manner described in the OPSUM. That supports, rather than weakens, the Respondents' case.
751. Particular 31(e) states that Person 14's allegation depended upon the discovery of the cache, and if the evidence did not support the discovery of a cache by Person 14 at the particular time he nominated, the allegation of murder collapsed. It is true that the discovery of a cache was an important feature of Person 14's story. But it is a *different* cache from the one that appears in the photographs. The circumstances and timing of the discovery of the *first* cache are irrelevant to the acceptance of Person 14's account; other than the fact that part of its contents were used in a brazen attempt to cover up the murder of a PUC late in the mission.
752. For the reasons outlined, the trial judge was correct to accept Person 14's evidence on that topic. No error has been shown. Particular 31 of the Notice of Appeal must be dismissed.

***The timing of events during the mission (Notice of Appeal particular 32)***

753. Particular 32 and BRS [31.1]-[31.3] challenge the trial judge's finding at J [1531] that it was "not impossible" that the sequence of events Person 14 described between the time when the helicopters left Tarin Kowt and when the EKIA was reported happened in that timespan was

“glaringly improbable” or did not meet the standard of proof. At BRS [31.3], Mr Roberts-Smith adds an argument that the primary judge’s “speculative reasoning inverts the burden of proof”.

754. The trial judge’s reasoning was not speculative, nor did it invert the burden of proof. The trial judge merely applied common sense to the evidence to conclude that Person 14’s account was coherent and plausible. Essentially, the trial judge was rejecting Mr Roberts-Smith’s submission that the timing was impossible. The timing was not used to positively strengthen the trial judge’s conviction that the events as described by Person 14 had occurred.

755. It is a matter of common sense that the events described by Person 14 could occur in the span of five minutes. There was a sense of hurry because Person 14 had to extract with his patrol.<sup>135</sup> There are three steps in his account of these five minutes:

- (a) Person 14’s evidence was that it took “60, 90 seconds” to get from the position down the hill to the tactical questioning area.<sup>136</sup>
- (b) Then he moved another 80 to 100 metres to the compound up the hill.<sup>137</sup>
- (c) Once he reached the compound, he immediately saw Mr Roberts-Smith questioning a PUC, he turned around and discovered the cache, the mood changed.<sup>138</sup> There was a short exchange of words and the Afghan male was shot.

756. The overall timing of around five minutes not only fits well with Person 14’s account; it is compellingly consistent with these events. Indeed, if the timespan on the Sametime chat were much longer there would be confusing gaps in Person 14’s account. Far from undermining Person 14’s credibility, the timing in Person 14’s story (which has remained consistent since 2018, well before Department of Defence records were produced) means that the Sametime chat powerfully corroborates his account.

757. For this reason, Particular 32 should be dismissed.

***The number of Persons of Interest to be returned to Tarin Kowt (Notice of Appeal particular 33)***

758. Particular 33, addressed at BRS [32.1]-[32.2], takes issue with the trial judge’s finding at J [1536] that the last-minute change in numbers of POIs to be brought back to Tarin Kowt provided “clear and strong support for the account by Person 14”. There are three bases for this submission. Each is misconceived.

759. *First*, for the first time on appeal, the suggestion is made that the 1530DE numbers were “rather tentative”: BRS [32.2](a). The number was not final as it was “to be confirmed”, but it gives a range, in which the final number would presumably fall: three to four. It did so just nine minutes before the trial judge found a second EKIA was accurately reported (that finding not being

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<sup>135</sup> T.1435/35-38 (P14).

<sup>136</sup> T.1661/39 (P14).

<sup>137</sup> T.1435/36-38 (P14).

<sup>138</sup> T.1441/25 (P14).

challenged on appeal) and just 22 minutes before extraction occurred.<sup>139</sup> That obviously raised questions about why the estimate dropped from 3-4, to two, in such a short space of time.

760. That is closely connected to the second point. Mr Roberts-Smith claims there is no logical reason why Person 26 would have been troubled by a reduction in the number of prisoners to be returned to base: BRS [32.3](b). The reason Person 26 might have been annoyed is clear from the facts of this case. Something had happened to at least one POI that meant they could no longer come back to Tarin Kowt. It affected the load plan for the helicopters. The troop sergeant might have to explain what had happened to the PUC. That is illustrated by his chilling question: “What happened – what happened to the fucking PUC?”<sup>140</sup>

761. Finally, Mr Roberts-Smith says that the primary judge relied on Person 14’s own evidence about Person 26 to corroborate his account: BRS [32.3](c). Mr Roberts-Smith has misconstrued the trial judge’s reasons. At J [1536]. The trial judge identified that there was a false engagement in the OPSUM at 1405DE, that the second engagement on the day occurred shortly prior to extraction at around 1539DE, that the estimate of persons of interest being taken back to Tarin Kowt was three to four persons, and that the number taken back was two. Person 14’s story included the detail that the last minute change annoyed the troop sergeant. This detail clearly and compellingly harmonised with the objective facts, increasing the likelihood that Person 14’s account as a whole was correct. This was not using an aspect of Person 14’s account to corroborate his account.

#### ***Other attacks on Person 14’s credit***

762. Mr Roberts-Smith makes two other attacks on Person 14’s credit.

763. At BRS [30.5], Mr Roberts-Smith says it is “relevant to the question” of Person 14’s reliability that he did not report the execution of a PUC. The trial judge took this into account, but was right to find that it did not outweigh the compelling factors pointing to the truth of what Person 14 said: J [1526], [1536]. There are many reasons why someone would not report a breach of the rules of engagement. Person 14 did tell Mr Masters about it, in 2018.

764. Also at BRS [30.5], Mr Roberts-Smith says that Person 14’s credit must be assessed in light of his evidence on W108. The Respondents refer to their submissions at [330]-[338] above.

#### ***Matters supporting Person 14’s credit***

765. Person 14’s evidence must be assessed as a whole, in the context of all of the evidence on Chinartu, including the official records. Performing that exercise, it is clear the trial judge was right to accept his evidence on Chinartu. Starting with the official records, Person 14’s account marries up perfectly with the sequence of events in the Sametime chat, especially the killing at around 1539DE, and the fact that the POI count had already gone in when the killing happened.

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<sup>139</sup> Ex R-36 (page 4).

<sup>140</sup> T.1443/39-40 (P14).

It was consistent with the POI estimate given (3-4) and the number of POIs actually taken back to Tarin Kowt (two). Person 14 had not seen those records when he first told a story of an execution as the helicopters were coming in.

766. Person 14's account also coheres with the falsification of the OPSUM entry. His evidence explains why the 1405DE entry would be falsely created, and why an account of an EKIA would be placed at that particular time. The trial judge was correct to say that the OPSUM entry being wrong was an "important conclusion" which provided "clear and strong support for the account by Person 14."<sup>141</sup> Relevant also is the fact that Person 14 was consistent in his account, both in oral evidence in this proceeding, and in his prior statements made to Mr Masters years earlier, in 2018. Person 14's evidence on Chinartu was honest and reliable.

#### **F. Conclusion**

767. Mr Roberts-Smith has failed to establish any errors of principle in the trial judge's approach. His Honour considered the evidence piece by piece, including Mr Roberts-Smith's multi-pronged attack on Person 14's credibility. Then his Honour stepped back to consider the whole of the evidence together. The conclusion was that Person 14's evidence on Chinartu must be accepted.<sup>142</sup> That conclusion was correct.

768. Mr Roberts-Smith's approach is now to focus on individual points where he says Person 14's evidence is inconsistent or improbable. Not only are these issues not genuine inconsistencies or improbabilities, they fail to take account of the whole of Person 14's evidence and compelling features establishing its reliability (including by reason of being corroborated by independent evidence of which Person 14 was unaware at the time he first gave his account of the murder).

769. Mr Roberts-Smith's attempt to salvage some of Person 11 and Person 32's credibility from the consequences of their dishonesty is misconceived. Their evidence on the key point – the execution of the PUC – should certainly not be taken into account.

770. The result is that this Court should dismiss Grounds 10 to 13 of the Notice of Appeal.

#### **SECTION VI: CONCLUSION**

771. For the foregoing reasons, the appeal should be dismissed with costs.

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Counsel for the Respondents

17 November 2023

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<sup>141</sup> J [1536].

<sup>142</sup> J [1536].