OMAGH
BOMBING INQUIRY

THE OMAGH BOMBING INQUIRY –RULING ON THE APPLICATIONS FOR THE APPOINTMENT OF SPECIAL ADVOCATES

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Part 1 - Introduction

1. This ruling addresses the question of whether there may be a role for Special Advocates in an inquiry conducted under the Inquiries Act 2005 ("the 2005 Act").

Background

2. The Omagh Bombing Inquiry ("the Inquiry") was formally established in February 2024 by the Secretary of State for Northern Ireland. Its broad purpose is to investigate whether there were reasonable steps which could have been taken by the United Kingdom authorities to prevent the bombing which took place in Omagh on 15 August 1998. Twenty-nine individuals and two unborn babies lost their lives in that atrocity and very many more suffered serious injury.

3. The Terms of Reference for the Inquiry set out the parameters of its investigations. They are in the following terms:

> "Purpose
>
> 1. To investigate whether the car bomb detonated in Omagh, County Tyrone on 15th August 1998 in which 29 people and two unborn children were killed could have been prevented by UK State authorities, with particular attention to the matters considered by Horner J. in the application for judicial review, *Re Gallagher* [2021] NIQB 85.
>
> Scope
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> 2. To the extent necessary to investigate issues relating to whether the Omagh Bombing could have been prevented by UK State authorities, the Inquiry's investigations will include consideration, individually and collectively, of the following matters:
>
> a. As background and context to the Omagh Bombing, the assessment by UK State authorities of the threat posed in Northern Ireland by dissident republican terrorists from 1st December 1997 to the date of the Omagh Bombing. This shall include consideration of any change in the assessment following the Belfast Agreement on 10th April 1998.
>
> b. The adequacy of the measures taken by UK State authorities, including the police, security forces and Intelligence and Security Agencies, to disrupt those dissident republican terrorists who had been involved in terrorist attacks or attempted terrorist attacks in the period from 1st December 1997 to the Omagh Bombing. This shall include consideration of any change in the measures used or approach taken by UK State authorities following the Belfast Agreement on 10 April 1998.
>
> c. The adequacy of the policies and practices of UK State authorities, including the police, security forces and Intelligence and Security Agencies, in sharing intelligence between themselves and with the authorities in the Republic of Ireland on the activities of those dissident republican terrorists who had been

involved in terrorist attacks or attempted terrorist attacks in the period from 1st December 1997 to the Omagh Bombing.

d. The allegation made by Norman Baxter (former Senior Investigating Officer in the investigation into the Omagh Bombing) in the course of his evidence to the Northern Ireland Affairs Select Committee on 11 November 2009, that police investigators into previous attacks in Moira (20 February 1998), Portadown (9 May 1998), Banbridge (1 August 1998) and Lisburn (30 April 1998) did not have access to intelligence materials which may reasonably have enabled them to disrupt the activities of dissident republican terrorists prior to the Omagh Bombing.

e. Information relating to dissident republican terrorist activity said to have been passed to police between June and August 1998 by an alleged British security forces agent known by the name of Kevin Fulton and whether that might reasonably have enabled UK State authorities, whether on its own or in conjunction with other information, to disrupt dissident republican terrorists engaged in the planning and preparation of the Omagh Bombing.

f. The nature of the intelligence said to have been obtained by the UK Government's Communication Headquarters (GCHQ), including from alleged vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and conduct of the Omagh Bombing and other earlier attacks.

g. The adequacy of the analysis and handling of and response by UK State authorities to any intelligence obtained by GCHQ, including from vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and/or conduct of the Omagh Bombing and other earlier attacks.

h. The extent and adequacy of steps taken by UK State authorities to track and analyse the mobile telephone usage by those suspected to be involved in dissident republican terrorist attacks before the Omagh Bombing and whether that might reasonably have enabled UK State authorities to disrupt dissident republican terrorists engaged in the planning, preparation and/or conduct of the Omagh Bombing.

i. Any other matters which are relevant to whether the Omagh Bombing on 15th August 1998 could have been prevented by UK State authorities. To the extent it is relevant to the issue of preventability by UK State authorities, this may include information sharing and investigations with and by State authorities in the Republic of Ireland.

Method

The Inquiry will examine and review all documents as the Inquiry Chairman shall judge appropriate. The Inquiry will receive such oral and written evidence, in OPEN and CLOSED, as the Inquiry Chairman shall judge appropriate and follow such procedures as are appropriate to ensure that the Inquiry is effective, taking account of the need to protect national security interests.

Report

The Inquiry will report to the Secretary of State for Northern Ireland as soon as practicable. The Inquiry Report will make such recommendations as may seem appropriate. Given the sensitive nature of the material, the Inquiry Chairman may choose to produce both an OPEN and a CLOSED report."

The Core Participants

4. The Inquiry Rules 2006 provide, by Rule 5, for the designation of Core Participants. Rules 6 and 8 provide for the designation of a recognised legal representative to act on behalf of a Core Participant and for a legal team to be appointed to assist the recognised legal representative. The Inquiry's protocol on applying for Core Participant status, published on 26 February 2024, states that those designated as such may participate in the inquiry by:

    a. receiving, in advance of hearings, disclosure of evidence which the Chair considers relevant to that Core Participant;
    b. making an opening and closing statement at certain hearings;
    c. suggesting lines of questioning to be pursued by Counsel to the Inquiry;
    d. their recognised legal representatives applying to the Chair to ask questions of a witness.

5. The Secretary of State for Northern Ireland, the Police Service of Northern Ireland, and The Police Ombudsman for Northern Ireland, were each designated as Core Participants. They are all represented by solicitors and a team of counsel. Sir Ronnie Flanagan, GBE, QPM, the former Chief Constable of the Royal Ulster Constabulary and the Police Service of Northern Ireland, was also designated as a Core Participant and is likewise represented by solicitors and counsel.

6. In addition, a number of bereaved family members and those who were otherwise victims of the bombing were also designated as Core Participants. Fifty-four of these Core Participants are represented by Fox Law, Solicitors, thirty-one are represented by John McBurney, Solicitors, Anthony Rush is represented by Elev8 Law, Solicitors, twelve are represented by Cambell & Haughey, Solicitors, eight were represented by Logan & Corry, Solicitors (since the hearing that firm has amalgamated with PA Duffy, Solicitors) and six are represented by Roche McBride, Solicitors. The firms of Fox Law, John McBurney, Solicitors and Elev8Law are each assisted by senior and junior counsel. The firms of Campbell & Haughey, Logan & Corry and Roche McBride each instruct the same team of senior and junior counsel. The result is that there are four teams of senior and junior counsel representing the Core Participants who are bereaved family members and those who were otherwise victims of the bombing. In this ruling I shall use the phrase "family Core Participants" to refer to both bereaved and survivors who have been granted this status.

The preparatory work of the Inquiry

7. The work of the Inquiry is still at an early stage. Material is in the process of being ingathered from a number of different sources, which include, amongst many others, the Police Service of Northern Ireland, the Northern Ireland Office, The Cabinet Office, the Ministry of Defence, the Joint Intelligence Committee, Government Communications Headquarters (GCHQ), other branches of the United Kingdom intelligence community and the Republic of Ireland.

8. Once ingathered, documents are assessed for relevance and sensitivity concerns by the Inquiry Legal Team and then disclosed, as appropriate, to the legal teams representing the Core Participants. To date, approaching 60,000 pages of documentation have been disclosed. This figure will increase very substantially as the Inquiry works towards its evidential hearings. By way of context, the Inquiry currently holds something approaching 400,000 pages of documentation in its open data management system alone.

9. As is anticipated in the Terms of Reference, some of the material of interest to the Inquiry will address sensitive matters concerning the ingathering and use of intelligence. This may well engage legitimate concerns around issues of national security, or raise other legitimate issues of confidentiality or potential harm. Paragraph 2, parts f, g and h, specifically raise questions as to whether there may have been relevant intercepted communications.

10. It is understood that some of the relevant material providers intend to invite the Inquiry to make restriction orders under section 19(2)(b) of the 2005 Act. The effect of any of such orders would be to avoid the need for material to be disclosed to Core Participants, or otherwise disseminated, and to permit the Inquiry to hear evidence relating to such materials at hearings from which some Core Participants and their legal representatives would be excluded (closed hearings). Detailed submissions on the scope and extent of any such restriction orders may require to be heard, at least in part, in closed hearings. The prospect of a Minister issuing a restriction notice under section 19(2)(a) also exists.

11. Advocates who have spoken at inquiry hearings to date have sensitively and realistically acknowledged the likelihood of closed material and processes. At a hearing on 22 July 2025, Mr Southey KC explained that:

> *"…*if you think about the realities of this case or this Inquiry, everyone recognises that large, key parts of this process are likely to be in closed"

At that same hearing, Mr Kane KC explained that:

"This Inquiry has a huge task involving what will probably be a large amount of material which will probably again fall into the closed section."

12. In the expectation that invitations to make restriction orders would be made, certain of the Inquiry Core Participants communicated a wish to have Special Advocates appointed to make submissions before the Inquiry at any hearing to determine whether a restriction order should be made, what the scope and extent of such an order ought to be, and to represent their interests at any closed hearings during which evidence would be heard. Accordingly, the Inquiry invited submissions from all Core Participants on the question of whether there was power within the 2005 Act, or the Inquiry Rules 2006, such as would permit the appointment of Special Advocates and, if there was, whether such a power should be exercised in the circumstances of the Inquiry. The Inquiry Legal Team and the Core Participants lodged helpful written submissions addressing these questions in line with a timetable fixed by the Inquiry and I heard supplementary oral submissions over two days on 21 and 22 July 2025.

Special Advocates

13. For the purposes of the submissions presented, the general role and function of a Special Advocate was taken to be as described in the Guide to the Role of Special Advocates Open Manual, second edition 2022, as issued by the Special Advocates' Support Office. The concept of a Special Advocate is a well-known feature in litigation of various different types, both in England and Wales and in Northern Ireland. Two Special Advocates appeared to represent the interests of the applicant in the closed hearings held in the *Re Gallagher* Judicial Review proceedings ([2021] NIQB 85), which preceded the Inquiry. For present purposes, the essential aspects of the function of a Special Advocate are that he or she may represent the interests of an excluded person at closed hearings but is not accountable to them. The Special Advocate does not have a professional relationship in the normal sense with the excluded person and, subject to some limited caveats, can only communicate with that person prior to being provided with the relevant closed materials. A Special Advocate cannot be instructed directly by or on behalf of a client. They are appointed by the relevant Law Officer.

14. It is therefore clear, that as the Chair of a statutory inquiry, I could not appoint Special Advocates to appear in these proceedings. All that I could do would be to invite the relevant Law Officer to make such appointments, if I thought it appropriate to issue such a request. Before doing so, I would require to be satisfied that there was a power available such as would accommodate the appointment of Special Advocates within the framework of the statutory procedure and that, in my view, it would be appropriate to make such an appointment. A shorthand method of addressing these

questions may be to ask whether or not there is a role for Special Advocates within inquiries conducted under the 2005 Act.

15. This was the issue which divided the participants at the hearing before me. The position of the Secretary of State was that there was no power available within the statutory framework, nor in any other source, to permit the appointment of Special Advocates in any inquiry established under the 2005 Act. Even if I were to conclude differently, the Secretary of State's submission was that I should decline to issue an invitation to make an appointment as there was no necessity for any such role in these proceedings. Bar one group, the family Core Participants submitted that there was power and that Special Advocates should be appointed.

The statutory framework

16. By way of introduction to the competing propositions, it may be helpful to set out the statutory provisions which were seen as being relevant to the debate and to note the decisions on this topic which have been reached in other statutory inquiries. The features of the 2005 Act which were central to the discussions were the provisions of sections 17, 18 19 and 20. They provide as follows:

> **"17 Evidence and procedure**
>
> (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
>
> (2) In particular, the chairman may take evidence on oath, and for that purpose may administer oaths.
>
> (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).
>
> **18 Public access to inquiry proceedings and information**
>
> (1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—
>
> > (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
> >
> > (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.
>
> (2) No recording or broadcast of proceedings at an inquiry may be made except—
>
> > (a) at the request of the chairman, or

(b) with the permission of the chairman and in accordance with any terms on which permission is given.

Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing.

(3) Section 32(2) of the Freedom of Information Act 2000 (c. 36) (certain inquiry records etc exempt from obligations under that Act) does not apply in relation to information contained in documents that, in pursuance of rules under section 41(1)(b) below, have been passed to and are held by a public authority.

(4) Section 37(1)(b) of the Freedom of Information (Scotland) Act 2002 (asp 13) (certain inquiry records etc exempt from obligations under that Act) does not apply in relation to information contained in documents that, in pursuance of rules under section 41(1)(b) below, have been passed to and are held by a Scottish public authority.

19 Restrictions on public access etc

(1) Restrictions may, in accordance with this section, be imposed on—

(a) attendance at an inquiry, or at any particular part of an inquiry;

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

(2) Restrictions may be imposed in either or both of the following ways—

(a) by being specified in a notice (a "restriction notice") given by the Minister to the chairman at any time before the end of the inquiry;

(b) by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.

(3) A restriction notice or restriction order must specify only such restrictions—

(a) as are required by any statutory provision, assimilated enforceable obligation or rule of law, or

(b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

(4) Those matters are—

(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;

(b) any risk of harm or damage that could be avoided or reduced by any such restriction;

(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;

(d) the extent to which not imposing any particular restriction would be likely—

(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or

(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

(5) In subsection (4)(b) "harm or damage" includes in particular—

(a) death or injury;

(b) damage to national security or international relations;

(c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information.

20 Further provisions about restriction notices and orders

(1) Restrictions specified in a restriction notice have effect in addition to any already specified, whether in an earlier restriction notice or in a restriction order.

(2) Restrictions specified in a restriction order have effect in addition to any already specified, whether in an earlier restriction order or in a restriction notice.

(3) The Minister may vary or revoke a restriction notice by giving a further notice to the chairman at any time before the end of the inquiry.

(4) The chairman may vary or revoke a restriction order by making a further order during the course of the inquiry.

(5) Restrictions imposed under section 19 on disclosure or publication of evidence or documents ("disclosure restrictions") continue in force indefinitely, unless—

(a) under the terms of the relevant notice or order the restrictions expire at the end of the inquiry, or at some other time, or

(b) the relevant notice or order is varied or revoked under subsection (3), (4) or (7).

This is subject to subsection (6).

(6) After the end of the inquiry, disclosure restrictions do not apply to a public authority, or a Scottish public authority, in relation to information held by the authority otherwise than as a result of the breach of any such restrictions.

(7) After the end of an inquiry the Minister may, by a notice published in a way that he considers suitable—

(a) revoke a restriction order or restriction notice containing disclosure restrictions that are still in force, or

(b) vary it so as to remove or relax any of the restrictions.

(8) In this section "restriction notice" and "restriction order" have the meaning given by section 19(2).

17. The Inquiry Rules 2006 were also relied upon, with Rules 10 and 12 being said to be of particular relevance. They provide:

"Oral evidence

10.—(1) Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry (or, if counsel has not been appointed, the solicitor to the inquiry) and the inquiry panel may ask questions of that witness.

(2) Where a witness, whether a core participant or otherwise, has been questioned orally in the course of an inquiry hearing pursuant to paragraph (1), the chairman may direct that the recognised legal representative of that witness may ask the witness questions.

(3) Where—

(a) a witness other than a core participant has been questioned orally in the course of an inquiry hearing by counsel to the inquiry, or by the inquiry panel; and

(b) that witness's evidence directly relates to the evidence of another witness,

the recognised legal representative of the witness to whom the evidence relates may apply to the chairman for permission to question the witness who has given oral evidence.

(4) The recognised legal representative of a core participant may apply to the for permission to ask questions of a witness giving oral evidence.

(5) When making an application under paragraphs (3) or (4), the recognised legal representative must state—

(a) the issues in respect of which a witness is to be questioned; and

(b) whether the questioning will raise new issues or, if not, why the questioning should be permitted.

Disclosure of potentially restricted evidence

12.—(1) In this rule—

(a) "potentially restricted evidence" means any evidence which is in the possession of the inquiry panel, or any member of the inquiry panel, and which is the subject of a relevant application which has not been determined or withdrawn;

(b) "relevant application" means an application which is

(i) made by any person that evidence or documents are the subject of a restriction notice made by the Minister pursuant to section 19(2)(a) of the Act;

(ii) made by any person that the chairman exercise his discretion under section 19(2)(b) of the Act; or

(iii) made by any person that evidence or documents be withheld on grounds of public interest immunity,

and which entails the withholding of evidence from the public.

(2) Subject to paragraph (3), potentially restricted evidence is subject to the same restrictions as it would be subject to if the order sought in the relevant application had been made.

(3) Where the conditions in paragraph (4) are satisfied, the chairman may disclose the potentially restricted evidence to a person who would not otherwise be permitted to see it.

(4) The conditions are that—

(a) the chairman considers that disclosure to an individual is necessary for the determination of the application; and

(b) the chairman has afforded the opportunity to—

(i) the person providing or producing the evidence to the inquiry panel; or

(ii) any other person making the relevant application,

to make representations regarding whether disclosure to that individual should be permitted.

(5) Any person who is shown potentially restricted evidence pursuant to paragraph (3) shall owe an obligation of confidence to the person who provided or produced the evidence to the inquiry.

(6) A breach of the obligation referred to in paragraph (5) is actionable at the suit of the person to whom the obligation is owed, subject to the defences applying to actions for breach of confidence."

18. It is clear from this framework that an inquiry Chair would be permitted to hold hearings from which family Core Participants (or other Core Participants) would be excluded. It is equally clear that there is no mention of whether Special Advocates would be entitled to be present and to represent the interests of excluded Core Participants at any such hearings.

19. In light of paragraph 2, parts f, g and h of the Terms of Reference, further statutory provisions are likely to be of direct relevance. Section 56(1) of the Investigatory Powers Act 2016 provides:

> "**56 Exclusion of matters from legal proceedings etc.**
>
> (1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—
>
> (a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—
>
> (i) any content of an intercepted communication, or
>
> (ii) any secondary data obtained from a communication, or
>
> (b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.
>
> This is subject to Schedule 3 (exceptions)."

20. Inquiries Act proceedings are defined as proceedings of an inquiry under the Inquiries Act 2005. Paragraphs 22 and 23 of Schedule 3 provide:

> "**22** (1) Nothing in section 56(1) prohibits—
>
> (a) a disclosure to the panel of an inquiry held under the Inquiries Act 2005, or
>
> (b) a disclosure to a person appointed as legal adviser to such an inquiry,
>
> where, in the course of the inquiry, the panel has ordered the disclosure to be made to the panel alone or (as the case may be) to the panel and any person appointed as legal adviser to the inquiry.
>
> (2) The panel of an inquiry may order a disclosure under sub-paragraph (1) only if it considers that the exceptional circumstances of the case make the disclosure essential to enable the inquiry to fulfil its terms of reference.
>
> (3) Any reference in this paragraph to a person appointed as legal adviser to an inquiry is a reference to a person appointed as solicitor or counsel to the inquiry.
>
> **23**(1) Section 56(1) does not apply in relation to any restricted proceedings of an inquiry held under the Inquiries Act 2005.
>
> (2) Proceedings of an inquiry held under that Act are "restricted proceedings" for the purposes of this paragraph if restrictions imposed under section 19 of that Act are in force prohibiting attendance at the proceedings by any person who is not—
>
> (a) a member of the panel of the inquiry,
>
> (b) a person appointed as legal adviser to the inquiry,

(c) a person who is a relevant party to the proceedings,

(d) a person representing such a person for the purposes of the proceedings, or

(e) a person performing functions necessary for the proper functioning of the proceedings.

(3) But sub-paragraph (1) does not permit any disclosure which has not been made in accordance with paragraph 22(1).

(4) In this paragraph "relevant party", in relation to any proceedings of an inquiry, means—

(a) any person making a disclosure to the panel of the inquiry, or to a person appointed as legal adviser to the inquiry, in accordance with paragraph 22(1);

(b) any person giving evidence to the inquiry in circumstances where, in the absence of sub-paragraph (1), the prohibition imposed by section 56(1) would be breached;

(c) any person whose conduct is the interception-related conduct (within the meaning of section 56) to which the disclosure or evidence relates (whether or not that conduct has in fact occurred);

(d) any other person to whom the subject-matter of the disclosure or evidence has been lawfully disclosed in accordance with section 58.

(5) Any reference in this paragraph to a person appointed as legal adviser to an inquiry is to be read in accordance with paragraph 22(3)."

21. It is therefore clear that the existence of interception-related conduct and the content of intercepted communications, could competently be disclosed to an inquiry Chair and legal advisor, which is defined as meaning both the Solicitor and Counsel to the Inquiry. It would also be competent to lead evidence of any such conduct, and of the content of intercepted communications, at an appropriately constituted hearing during the course of inquiry proceedings. Paragraph 22 would not appear to permit disclosure to any Special Advocates and the list of those persons permitted to attend at a "restricted proceedings" hearing does not include a Special Advocate, at least by name.

Previous inquiry rulings

22. Three previous rulings in Inquiries Act proceedings have touched upon the appointment of Special Advocates and the question of whether there was a power to accommodate such an appointment was raised in each. It does not, however, appear as though the Chairs of any of these inquiries had the benefit of the type of detailed analysis that I was provided with.

The Litvinenko Inquiry

In the Litvinenko Inquiry, the wife and son of the deceased Mr Litvinenko were both Core Participants. The Secretary of State had issued restriction notices in terms of section 19(2)(a) of the 2005 Act. Each of these Core Participants sought the appointment of a Special Advocate. The applications were made upon the basis that a Special Advocate would be in a position to apply for judicial review of the restriction notices and that this would be the only means of ensuring some sort of independent judicial oversight of the Minister's decision to issue restriction notices. It was also said to be the means by which these Core Participants could make an informed contribution to the issue of Russian State responsibility. Mrs Litvinenko, as was acknowledged, had intimate knowledge of her husband's history and activities.

Sir Robert Owen issued a ruling dated 9 October 2014, in which he explained that he had formed a provisional view that the power to appoint a Special Advocate was implicit in the broad power to determine the procedure to be adopted in an inquiry and the express duty to act fairly. He considered that the circumstances in which the appointment of a Special Advocate would be necessary to enable the Chairman of an inquiry properly to discharge his functions would be wholly exceptional. Bearing in mind the inquisitorial nature of an inquiry constituted under the 2005 Act, and the role to be played by Counsel to the Inquiry, he did not consider the appointment of a Special Advocate to be necessary for the proper discharge of his function. On the premise that he (sic) had power to appoint a Special Advocate, he was not persuaded that he should do so.

The Manchester Arena Inquiry

In the Manchester Arena Inquiry, certain of the family Core Participants sought the appointment of Special Advocates to enable them to have a more meaningful participation in the closed hearings which were to take place as part of the inquiry. In his ruling dated 7 October 2021, Sir John Saunders considered that he had power to appoint Special Advocates through necessary implication arising out of the terms of section 17 of the 2005 Act. He also considered that there was a general power to appoint Special Advocates, as supported by the authority of *R v AHK and Others* [2009] EWCA Civ 287. Further support was capable of being drawn from the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45.

In determining whether he ought to grant the application, Sir John concluded that the interests of the families and that of Counsel to the Inquiry would be aligned, as the families had no special information that they could feed into this specific part of the inquiry. His view was that a Special Advocate would be doing no more than checking to make sure that Counsel to the Inquiry were doing their job properly. That was something

he could judge for himself. He also noted that Counsel to the Inquiry would be able to speak to the Core Participants and that they could suggest questions to him. It was important that the families were not left with an inaccurate impression of what a Special Advocate could do. He observed that if they were looking for re-assurance that the investigation conducted in a closed hearing was undertaken rigorously, they would not be able to get it, as they would not be able to have contact with the Special Advocate after he or she had received the restricted information. In these circumstances Sir John concluded that it was not necessary or desirable to appoint Special Advocates and he refused the application.

The Independent Inquiry Relating to Afghanistan

In this inquiry an application was made to Lord Justice Haddon-Cave to appoint Special Advocates to represent the interests of the Afghan families who were Core Participants. The application was presented upon the basis that there was a very real prospect that the families would be the subject of severe criticism during the closed hearings which they must be entitled to challenge. Additionally, the involvement of Special Advocates would lend an important legitimacy to the closed hearings, which might constitute the bulk of the inquiry's work, both for the families and for public reassurance.

23. Although the question of power to make an appointment was raised, Lord Justice Haddon-Cave proceeded upon the view that it was not necessary for him to determine this issue of principle, as it was neither necessary nor appropriate for Special Advocates to be appointed. His reasons were as follows:

> "(1) The Inquiry involves an independent and impartial investigation by a specially appointed Chair; its process is inquisitorial and is aimed at getting to the truth and not adversarial.
>
> (2) I have complete confidence that Counsel to the Inquiry will test the evidence in CLOSED with the same diligence and independence as they will in the OPEN hearings. Further, my approach to the CLOSED hearings will be just as rigorous as in OPEN.
>
> (3) The appointment of Special Advocates would duplicate the existing role and functions of Counsel to the Inquiry, and moreover would involve unnecessary complication and cost.
>
> (4) The appointment and involvement of Special Advocates would also cause significant delay, in circumstances where it is important that the Inquiry proceeds at pace.
>
> (5) The extent to which Special Advocates would be able to communicate with the Afghan Families' RLR having already had access to the sensitive material in the context of the judicial review proceedings, is limited. In any event, any proposed lines of focus or enquiry could still be communicated to Counsel to the Inquiry to the same end.

(6) Given the substantial disclosure that has already been made in OPEN and will in due course be made, other Core Participants will still be able to meaningfully participate in the Inquiry."

24. In these circumstances, Lord Justice Hadden-Cave was prepared to assume that a power to appoint was available, although he thought it required further examination, but did not think that the Special Advocate procedure would be appropriate or practical for his Inquiry.

25. The combined research of Counsel to the Inquiry, and the various senior counsel for the Core Participants, vouches that no application for the appointment of a Special Advocate has been made in any other inquiry under the 2005 Act and that no Special Advocate has ever been appointed to act in such an inquiry.

26. As Lord Justice Haddon-Cave perhaps alluded to, the question of principle does not appear to have been assessed in any real depth in either the submissions or the rulings in any of any of the previous Inquiries Act settings in which it arose. It may also be of importance to note that the import of the Investigatory Powers Act does not seem to have been considered in any of the previous debates.

Part 2 – The applications for appointment of Special Advocates

27. Applications seeking the appointment of Special Advocates were made on behalf of all bar one of the groups of family Core Participants. Each of the applicants contended that there was power within the 2005 Act to make an appointment and that it was necessary in their interests to do so. The remaining family group was neutral on the issue of power but did not seek the appointment of a Special Advocate to represent their interests. The Fox Law group of Core Participants sought the appointment of three Special Advocates, the John McBurney, Solicitors group sought the appointment of a different Special Advocate. The remaining group was content to have the same Special Advocates as the Fox Law group.

28. Submissions on behalf of the Police Ombudsman for Northern Ireland supported the existence of a power but did not add anything of substance to what had been presented on behalf of the family groups. The submissions on behalf of the Police Service of Northern Ireland were somewhat ambivalent, contending that there may be a power. As mentioned, the Secretary of State submitted that there was no power to make such an appointment.

The family submissions

29. The essence of the written submissions lodged by the family Core Participants can be summarised as follows. There was no prohibition against appointing a Special Advocate in either the 2005 Act or the Rules. The importance of open justice was reflected in the requirements of section 18 of the 2005 Act. For the Inquiry to hold hearings of any sort in the absence of the family Core Participants would be a departure from common law procedural fairness. They had a right to be heard, supported by natural justice considerations – *The Petition of Greater Glasgow Health Board for Judicial Review* [2025] CSOH 12 and the cases referred to therein.

30. Although family Core Participants could be excluded from hearings if an order was made under section 19 of the 2005 Act, such a step would constitute a denial of their procedural rights. If excluded, the family Core Participants would not be able to advance or safeguard their interests and would be placed at a disadvantage as compared to State Core Participants, who would be able to attend, question witnesses and make submissions.

31. Article 2 ECHR imposed requirements which the Inquiry was obliged to meet. The family Core Participants required to be involved in the procedure to the extent necessary to safeguard their legitimate interests. Whilst the right to disclosure may not be absolute, any unfairness must be counterbalanced. The right to involvement provided for by Article 2 would not be met in the absence of Special Advocates being appointed to represent the interest of the family Core Participants -*R (Amin) v Secretary*

of State for the Home Department [2004] 1 AC 653, *Jordan v United Kingdom* App 24746/94, *Regner v Czech Republic* app 35289/11, *IR v United Kingdom* App 14876/12.

32. Both domestic and ECtHR authority demonstrated that when procedural rights were denied on legitimate grounds there was nevertheless a duty to instigate steps which would compensate for, or counterbalance, that denial of normal standards of procedural fairness – *R (Roberts v Parole Board* [2005] 2 AC 738, *R (E (Russia) v Secretary of State for the Home Department* [2012] 1 WLR 3198, *Regner v Czech Republic* and *IR v United Kingdom*. Special Advocates were recognised as being capable of fulfilling that function. Any derogation from open justice, as authorised by section 19, should be to the most limited manner available. The Inquiry had a power and a duty to avoid unfairness, as reflected in section 17 of the 2005 Act. That power was broad enough to accommodate the appointment of Special Advocates. Case law supported the contention that the appointment of Special Advocates was not dependent on the existence of express statutory authority – *R (Roberts) v Parole Board*. Powers and duties necessary to ensure fairness can be implied into statutes - *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

33. The oral contributions on behalf of the family groups were led by Mr Southey KC. His overarching submission was that the family Core Participants had a right to be represented in some fashion at any closed hearing. That right manifested itself either as a component of natural justice, procedural fairness or Article 2 ECHR. Given that such a right could be seen to be present, there must be a method within the Inquiries Act proceedings of giving effect to it. It followed that section 17 should be viewed as being broad enough to facilitate the ability of Special Advocates to participate and thus give effect to the right possessed by the family Core Participants. His comprehensive analysis of this issue was adopted by the other counsel who supported appointment.

34. In support of these contentions, Mr Southey drew attention to what had been said by Lord Reed in *R (Osborn) v Parole Board* [2014] AC 1115 about the purpose and importance of procedural fairness. He submitted that the family Core Participants would be significantly affected, in the manner contemplated by Lord Reed, by the outcome of the Inquiry. They had campaigned for its establishment over many years. Their experiences over those years had left the families with a distrust of state authorities which underpinned their interest in seeing that the evidence was challenged and tested. Their participation would go to assist the quality of the decisions reached by the Inquiry. They had an interest in ensuring that the Inquiry reached conclusions which they had confidence in.

35. In *Osborn,* at paragraph 68*,* Lord Reed had identified that one of the purposes of a fair hearing was the avoidance of the sense of injustice which could arise where persons whose rights were significantly affected by decisions taken in the exercise of administrative or judicial functions were denied a procedure which respected their right to participate in the procedure by which that decision is made. At paragraph 70 he acknowledged that Courts have recognised the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. Mr Southey's contention was that the sense of resentment mentioned was a real concern in these proceedings if, having campaigned for so long, key findings were to be made in circumstances where the ability of the family Core Participants to influence the outcome was restricted because of the fact that they had not been able to instruct Special Advocates. This point was all the more telling where in the past Special Advocates had been heavily involved in the litigation which led to the Inquiry.

36. Reassurance came to assume a central part of the oral submissions. Mr Southey started from the proposition that Public Inquiries were set up to address matters of public concern, as reflected in section 1(1) of the 2005 Act. It followed that the ability to test and challenge the evidence on behalf of the family Core Participants would provide them and the public with reassurance and allow there to be public confidence in the outcome of the Inquiry. Conversely, to deny the family Core Participants representation during hearings at which important evidence was heard would have the potential to undermine public confidence in the work of the Inquiry. Even if the families and their legal teams were not permitted to be present at a closed hearing, they would be reassured by the participation of Special Advocates who were acting in their interests alone.

37. The importance of a fair procedure, the benefits of reassurance and the associated public confidence, were presented by Mr Southey as setting the context within which the case law concerning the power to appoint Special Advocates should be seen. In essence, what he contended could be drawn from the case law was this: that where there was a power to consider material in closed hearings in the absence of one of the parties, that would always raise a concern about fairness; however, the courts who had this power also had a power and a duty to ensure fairness; accordingly, these courts had power to appoint Special Advocates, because that step enhanced the rights of the individual who was being denied access.

38. These factors were said to be present in the circumstances we were considering. Section 19 of the 2005 Act enabled the Inquiry to hold closed hearings but section 17 preserved the duty to act fairly. Because section 19 envisaged a departure from the normal standards of fairness, any

restriction on attendance should be to the minimum extent needed. Appointing Special Advocates helped to minimise the extent to which family Core Participants would otherwise be adversely affected.

39. It was said that the case law demonstrated that Special Advocates had been appointed in a range of different court processes, such as criminal proceedings, civil proceedings and family proceedings. The decisions in cases such as *R v H* [2004] 2 AC, 134 *R (Roberts) v Parole Board* [2005] UKHL 45 and *Re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048, were said to demonstrate that the power existed without the need for any statutory authority.

40. The case of *Roberts* was relied upon in particular. It was submitted that it provided a close analogy to the situation being considered. There were two reasons given for this proposition. First, there was said to be a degree of similarity between the statutory scheme governing inquiries and the scheme considered in *Roberts*. Second, the issue in *Roberts* arose in the context of an administrative body, rather than something which was regarded as a classic court. The principle which could be taken from the decision in *Roberts* was said to be that: in circumstances where there was an express power to withhold material from a party to some form of proceedings, and that resulted in unfairness, the use of a Special Advocate can mitigate that unfairness. The value of the case was that the statutory scheme under consideration in *Roberts* was similar to the scheme governing inquiries. In *Roberts* there was a power to withhold the relevant material and a general duty to act fairly, which resulted in the appointment of a Special Advocate. In the present circumstances, closed hearings were expressly permitted, despite that being a departure from normal principles of fairness. The legislation then required the procedure adopted to be as close to fair as possible. In making that requirement, it implicitly gave an inquiry the power necessary to achieve fairness and, if necessary, to appoint a Special Advocate. The test as to whether such an appointment was necessary could be seen as being one of achieving fairness.

41. It was recognised that the Inquiry Rules make no reference to Special Advocates, even when providing for who may question witnesses. This, it was said, was of no moment. The Rules were secondary legislation. They could not be interpreted as a comprehensive code. Common law fairness would supplement the Rules, so that if section 17 of the 2005 Act required the appointment of a Special Advocate to ensure fairness, the fact that such a step was not addressed in the Rules would be no barrier. The Rules required to be interpreted consistently with the 2005 Act.

42. Attention was then drawn to the Investigatory Powers Act 2016, when Mr Southey turned to explain why nothing in this Act undermined any of

his submissions. The basic principle was that section 56 of the Act operated so as to prevent evidence being adduced, questions being asked or disclosure being made, in relation to intercept material, in any type of proceedings. Schedule 3 then specified some types of proceedings in which closed hearings were authorised and in which section 56 would be disapplied. Some of these were proceedings in which there existed statutory authority for the appointment of a Special Advocate. The relevant paragraphs of the Schedule permitted a duly appointed Special Advocate to participate in such closed proceedings when the prohibition was disapplied. Paragraphs 22 and 23 of Schedule 3 disapplied the section 56 prohibition in relation to closed hearings held in certain circumstances in Inquiries Act proceedings but made no mention of the ability of a Special Advocate to participate.

43. On Mr Southey's analysis, the import of Schedule 3 in relation to Inquiries Act proceedings began with an appreciation that the Schedule was not comprehensive, in the sense that it did not cover every situation in which a Special Advocate may need to be appointed. The example of family law was identified. Although a Special Advocate could be appointed in family law proceedings there was no mention of such an exception in Schedule 3. Thus, the absence of any mention of a Special Advocate being able to participate in proceedings authorised by paragraphs 22 and 23 was not decisive.

44. Paragraph 23 of Schedule 3 concerned the circumstances in which evidence which would otherwise be prohibited could be heard at what was defined as a "restricted proceedings" hearing. Subparagraph (2) identified the only persons who could attend such a hearing. Subparagraph (2)(e) permitted the presence of "a person performing functions necessary for the proper functioning of the proceedings". This ought to be seen as a catchall provision which could be linked back to the structure of the Inquiries Act, and to the broad and flexible terms of section 17 of that Act. Accordingly, if the appointment of Special Advocates was necessary to ensure fairness in relation to general closed hearings conducted under section 19 of the 2005 Act, such a person would be viewed as being necessary for the proper functioning of a restricted proceedings hearing. He, or she, would therefore be permitted to attend by virtue of the paragraph (2)(e) stipulation. It followed that Special Advocates appointed to act in the interests of the family would not be excluded from a restricted proceedings hearing.

45. The points identified by Mr Southey in relation to procedural fairness and natural justice were then revisited through the lens of Article 2 ECHR. It was accepted that section 19 of the 2005 Act could operate compatibly with Article 2, as public hearings involving the next of kin were not always required. That did not mean that there was no right to family involvement

where section 19 operated. The case of *R (Amin) v Secretary of State for the Home Department* [2004], at paragraph 20, illustrated the correct approach to take. Even where it was legitimate to hold parts of an investigative process in private, for example where the police were ingathering evidence, it was necessary that the test in *Jordan v United Kingdom* should be met, namely that in all cases the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. The safeguarding of interests was not restricted to questioning witnesses. It was also concerned with being able to assess whether there had been an error in law in relation to proceedings conducted in a closed hearing and whether there was an evidential basis for findings reached on the basis of evidence held in closed hearings. It was, on Mr Southey's submission, easy to conceive of circumstances where the next-of-kin would not be able to safeguard their legitimate interests during closed hearings in the absence of Special Advocates. In that situation, the inquiry would not be acting compatibly with Article 2. That, in turn, pointed towards the likelihood that there would be a power to appoint a Special Advocate in order to avoid any issue of incompatibility.

46. The same conclusion would be arrived at if one approached the issue by asking what mechanism there could be to protect the legitimate interests of the family Core Participants. On Mr Southey's submission it was helpful to consider, by way of analogy, cases concerning Article 6, where he suggested issues concerning national security more commonly arose. The European Court of Human Rights had recognised that steps may be taken to ensure that the State's interests are protected but where this takes place there must, as far as possible, be adequate safeguards in place to ensure adversarial proceedings and equality of arms. It was on this basis that the European Court had endorsed the use of Special Advocates – *Regner v The Czech Republic* GC. Although he recognised that Inquiries Act proceedings were not adversarial, Mr Southey submitted that the concept of equality of arms remained important, as a number of State parties would be present during any closed hearings.

47. A further test could be applied to determine whether Inquiries Act proceedings were conducted in compliance with Article 2. This concerned public confidence, the importance of which was emphasised in both the cases of *R (JL) v Secretary of State for Justice [2009] 1 AC 588* and *R (Amin) v Secretary of State for the Home Department.* Accordingly, the way to determine whether there had been compliance with Article 2 was to look to whether the next-of-kin had been adequately able to safeguard their legitimate interests in the proceedings, and whether the mechanism available to them to do so was one which would provide public confidence. There was no difficulty in ensuring that an adequate mechanism was available, as the basic power given to an inquiry Chair to ensure fairness

would have to include a power to ensure that the procedure adopted complied with Article 2. It was important to bear in mind that Mr Underwood KC and Mr Kennedy had appeared as Special Advocates in the Judicial Review hearing which preceded the Inquiry. The grounds which were found to be arguable all related to intelligence. There was therefore a belief amongst the family Core Participants that the Special Advocates must have played a significant role in achieving the public inquiry. The family Core Participants had confidence in Mr Underwood as leading counsel and believed him to be an effective advocate on their behalf.

48. Whilst the cases of *Ramsahai v Netherlands* (2008) 46 EHRR 43 and *R (JL) v Secretary of State for Justice* had been drawn attention to in the written submissions of the State Core Participants, they were said by Mr Southey to be of no assistance. They were not in point because they were focused on the question of whether or not proceedings required to be held in public. They were not concerned with the question of next-of-kin involvement and how that was facilitated.

49. The concept of the need for representation of the interests of the family Core Participants at closed hearings was at the heart of all that was said by Mr Southey. The inquisitorial nature of the proceedings and the role of Counsel to the Inquiry were said not to be sufficient to meet the requirements of procedural fairness, or Article 2, in this context. Neither the Inquiry nor Counsel to the Inquiry represented the interests of the families. The extent of this deficiency was said to be illustrated by a number of examples which went to demonstrate the limitations of the role of Counsel to the Inquiry. They would, it was said, find it difficult to be impartial and advance issues that one side wished to raise. In considering whether State objections to disclosure were proper, in the context of an application to make a restriction order, the State would have an advantage. It would be able to instruct experienced counsel to present submissions. Counsel to the Inquiry would be expected to provide impartial advice, whereas Special Advocates acting on behalf of the families would be able to effectively argue against the State and in support of further disclosure. Furthermore, Counsel to the Inquiry could not be expected to argue that any error of law had occurred in closed hearings. A suggested example was offered. If Counsel to the Inquiry argued in favour of disclosure but the Chair rejected that submission in favour of a submission made by a State Core Participant, there would, in the first place, be no basis upon which the family Core Participants would know of this decision and be able to challenge it. Secondly, even if Counsel to the Inquiry believed the decision to constitute an error of law, there would be no method by which this could be advanced, as their duty would be to the Inquiry.

50. This sort of disadvantage applied not just to decisions made during closed hearings but also to findings made upon the evidence led in such hearings. In the absence of Special Advocates, the family Core Participants would have no opportunity to challenge findings made on the basis of evidence heard during closed hearings.

51. The presence of advantages of this sort being available to the State Core Participants, and being denied to the family Core Participants, went to demonstrate an inequality of arms. That inequality constituted a breach of the domestic requirement of procedural fairness and natural justice. It also meant that the family Core Participants were unable to safeguard their legitimate interests with the consequence that the proceedings would not be compatible with Article 2.

52. Issues of this nature were, it was said, brought into sharp focus by considering the fact that Sir Ronnie Flanagan, the former Chief Constable of the RUC and PSNI, was also a Core Participant. He had been the subject of criticism by some of the families in the past. Mr Southey suggested that it would be difficult to see why Sir Ronnie should be excluded from closed hearings operating under the authority of section 19 of the 2005 Act. This would mean that he would be in a position to assess whether there should be any challenge to decisions or findings made by the Inquiry at closed hearings. In the absence of Special Advocates that would give him an advantage which the family Core Participants would be denied. Alternatively, if there were to be justifications for excluding Sir Ronnie from closed hearings, that would put Counsel to the Inquiry into the difficult position of having to question on behalf of parties with conflicting interests.

Part 3 – The Response

The submissions for the Secretary of State

53. As a Core Participant, The Secretary of State for Northern Ireland is acting in the interests of all of the Government Departments with which the Inquiry is engaging, and also in the interests of the UK intelligence community. On his behalf, Ms Grange KC submitted that there was no power within the legislation, or the accompanying Rules governing statutory inquiries, to permit the appointment of Special Advocates. This, she submitted, was the clear conclusion to be drawn from:

- a consideration of the language used in the statutory scheme governing the conduct of inquiries;
- the context within which the legislation came to be passed; and
- various changes made by Parliament to legislation in the national security sphere since the coming into force of the 2005 Act.

The language used in the statutory scheme

54. Ms Grange submitted that the statutory scheme ought to be viewed as providing a comprehensive code for the conduct of an inquiry, including, where necessary, closed hearings held under the authority of section 19. It followed that the question of whether a particular power existed could only be determined by taking account of all of the legislative provisions, rather than by focusing on the terms of section 17 of the 2005 Act. Looked at in this broader fashion, the 2005 Act and the associated Rules could be seen as providing a comprehensive regime for the withholding of closed material, as necessary, and for the holding of hearings in the absence of the public, or in the absence of particular Core Participants, where there may be harm or damage which necessitates the withholding of that material. That regime was principally to be found in sections 19 and 20 of the 2005 Act.

55. The terms of Rule 12 were also said to be of importance. That Rule applied where an inquiry had received potentially relevant material and the Chair was considering, for example, whether or not to make a restriction order. The Rule permitted other persons, who would not otherwise be permitted to see it, to have access to the relevant material in order to assist the Chair in making the decision. Ms Grange contended that one could discern from these statutory provisions that Parliament had given an inquiry Chair tools to assist in determining whether to make a restriction order and direction as to who was to contribute to that process.

56. The view that the legislative scheme provided a complete code for determining whether to and, if so, how to conduct closed hearings had an important consequence in linking back to section 17, which began with

the words "subject to any provisions of this Act or of rules under Section 41". On Ms Grange's submission, this was to be interpreted as meaning that where Parliament had given specific powers to the Chair of an inquiry that was where it had chosen to strike a balance in relation to fairness. Accordingly, if Parliament had intended to include within the scheme power to appoint Special Advocates, it would have said so expressly. The fact that it had not done so was said to be a powerful indicator of the absence of any such power.

57. Attention was then drawn to other aspects of the legislative scheme which were said to point in the same direction. The appointment of Counsel to the Inquiry was anticipated in both the Rules and the Act, the latter of which made provisions for payment of such a person and for immunity from suit. The role of Special Advocates was an unusual one, in the sense that they typically owed no duty to those whose interests they represented in closed hearings and had no professional relationship, as ordinarily understood, with that person or those persons. The peculiarity of that relationship called out for delineation and explanation, such as could be found in other statutory regimes where the appointment of Special Advocates was contemplated.

58. Rule 10 concerned oral evidence and was prescriptive as to who was entitled to ask questions of witnesses. The only opportunity for a representative of a Core Participant to question a witness arose if permission was granted under the application of paragraphs (4) and (5). It could therefore be seen that in Inquiries Act proceedings strict control over the questioning of witnesses was held by the Chair. Since a Special Advocate could not be appointed to act as a "recognised legal representative", in the manner provided for by Rule 6, there was no provision which would permit a Special Advocate to ask questions or to apply to ask questions. This not only pointed towards the absence of any role for a Special Advocate but also served to emphasise the centrality of the role of the Inquiry Chair and Counsel to the Inquiry in leading the investigation. This, in turn, served to reinforce the distinction between the Inquiries Act procedure, which provided for an inquisitorial investigation, and adversarial litigation. That distinction was crucial in understanding the need for the sort of mitigating balance which could be provided by Special Advocates in adversarial proceedings, where rights or allegations were being determined by a judicial officeholder acting as an adjudicator. That same distinction went to explain why any such comparable need was absent in inquisitorial proceedings.

Purpose and context of the 2005 Act

59. The purpose behind an Act of Parliament and the context within which it had been enacted provided a frame of orientation for the use of the

language employed within the Act – *R (Daly) v Secretary of State for the Home Department* [2000] 2 AC 532 at 548, *R (Westminster City Council) v National Asylum Support Service* [2002] All ER 654 at paragraph [5]. Ms Grange submitted that a key purpose behind the passing of the 2005 Act was to control the cost of statutory inquiries. The terms of section 17(3) imposed a duty on the Chair to conduct the inquiry with regard to the need to avoid unnecessary cost. Section 39 gave power to the Minister to limit the scope of cost liability if an inquiry should depart from its Terms of Reference. Almost half of the 34 provisions within the Inquiry Rules 2006 concerned costs. Given these restrictions, it was submitted that Parliament would not have granted the Chair of an inquiry an implied power to appoint Special Advocates without making any provision whatsoever to address the cost consequences of doing so, which could be very significant in an inquiry with any measure of closed hearings.

60. More fundamentally, the context of the legislation was that it created an inquisitorial scheme. This, it was contended, was the most relevant factor when it came to interpreting the provisions within the Act and accompanying Rules. The very obvious difference between Inquiries Act proceedings and *inter partes* litigation was that the former did not involve parties pursuing competing pleaded cases, or agendas, each seeking to pull the investigation in different directions. Statutory inquiries were set up to look at matters of public importance and to do so by looking to the past but then to look to the future and make recommendations. This involved an independent objective investigation by the Chair, assisted by Counsel to the Inquiry. The disclosure provisions within the Act and the Rules were all crafted around that inquisitorial focus and reflected the fact that there was no requirement for partial representation in an inquiry of this nature. All of the participants ought to be focused on assisting the Chair in conducting the investigation. Having Special Advocates to represent particular interests in the closed proceedings would be antithetical to the inquisitorial process. All of this was underpinned by the terms of section 2(1), which made it clear, right at the start of the 2005 Act, that an inquiry Chair (or panel) was expressly prohibited from entering into any determination of a person's civil or criminal liability. The Inquiry was therefore a very different beast from adversarial litigation and that illuminated the question of what fairness required. A proper appreciation of this distinction went to understanding why Parliament had made no provision for the appointment of Special Advocates in determining how it should strike the balance of fairness.

Further legislative developments

61. The third strand of this submission concerned amendments to national security legislation which addressed the question of the extent to which intercept related material could be made available in Inquiries Act

proceedings. This process began with the 2005 Act itself, which amended the prohibition, then found in sections 17 and 18 of the Regulation of Investigatory Powers Act 2000, against disclosing or revealing the content of intercepted communications or the existence of a warrant to do so. Paragraph 21 of Schedule 2 to the 2005 Act had the effect of allowing otherwise prohibited material to be disclosed to the panel of an inquiry in the course of which the panel had ordered the disclosure to be made to it alone. Section 74(1) of the Counterterrorism Act 2008 introduced a further amendment so as to permit any such disclosure to be extended to Counsel to the Inquiry as well as to the panel. Further amendments were then brought about by the Investigatory Powers Act 2016, with the effect that Parliament engaged in a very careful analysis of which of the personnel involved in an inquiry could be given access to this particular species of closed material. No exception was made for a Special Advocate. This was said to strongly suggest that there was no power within the Inquiries Act legislative scheme to appoint Special Advocates. Had Parliament thought that an inquiry had such a power, there would be no reason for it to create a situation in which the Chair, Counsel to the Inquiry and the Solicitor to the Inquiry could all be provided with a certain category of closed material but not to include Special Advocates within that dispensation. The whole legislative scheme required to be interpreted in a coherent fashion. The explanation which permitted this was that there was no power to appoint Special Advocates to participate in any closed hearings conducted in Inquiries Act proceedings.

62. In light of the extent of the reliance placed by the family Core Participants on the case of *Roberts v Parole Board*, Ms Grange offered some submissions on the effect which she contended it ought to have on my decision. The context in which the decision was reached was important. The stakes were high on both sides of the equation, with public safety pointing towards the need for the Parole Board having all relevant material relating to risk before it, and the liberty of the applicant on the other side, pointing towards fairness requiring that he be able to respond to the information being presented against his release. The express powers available to the Parole Board were different from those available in Inquiries Act proceedings and included the power to take steps incidental or conducive to the discharge of its functions. These powers were germane to the majority decision reached in the case. Given the importance of context in assessing what fairness required, the mitigating counterbalance of a Special Advocate was available as a step which was incidental or conducive to the discharge of the Parole Board's function. The very different context in which the decision was reached meant that it had little read across to the circumstances of Inquiries Act proceedings.

63. Turning to the requirements of Article 2, Ms Grange submitted that the case law made it clear that the investigative obligation did not require that the public or Core Participants have full access to all aspects of an inquiry proceedings or evidence. The use of closed proceedings, where necessary, had been approved of, as vouched by cases such as *R (Amin) v Secretary of State for the Home Department*, *Ramsahai v Netherlands* and *R (JL) v Secretary of State for Justice.* There was no suggestion in the case law that a Special Advocate must be appointed in inquisitorial proceedings in order to comply with Article 2. What was required was that the next of kin had to be involved to the extent necessary to safeguard their interests. It could be seen that the families were heavily involved in any statutory inquiry. They had a right to apply for Core Participant status, to apply for legal representation, to work with Counsel to the Inquiry, to suggest questions and to apply to the Chair to ask questions themselves. When it came to any closed proceedings conducted under the authority of section 19, by definition, such hearings would concern material that the family could not give instructions on, because they would not be aware of what it was. Any concerns which they had, or lines of inquiry which they wanted pursued in relation to a general understanding of the topic, could all be pursued at their suggestion by Counsel to the Inquiry.

64. What should be understood was that Parliament had decided where to strike a balance as to what fairness required in the context of Inquiries Act proceedings, including in relation to closed hearings. That balance recognised that something might happen in closed proceedings which the open Advocates were not aware of and could not challenge. However, Parliament had decided that the safeguards which it had put in place, namely the independence and experience of the Chair and the role of Counsel to the Inquiry, meant that fairness was mitigated to the extent that it needed to be, given that the process was not one in which civil or criminal liability was being determined.

65. Striking the balance in this fashion was also consistent with the way in which reviewing courts had respected the discretion or latitude available to inquiry Chairs, and to their counsel, to conduct matters, both procedurally and substantively, in the way thought to be most effective by them. Ms Grange suggested that it was very rare indeed for a reviewing court to interfere with a decision reached in a statutory inquiry. Parliament had intended to create a comprehensive regime which was proportionate in terms of costs. The unique nature of the inquisitorial scheme designed by the Act invested the Counsel and Solicitor to the Inquiry, as defined in Rule 2, with the duty of investigation and went to explain the level of deference given to decisions reached. For these reasons, it was said that the monitoring benefit of a Special Advocate, as identified by Mr Southey, was neither necessary nor appropriate.

66. In concluding her submissions on the issue of power to appoint, Ms Grange mentioned the previous rulings on this topic. In common with the submissions presented by Mr Southey, she suggested that the combined written and oral submissions presented to me had analysed the topic in depth and in detail, in ways which did not appear to have been the case in those previous inquiries.

The remaining non-family Core Participants

67. The submissions on behalf of the Police Ombudsman for Northern Ireland and the Police Service of Northern Ireland, in so far as relevant, have been sufficiently encapsulated in the summary of the submissions as set out above. On behalf of Sir Ronnie Flanagan, it was pointed out that he was likely to have had authority to view most of the closed material at the time and may well have been given sight of the actual material to be considered by the Inquiry in closed sessions. It was therefore anticipated by his legal team that the Inquiry might have in mind seeking evidence from Sir Ronnie in due course. Equally, it was submitted that he should be afforded a right to give evidence if any of the material was considered by the Inquiry to ground a criticism of Sir Ronnie. In either of such circumstances it was submitted that he and his legal team would require disclosure of relevant closed material but there was no perceived need for the appointment of a Special Advocate to act on his behalf. Apart from these situations, Sir Ronnie and his legal representatives had no wish to access closed materials and were content for closed sessions to be conducted by Counsel to the Inquiry.

Part 4 Discussion and analysis

Structure

68. The combined submissions presented by counsel engaged an important question for Inquiries Act proceedings and were presented in a fittingly detailed and helpful manner. It is therefore appropriate for me to address them as fully as I can. I propose to undertake that analysis in the following fashion.

First, I shall set out an introduction to the nature of the Inquiry.

Second, I shall seek to identify Parliament's intention in relation to the conduct of closed hearings held under the authority of section 19 of the 2005 Act. In this exercise, I shall trace some of the background to the Act and consider the language decided upon in what appear to be the relevant provisions. I shall then compare the 2005 Act scheme with other statutory provisions in which closed hearings are catered for. Finally, in this exercise, I shall examine the question of whether the provisions of the Investigatory Powers Act 2016 have relevance and what, if any, light they may cast on the underlying question.

Third, I shall weigh the effect to be given to the submissions relating to natural justice and procedural fairness. In this exercise I will seek to separate out the defining architecture of adversarial, as against inquisitorial, proceedings, in order to set the proper context within which to assess what natural justice and procedural fairness considerations mean in the context of Inquiries Act proceedings. Having done so, I will address each of the principal points advanced individually.

Fourth, I shall consider what, if anything, the implied procedural obligation of investigation contained within Article 2 ECHR adds to the question.

Having undertaken these tasks, I shall then set out my conclusions and turn to the question of the exercise of a discretion.

Introduction

69. The Omagh Bombing Inquiry is, of course, an inquiry established under the provisions of the 2005 Act. Such inquiries are often referred to as "Public Inquiries", although that term is not used in the statute or in the accompanying Rules. That description may be apt to mislead, as the governing legislation provides for circumstances in which the public may be excluded from the inquiry proceedings. In his statement to Parliament announcing that the Inquiry would be established, the then Secretary of State for Northern Ireland referred to establishing "an independent statutory inquiry". That phrase properly describes the process and the terminology used has some importance, as its proper use distinguishes an inquiry from other types of legal processes.

70. The first and important point of distinction is between an inquiry established under statute and a court. A court is invested with a residue of inherent powers to govern its own procedure which can undoubtedly, in appropriate circumstances, extend to a power to request the appointment of a Special Advocate – *R (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin) at paragraph 99, *R v H and Others* [2004] 2 AC 134 at paragraph 22. As the Chair of a statutory inquiry, I am limited to exercising the powers conferred by the 2005 Act or the accompanying Rules. The extent of any inherent power available to me to govern procedure is encompassed within the terms of section 17 of the 2005 Act. The entire focus of the lengthy and detailed debate before me concerned the simply stated question of, whether the duty found in that subsection to act with fairness in making any decision as to the procedure or conduct of an inquiry, was wide enough to accommodate the use of Special Advocates in closed proceedings, such as would provide a competent basis for me making a request of the relevant Law Officer to make such an appointment or appointments.

Parliament's intention

71. The approach which I have taken to the determination of this question is to begin by considering whether Parliament's intention in relation to the use of Special Advocates in Inquiries Act proceedings can be discerned. This is an exercise in which attention needs to be paid to the words used in their particular context and in which it may be important to take account of the wider context of the statute as a whole. Explanatory notes may help and other external aids, such as Government White Papers, may also assist in identifying the purpose of the legislation. The context disclosed by such materials may assist in ascertaining the meaning of the statute, whether or not there is ambiguity and uncertainty – *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at paragraph 9, quoting from the judgment of Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3.

72. The process of identifying what Parliament's intention was can be approached by first considering the background which led to the passing of the 2005 Act. The genesis of the Act can be traced back to the announcement, made on 24 February 2004, by the House of Commons Select Committee on Public Administration, that it would be examining the subject of "Government by Inquiry" and to the list of questions published by it about the value of the inquiries established by Ministers. In response, the Department for Constitutional Affairs published a Consultation Paper on 6 May 2004 entitled: "Effective Inquiries". There was no White Paper published but the Consultation Paper served a similar purpose. It therefore seems to me to be helpful and appropriate to take account of its contents. Question 12 within the paper posed the question:

"Should inquiries always sit in public or are there circumstances when it is right to conduct an investigation in private?"

73. Between paragraphs 118 and 135, the Consultation Paper discussed the benefits of holding an inquiry in public, as against the need to, or benefit flowing from, holding either all or part of an inquiry in private. Paragraph 125 included the following statement:

> "It is very important that evidence should not be made public if it might threaten national security. The Minister setting up the inquiry has a duty to ensure that national security arrangements are not undermined by publication of material during the inquiry, and may need to direct that some or all of the inquiry be held in private for this reason. Inquiry chairmen must also be able to hold hearings in private if issues emerge with ramifications for national security."

Paragraph 135 brought together this section of the Consultation Paper by stating:

> "In summary, the Government believes that there are circumstances in which it is right to conduct an inquiry partially or wholly in private, and anticipates that any legislation on inquiries would need to cover this. Sometimes, a Minister will need to decide at the outset that an inquiry should be held in private. In other situations, it will be for the chairman to decide whether to conduct hearings in private. Whenever proceedings are held in private, it is important that clear reasons are given for doing so and the inquiry is conducted in accordance with the essential requirements of fairness. If procedure rules were introduced, as discussed in response to question 11, they could cover arrangements for private inquiries."

74. In the Queen's Speech on 23 November 2004, it was stated that:

> "Legislation will be brought forward to provide a modern and comprehensive framework for statutory inquiries into matters of public concern."

The Inquiries Bill was introduced into the House of Lords and given its first reading two days later, on 25 November 2004. Section 17 of the Bill, as introduced, concerned "Restriction on public access etc". The first five subsections came to be replicated in identical terms in what became section 19 of the 2005 Act. The remaining two subsections were transposed into what became section 18 of the Act. The Explanatory Notes attached to the Bill stated, in paragraph 3, that:

> The Inquiries Bill is intended to provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern. It gives effect to proposals contained in a Government consultation paper, dated 6 May 2004 entitled "Effective Inquiries" …"

75. The intention, as stated in both the Queen's Speech and the Explanatory Notes, supports Ms Grange's contention that the legislation was designed to comprise a comprehensive scheme for the conduct of

statutory inquiries. Mr Southey of course contended otherwise, relying on what he saw as the broad terms of section 17 of the 2005 Act. When the Bill made its way to the House of Commons it received a Second Reading on 15 March 2005. In looking to what the Parliamentary Under-Secretary of State for Constitutional Affairs said in introducing the Bill, it appears to me that three statements concerning the purpose of the Bill can be discerned which are worthy of noting. They were:

- the Bill was designed to reform the arrangements for conducting inquiries into events of serious public concern;
- the Bill was designed to create a comprehensive new statutory framework for inquiries set up by Ministers to look into particular events that have caused public concern;
- the Bill would put on a proper, more comprehensive footing the ability to conduct an effective public inquiry in circumstances where national security issues may well arise.

76. These statements are consistent with what is said in the Explanatory Notes to the Bill. To the extent that there may be said to be an ambiguity or uncertainty about the question of whether the legislative scheme is intended to be comprehensive, it appears to me to be permissible to take account of them in light of the criteria in *Pepper v Hart* [1993] AC 593.

77. The Inquiries Act 2005 came into force on 7 June 2005. The terms of sections 17, 18, 19 and 20 were all foreshadowed in exactly the same language in the Bill (with the exception of a minor change found in section 20(6) which is irrelevant for present purposes). The Explanatory Notes to the Act repeat what was said in relation to the Bill, namely:

> "The Inquiries Act is intended to provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern."

78. The Inquiry Rules 2006, prepared by the Lord Chancellor under the authority of section 41 of the Act, came into force on 1 August 2006. There is no mention in either the Act or the Rules of any role for a Special Advocate, nor of any power given to anyone to appoint one.

79. Prior to the passing of the 2005 Act, inquiries had been conducted on an *ad hoc* basis, or under subject specific legislation and, occasionally, under the provisions of the Tribunals of Inquiry (Evidence) Act 1921 (see paragraph 1 and 17 of the Consultation Paper). It seems plain that Parliament intended to reform these structures by replacing them with a new and comprehensive framework for the conduct of statutory inquiries. The question brought into focus in paragraph 2 of the Consultation Paper was precisely whether there was a case for legislation providing a complete statutory framework for all inquiries. That was the intention set out in the Queen's Speech and it was repeated in the Explanatory Notes to both the

Bill and the Act. The Under-Secretary of State gave the same explanation of the Bill's purpose when he introduced it in the House of Commons.

80. A further element of the context in which the 2005 Act came to be framed concerns cost. Ms Grange was clearly correct in identifying that the costs associated with inquiries was a matter with which Parliament was concerned when it came to drafting the terms of the Bill. This is obvious from the Consultation Paper and it is reflected in the provisions of the Act concerning the payment of costs, such as sections 39 and 40. A duty to avoid any unnecessary cost is imposed directly on the Chair of an inquiry by virtue of section 17(3). As Ms Grange mentioned, a number of the provisions within the Inquiry Rules also concern issues of costs. It is perfectly plain that the sort of function contemplated by Mr Southey, and those who adopted his submissions, would lead to a very substantial cost burden which would have to be met from public funds.

81. Looking to this background, I agree that there is some force in the contention that Parliament would not have granted the Chair of an inquiry an implied power to provide for the participation of Special Advocates without making any provision whatsoever to address the cost consequences of doing so. In my view, a far more powerful consideration however is this. It is plain that the need to protect national security sensitive material, in the context of the proposed new statutory scheme, was at the forefront of Parliament's mind from the outset. It is mentioned in straightforward terms in the Consultation Paper. It was seen as part of the benefit of the statutory scheme as identified by the Under-Secretary of State in introducing the Bill into the House of Commons.

82. The manner in which the relevant protection was to be provided is to be found principally in sections 18, 19 and 20 of the Act. Section 18 sets out the principle that, subject to section 19, the proceedings of an inquiry are to be open to the public to attend or otherwise view. Section 19 provides that restrictions may be imposed on attendance at an inquiry, or at a particular part thereof, and may be imposed in relation to disclosure or publication of any evidence or documents provided to an inquiry. Any such restrictions imposed may only be those as the Minister or Chair considers to be conducive to the inquiry fulfilling its terms of reference, or to be necessary in the public interest, having regard to certain specified matters. Those include any risk of harm or damage that could be avoided or reduced by any such restriction. Harm or damage includes damage to national security or international relations. Section 20 sets out further provisions concerning restriction notices and orders which govern the extent to which they should remain in force and how they may be revoked.

83. If circumstances warranting the exercise of the section 19 power are present, then it is clear, and not disputed, that they may justify an inquiry Chair declining to disclose relevant material to family Core Participants and their legal representatives. The same circumstances may similarly justify excluding them from hearings concerning that material.

84. Rule 12 also contributes to the scheme concerning the operation of section 19. It is headed "Disclosure of potentially restricted evidence" and its precise terms have been set out above. It can be seen that this Rule provides for a procedure which is designed to assist an inquiry Chair in determining either, whether evidence or documents fall within the scope of a restriction notice, or whether or not to make a restriction order. In summary, the Chair is empowered to make disclosure of what is called the "potentially restricted evidence" to "an individual" who would not otherwise be permitted to see it, if he considers that such disclosure is necessary for the determination of the application, and so long as certain other conditions are satisfied.

85. It becomes plain, that through section 19, Parliament constructed a procedure which gave effect to the Government's intention to ensure that inquiries could be conducted in private when necessary. Through Rule 12 the Chair was later provided with a method of acquiring assistance in determining whether or not the section 19 power required to be exercised. The concept of Special Advocates was one well known to Parliament by the time that the Bill was progressing through its legislative processes. The starting point is therefore to note that in constructing a procedure which would have the effect of excluding family Core Participants, Parliament made no mention of any possible role for Special Advocates.

86. Understandably, it was not suggested to me that the reference in Rule 12 to the opportunity of disclosure to "an individual" was broad enough to include a Special Advocate. An individual is a term which connotes something quite different from a representative. If there had been an intention to encompass a Special Advocate within this Rule one would have expected Parliament simply to have said so. The absence of any conditions in the Rule concerning the extent to which communication with the Core Participant could be permitted would, in any event, strongly point away from any such contention. It is also noteworthy that no similar provision contemplating disclosure to "an individual" appears in section 19. There would seem little value in a scheme which permitted a Special Advocate to contribute on behalf a Core Participant to the question of whether closed hearings should be authorised and yet make no provision for representation of that Core Participant's interests at any closed hearing then authorised.

87. Further insight may be gained by taking account of some of the other provisions included within the scheme for the conduct of statutory inquiries. The power specified in section 17 of the Act allows the Chair to determine the procedure and conduct of an inquiry. However, this power is expressly stated to be subject to any provisions of the Act or the Rules. Care is taken in the Rules to identify who may comprise the "inquiry team" and who may qualify for certain of the positions within it. There is a procedure specified in Rule 6 for the appointment of a "recognised legal representative" to act on behalf of a Core Participant and Rule 8 provides for the appointment of a legal team to assist the recognised legal representative in the discharge of his functions. A Special Advocate cannot be appointed under either of Rules 6 or 8.

88. Rule 10 is headed "Oral evidence" and it is prescriptive as to who may ask questions of a witness. Its terms have been set out above. The Rule specifies that only Counsel to the Inquiry and the Chair (or panel) have a right to ask questions of the witness. The recognised legal representative (and therefore any member of a legal team appointed to assist) may apply for permission to ask questions of the witness. Any such application requires to identify the issues in respect of which the witness is to be questioned and whether the questioning will raise new issues or, if not, why the question should be permitted.

89. As noted at paragraph 73 above, the Consultation Paper suggested that procedure rules might cover arrangements for private inquiries. There is no specific mention of how closed hearings are to be conducted in the 2006 Rules. That does not mean that the suggestion was overlooked, or that closed hearings were left ungoverned. On the contrary. Rule 10 is stated to apply "where a witness is giving oral evidence at an inquiry hearing". The Rule therefore appears to expressly cover any form of evidential hearing held in Inquiries Act proceedings. It follows that, by design, the same procedure is to be followed at a closed hearing held under the authority of section 19 as at any other hearing. The opportunity for a Special Advocate to participate remains unacknowledged.

90. It is difficult to accept that the absence of any mention in Rule 10 of a role for a Special Advocate was an oversight, or, that in the context of what was designed to be a comprehensive scheme, Parliament intended that a role for Special Advocates should be left to implication. The terms of the Rule appear to demonstrate otherwise, as does the qualification which introduces the Chair's power under section 17(1). There is therefore force in the contention that had Parliament envisaged that a Special Advocate might contribute in any fashion in Inquiries Act proceedings, it would have said so and that the absence of any such statement is both deliberate and telling.

Comparative proceedings

91. This analysis can be tested further by looking to Parliament's practice in providing for the use of Special Advocates in other types of proceedings. A number of other statutory schemes include provision for evidence being heard in closed hearings, or in the absence of one of the parties, and for the appointment of a Special Advocate to represent the interests of the excluded party. These include:

- Proceedings before the Special Immigration Appeals Commission,
- Proceedings before the Prescribed Organisations Appeal Commission,
- Proceedings before the Sentence Review Commissioners appointed under the Northern Ireland (Sentences) Act 1998,
- Proceedings concerning acts of discrimination challenged before the Tribunal set up under section 91 of The Northern Ireland Act 1998
- Proceedings before an employment tribunal,
- Proceedings before the Pathogens Access Appeal Commission (created by the Anti-Terrorism, Crime and Security Act 2001)
- Appeals under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 (although provision for closed hearings were contained within each statute as enacted, the opportunity to appoint a Special Advocate only arose in the amendments to each Act brought about by Section 80 of the Planning and Compulsory Purchase Act 2004) ,
- Financial restriction proceedings under section 63 of the Counter-Terrorism Act 2008,
- TPIM proceedings under the Terrorism Prevention and Investigation Measures Act 2011,
- Proceedings in which section 6 of the Justice and Security Act 2013 is engaged,
- Temporary Exclusion Order proceedings under the Counter-Terrorism and Security Act 2015,
- Proceedings on an application under section 38 of the Sanctions and Anti-Money Laundering Act 2018,
- Proceedings concerning prevention and investigation measures under part 2 of the National Security Act 2023,
- Proceedings before the Parole Board for England and Wales,
- Proceedings before the Parole Commissioner for Northern Ireland.

92. A broadly similar formula is adopted in the legislation governing almost all of these proceedings. Express statutory power to appoint Special Advocates is conferred, complemented by a set of rules contained in subordinate legislation which prescribe the function of the Special

Advocate in those particular proceedings. In relation to the Parole Board for England and Wales, the position appears to be slightly different. The Parole Board Rules 2011 acknowledged the opportunity for a Special Advocate to be appointed by the Attorney General. However, rule 17 of the current rules (2019 Rules as amended in 2024) provides that if a non-disclosure direction is made that relates to both the prisoner and his representative, the panel chair is empowered to direct the Attorney General to appoint a Special Advocate. The legislation which permitted the appointment of Special Advocates in the first seven types of proceedings listed above was in place before the enactment of the 2005 Act.

93. Further elements of consistency tend to be found in the various rules concerning the procedure to be followed in the proceedings to which they apply. This is reflected in the provisions promulgated both before and after the enactment of the 2005 Act. The relevant (and varying) Law Officer with the discretionary power to appoint a Special Advocate is identified. The function of the Special Advocate tends to be specified in the relevant rules and varies, presumably in light of the scope of participation thought necessary or appropriate. In some proceedings he or she may make submissions, adduce evidence and cross-examine witnesses[1]. In others there is no power to lead evidence[2]. There is sometimes power to make written submissions[3]. In some proceedings cross-examination is only allowed with permission[4]. Detailed provisions concerning who the Special Advocate may communicate with and in what circumstances also tend to be included.

94. It can be seen then that the 2005 Act provisions and the 2006 Rules stand out in sharp contrast against this apparent legislative practice. Yet the provisions which concern the restriction of disclosure and attendance at inquiry hearings form a prominent part of the statutory scheme set out in the 2005 Act. They are set out in some detail across sections 19 and 20. There is no sense in which they could be thought of as concerning ancillary or subordinate matters. As noted above, they were amongst the first measures recognised as being necessary. Had Parliament thought that Special Advocates could, or would, have a role to play in any of the procedures provided for by those sections, one would have expected that it would have said so, using something similar to the recognisable formula deployed in so many other types of proceedings. Instead, despite granting power to the Chair of an inquiry to exclude Core Participants and their

[1] eg The Special Immigration Appeals Commission (Procedure) Rules 2003.
[2] eg The Northern Ireland Act Tribunal (Procedure) Rules 1999, The Pathogens Access Appeal Commission (Procedure) Rules 2002 and The Parole Commissioners' Rules (Northern Ireland) 2009).
[3] eg The Planning (National Security Directions and Appointed Representatives) (England) Rules 2006
[4] eg The Proscribed Organisations Appeal Commission (Procedure) Rules 2007.

legal representatives, in order to prevent damage to such sensitive matters as national security, there is nothing of a comparable nature in either the 2005 Act or the 2006 Rules.

95. The fact that there is no mention of which Law Officer an inquiry Chair would make a request for appointment to is not unimportant, since it is in the nature of the concept of a Special Advocate that appointment cannot be made by a Core Participant or by an inquiry Chair. Each of the schemes mentioned above identifies to whom the application for appointment should be directed. If appointment was competent in inquiry proceedings, the absence of any such direction would at the very least cause complication. It might be that different Law Officers would have authority depending on where an inquiry sat, or perhaps who had established it. In the written submissions presented to me, some Core Participants suggested that a request should be made of the Attorney General for England and Wales, others suggested that it should be directed towards the Attorney General for Northern Ireland and yet others suggested that the correct recipient would be the Advocate General for Northern Ireland.

96. Having taken the care to specify the availability of Special Advocates in so many different types of proceedings, and to be prescriptive about modelling their function and duties, it is difficult to accept that when it came to considering national security and other sensitive issues in the context of Inquiries Act proceedings, Parliament was content to leave all such issues to the Chair in the exercise of a broad and undefined discretion. It therefore seems to me that when one tests Ms Grange's contention in this comparative manner it becomes all the clearer that she was correct in submitting that Parliament had deliberately made no mention of a role for Special Advocates in Inquiries Act procedure.

97. In my view, the emerging picture which comes into clearer focus as one takes account cumulatively of the matters canvassed above, is that Parliament saw no role for Special Advocates in hearings authorised under section 19 from which Core Participants and their legal representatives were excluded. It seems to me to be correct to view the legislative scheme as being comprehensive by design.

A further examination

98. The issue can then be re-examined from a different perspective. The 2005 Act does not always operate in isolation when an inquiry is considering material, or hearing evidence, in the absence of the public or Core Participants. There is a particular type of evidence which may be led at an inquiry hearing authorised by section 19, but only if further restrictions as specified by statute are in place. This material and evidence

concerns “interception-related conduct”, or the content of intercepted communications.

99. The Interception of Communications Act 1985 made it unlawful to adduce evidence, or to ask a question in any court or tribunal proceedings, which suggested that interception of communications had taken place. Over time, that prohibition was relaxed in relation to certain specified types of proceedings and then came to be governed by the Regulation of Investigatory Powers Act 2000. The Investigatory Powers Act 2016 (“the IPA”) is now the governing legislation. Section 56 of the IPA provides for the comprehensive exclusion by way of disclosure, evidence, or assertion, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings, of any information which tends to reveal the content of an intercepted communication, or suggests that any interception-related conduct has taken place. Despite this prohibition, Schedule 3 to the IPA then goes on to specify various types of proceedings in which the prohibition is disapplied.

100. In paragraphs 5 through to 18 of the Schedule, twelve of the types of proceedings mentioned in paragraph 91 above are identified as proceedings in which the prohibition is disapplied. In each case, the relevant paragraph explains that although the section 56 prohibition does not apply to those proceedings, disclosure is not permitted to specified parties or persons. The effect, in each case, is that the relevant paragraph permits disclosure and the leading of evidence of interception-related conduct, or the content of intercepted communications, at closed hearings as permitted in the legislation governing the types of proceedings concerned. In each case, the relevant paragraph of Schedule 3 also permits disclosure to a Special Advocate, as appointed under the provisions relative to that type of proceedings. In short, the Schedule identifies the types of proceedings at which intercept evidence may be led in closed hearings where the relevant party is excluded and may be represented by a Special Advocate.

101. Schedule 3 also identifies Inquiries Act proceedings as those to which the prohibition can be disapplied. The enactment of the IPA extended the opportunity to lead evidence of the content of intercepted communications to Inquiries Act proceedings for the first time. Prior to this, however, an inquiry was able to take notice of intercepted communications in certain circumstances. It may be instructive to follow the development of these opportunities.

102. Paragraph 20 of Schedule 2 to the 2005 Act amended section 17 of the Regulation of Investigatory Powers Act 2000, so as to make it plain that the general prohibition applied to legal proceedings or Inquiries Act

proceedings (defined as meaning proceedings under the 2005 Act). Paragraph 21 of the Schedule then provided that the prohibition was disapplied to the extent that disclosure was permitted to the panel of an inquiry held under the 2005 Act in the course of which the panel had ordered the disclosure to be made to it alone. A further amendment made it plain that such an order for disclosure was not to be made unless the panel was satisfied that the exceptional circumstances of the case made the disclosure essential to enable the inquiry to fulfil its terms of reference. As a consequence of this amendment, the content of intercepted communications could be provided to the Chair and to any other members who sat as part of the panel but to no one else, either within the inquiry team or beyond it.

103. Section 74(1) of the Counter-Terrorism Act 2008 introduced a further amendment to section 18 of the Regulation of Investigatory Powers Act 2000. On this occasion, the effect was to permit disclosure to be made to a person appointed as Counsel to the Inquiry in addition to the panel members. The additional qualifications concerning disclosure remained in place. This is where matters rested until the enactment of the IPA when it became possible to lead evidence of intercepted communications at a hearing in Inquiries Act proceedings.

104. Paragraphs 22 and 23 of Schedule 3 to the IPA respectively concern disclosure to an inquiry and the leading of evidence before an inquiry. Paragraph 22 now permits disclosure of otherwise prohibited material to the panel of an inquiry and to anyone appointed as either Counsel to the Inquiry or Solicitor to the Inquiry. As before, disclosure is only competent where the panel had ordered the disclosure to be made to it alone, or to it and Counsel or Solicitor to the Inquiry. As was the case previously, such an order for disclosure can only be made if the panel considers that the exceptional circumstances of the case make the disclosure essential to enable it to fulfil its terms of reference.

105. None of the paragraphs within Schedule 3 relating to other types of proceedings split provisions concerning disclosure and those concerning the hearing of evidence over two separate paragraphs in the same way as is done for Inquiries Act proceedings. This is because of the distinct inquisitorial nature of Inquiries Act proceedings, in which material is ingathered by the inquiry itself and the question of what falls to be viewed as relevant and led in evidence is one for the inquiry itself. In the other types of proceedings dealt with in Schedule 3 the parties will be in control of the material which they wish to place before the relevant body.

106. Paragraph 23 of the Schedule then provides for a mechanism by which the content of any intercepted communication, or information about the

fact of interception, may be led in evidence and taken account of as part of an inquiry's investigation. This paragraph operates in conjunction with the 2005 Act by providing that a hearing may take place under the authority of section 19 of that Act, but only if certain precise restrictions as to who may attend are in place. Such a hearing is distinguished from one governed by a section 19 restriction notice, or restriction order, by being referred to as a "restricted proceedings" hearing. Paragraph 23(2) provides that such a hearing is one to which the restrictions imposed under section 19 of the 2005 Act prohibit the attendance of any person who is not –

> "(a) a member of the panel of the inquiry,
>
> (b) a person appointed as legal adviser to the inquiry,
>
> (c) a person who is a relevant party to the proceedings,
>
> (d) a person representing such a person for the purposes of the proceedings, or
>
> (e) a person performing functions necessary for the proper functioning of the proceedings."

107. A "relevant party" is defined in paragraph 23(4). For present purposes notice can be taken of subparagraphs (4)(a) and (b). Paragraph 23(4)(a) permits the attendance at the restricted proceedings hearing of the person making the disclosure to the inquiry, one might anticipate that this would be a government agency or an official of that body. Paragraph 23(2)(d) permits the representative of such a person (or agency) to be present at the restricted proceedings. This would be the route through which authority to attend could be granted to those acting for the Secretary of State. Paragraph 23(4)(b) permits the attendance of the witness who is to give evidence about matters which would otherwise be prohibited by section 56 of the IPA. The witness giving evidence at the restricted proceedings hearing therefor falls within the definition of a "relevant party".

108. As is plain, a Special Advocate does not feature within the list, either by name or by description of function. Mr Southey sought to explain that Schedule 3 did not constitute a comprehensive list of circumstances in which Special Advocates might be appointed. That is correct but, with respect, I think rather misses the point. Schedule 3 constitutes a comprehensive list of proceedings in which intercept evidence may be led. It also identifies in which of those proceedings Special Advocates may participate. Mr Southey's submission in relation to Schedule 3 concerned the scope of paragraph 23(2)(e). I am unable to accept his proposition that the opportunity provided by this subparagraph would encompass the attendance of a Special Advocate. There are two reasons for reaching this view.

109. The first reason concerns who the target of subparagraph (e) is intended to be. This can be informed by looking to the preceding subparagraphs. Letter (a) permits the Chair to attend. The very fact that this permission is specified highlights how prescriptive the terms of paragraph 23(2) are intended to be. Letter (c) provides authority for the relevant witness to attend. Again, the hearing could hardly function without such a contribution. Letters (b) and (d) identify the lawyers who may attend. That leaves subparagraph (e). In my view, this subparagraph is designed to permit the attendance of interpreters, information technology operators, evidence managers and others providing necessary assistance to the Chair or Counsel to the Inquiry. The need to specifically authorise the attendance of those performing such support functions at a restricted proceedings hearing arises from the contrast between the way in which paragraph 23 allows for otherwise prohibited evidence to be led in Inquiries Act proceedings and the way in which such evidence is authorised within the other types of proceedings included within the Schedule.

110. Each of the other relevant paragraphs within Schedule 3 concern proceedings before tribunals, commissions or courts, in which closed hearings can be authorised by their governing provisions, with the effect that a party to the proceedings and their representatives are excluded from that hearing. In relation to each of those other proceedings, the relevant paragraph within Schedule 3 provides for the admission of evidence of the content of intercepted communications, or information about the fact of interception, before the body concerned, or in proceedings of the type with which the paragraph is concerned. Each does so by stating that section 56(1) does not apply in relation to any proceedings of the kind with which the paragraph is concerned. Accordingly, those performing the normal type of necessary support functions are able to attend. The only persons who may not attend are those excluded by virtue of the order granted under the governing provision, i.e. the excluded party and their representatives. By way of contrast, a more circumscribed approach is taken in paragraph 23, where a competent restricted proceedings hearing is defined by identifying those entitled to attend. Absent subparagraph (e), those performing necessary support functions would be unable to attend a hearing in Inquiries Act proceedings at which evidence of intercepted communications was being lawfully led.

111. The second reason for reaching the view that paragraph 23(2)(e) does not encompass the attendance of a Special Advocate at a restricted proceedings hearing also arises out of a comparison with the other contents of Schedule 3. Each of the twelve types of proceedings identified between paragraphs 5 and 18 are governed by statutory provisions, or by statutory provisions as supplemented by rules promulgated under the authority of the governing statute. In the case of each of these proceedings

section 56(1) is disapplied. However, each of these relevant paragraphs goes on to specify that disclosure to the excluded party and his representative remains prohibited, unless that representative has been appointed as a Special Advocate under the relevant provisions applicable to the individual type of proceedings. The thirteenth type of proceedings identified in Schedule 3 are proceedings before the Investigatory Powers Tribunal, which is specified in paragraph 4. There is no provision for the appointment of a Special Advocate within the statutory scheme applicable to this Tribunal. Nothing is therefore said within paragraph 4 about any such participant. With the exception of the paragraphs dealing with the Investigatory Powers Tribunal and Inquiries Act proceedings, each provision which disapplies the section 56 prohibition specifies that disclosure may be made to a person appointed to act as a Special Advocate.

112. It can be seen then that Parliament has taken care to specify the various types of proceedings in which intercept evidence may lawfully be led. Where a Special Advocate may have a role in any such proceedings it has taken care to specify that the section 56(1) prohibition does not apply to that Special Advocate. For Inquiries Act proceedings alone, intercept evidence may only lawfully be led at a hearing which is defined by identifying those entitled to be present, and by the role which they are to perform. Had Parliament considered that a Special Advocate might have a role to play where intercept evidence was lawfully led at an inquiry, it would surely have made a provision in similar terms as it had in relation to the other types of proceedings. In these circumstances, it is impossible to accept that Parliament had in mind authorising the participation of a Special Advocate in a somewhat coded fashion by using the language found in paragraph 23(2)(e).

113. There is a further reason for concluding that a Special Advocate can have no role to play in a restricted proceedings hearing. As mentioned above, paragraphs 22 and 23 distinguish between circumstances permitting disclosure and permitting a hearing to take place. The evolution of what has become paragraph 22 is explained above. The notable consequence is that the limitation on those to whom disclosure is permitted has consistently excluded a Core Participant and any form of representative of such an individual. There would be no sense in permitting a Special Advocate to represent the interests of a Core Participant at a restricted proceedings hearing if there was no power to permit disclosure to such an individual.

114. Given that Schedule 3 of the IPA permits the use of Special Advocates in various other types of proceedings at which evidence of intercepted communications may be led, Parliament's decision to maintain the restriction on disclosure of such material in Inquiries Act proceedings, and

to decide to omit any reference to a role for Special Advocates at a restricted proceedings hearing, is telling. In my view, the firm conclusion to be reached is that Special Advocates were not thought to have any place in Inquiries Act proceedings which were concerned with interception-related conduct or the content of intercepted communications. I am directed to this conclusion upon a study of the statutory provisions set out above.

115. If Parliament's intention concerning who may attend at restricted proceedings hearings is clear, as I consider it to be, the conclusion reached cannot be departed from in light of any of the points advanced by Mr Southey in relation to fairness, natural justice or the benefit of a monitoring function being caried out by a Special Advocate. There is therefore no room for coming to any different view in light of the discretion afforded to me by section 17(1) of the 2005 Act.

116. The reason for distinguishing Inquiries Act proceedings from the other types of proceedings identified in paragraphs 5 to 18 of Schedule 3 is presumably because of the fact that those other proceedings are adversarial in nature and concern, in one fashion or another, the resolution of a right or claim. None include a participant with a role which is the equivalent to that of Counsel to the Inquiry. Parliament cannot have been blind to the fact that excluded Core Participants would remain interested in the evidence heard during restricted proceedings hearings, nor to the fact that they would wish to be confident that such evidence was explored diligently and thoroughly. The overarching understanding is that family Core Participants require to be involved in the procedure to the extent necessary to safeguard their legitimate interests (*R (Amin) v Secretary of State for the Home Department*, *Jordan v United Kingdom*. The conclusion to be reached is that, in relation to restricted proceedings hearings, Parliament was content to leave the protection of any interest which the next of kin might have to the inquiry Chair and Counsel to the Inquiry. This is unsurprising, after all, any relevant area of questioning, or any appropriate need for testing, as perceived by the next of kin, would be just as much of interest to the inquiry Chair and his or her counsel.

117. The conclusion that Special Advocates are not permitted to represent the interests of excluded Core Participants at restricted proceedings hearings cannot stand in isolation. As is obvious from Schedule 3 of the IPA, Special Advocates are trusted to appear at hearings in various different proceedings which consider intercept evidence. The trust which is imbued in the integrity of Special Advocates would be given as readily were they to participate in Inquiries Act proceedings concerning intercept evidence. Equally, there would appear to be no greater reason for intercept evidence to be guarded in Inquiries Act proceedings than in any of the other types of proceedings covered by Schedule 3. A deliberate choice has

been made. This then necessarily raises the question of whether it can be the case that Special Advocates have no role to play in some parts of the closed proceedings of an inquiry but could participate in other closed parts.

118. Restricted proceedings hearings have been added into the scheme for the conduct of statutory inquiries. One would expect that the whole scheme could be interpreted in, and would operate in, a coherent and consistent fashion. It is therefore difficult to reconcile the conclusion reached in relation to restricted proceedings hearings with a suggestion that Special Advocates may competently appear at other types of closed hearings which take place in Inquiries Act proceedings as authorised by section 19 of the 2005 Act.

119. I do not consider that this line of thinking involves any impermissible exercise in statutory interpretation, such as is discussed in Bennion on Statutory Interpretation section 24.19, and referred to by the family Core Participants. It is necessary for me to determine the effect of the IPA on the question of whether Special Advocates may be appointed to represent the interests of excluded Core Participants in restricted proceedings hearings. The conclusion reached then tends to reinforce the view that Parliament did indeed intend that there should be no role for Special Advocates in other closed proceedings as authorised by section 19 of the 2005 Act.

120. In order to arrive at a concluded view as to whether Special Advocates may competently participate in closed proceedings governed by section 19, other than restricted proceedings hearings, it will be necessary for me to assess the merits of each of the points argued by Mr Southey. The purpose in doing so will be to determine whether natural justice or procedural fairness considerations (which I address in Part 5), or the requirements of Article 2 ECHR (which I address in Part 6), mean that the family Core Participants have a right to be represented in some fashion at such hearings. I will then be in a position to determine whether any of these submissions causes me to reconsider my view as to what Parliament's intention must have been.

Part 5 – Discussion and analysis

Natural justice and procedural fairness issues

121. In support of the submission that natural justice applied to Inquiries Act proceedings, Mr Southey drew my attention to what had been said in *R v Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, *Mahon v Air New Zealand Ltd* [1984] AC 808 and *The Petition of Greater Glasgow Health Board for Judicial Review*. I have no difficulty in accepting this proposition as a matter of high-level principle. As the Lord President (Hope) said in the case of *Humphrey Errington (t/a H J Errington & Co) v Mrs Elizabeth Wilson and Others* 1995 SC 550 at 555:

> "… the duty to act fairly which the second and third respondents admit, and the duty to act in accordance with the principles of natural justice, which the petitioner avers, are different ways of expressing the same thing."

122. The question is what does the application of natural justice principles mean for Inquiries Act procedure? In the *Greater Glasgow Health Board* case the question was whether an expert report tendered on behalf of the Health Board should be received into evidence. As Lady Wise noted, the report bore to relate:

> "to a central question for the inquiry, namely the safety or otherwise of the Queen Elizabeth University Hospital".

At paragraph [33] of her opinion, Lady Wise observed that in its application to modern statutory inquiries the demands of fairness included considering material evidence on the core issues. She then stated:

> "Once it is known that there is expert evidence on technical and scientific matters available, the conclusions of which are contradictory to that led to date by the Inquiry experts, it is difficult to regard its complete exclusion from consideration could be fair (sic)."

123. This is entirely consistent with the requirement identified by the Judicial Committee of the Privy Council in the case of *Mahon,* that an inquiry Chair must listen fairly to any relevant evidence and rational argument that a person represented at the inquiry and whose interest may be adversely affected by its findings may wish to place before him. The key in this situation is the potential for an adverse finding. It is very easy to understand why individuals, or Core Participants, who were represented at an inquiry, and who may be affected adversely by a finding to be made by the inquiry Chair, should be given an opportunity to be heard on whether that finding should be made. This point is now further embedded by the Inquiry Rules, which provide, in Rule 13(3), that no explicit or significant criticism of any person may be included in any report unless a warning letter has been sent to that person and they have been given an opportunity to respond to that letter. The circumstances in the cases relied on are a world away from those of the family Core Participants in the

present Inquiry. There is, of course, no possibility whatsoever of any victim or family member being blamed for what occurred, or any possibility of criticism being attached to any of them in relation to the fact of the bombing. Is it then correct to say that by virtue of their status as Core Participants, the family Core Participants have a right to be heard at closed hearings which requires to be accommodated despite their lawful exclusion?

124. A right to be heard, or to be represented in some fashion before the decision-making body, is easily recognised as an integral component of adversarial proceedings. That cannot simply be read across to Inquiries Act proceedings. The factors which triggered natural justice considerations in cases such as *Mahon* and *Greater Glasgow Health Board* arose out of their specific factual circumstances. It cannot be said that a right to be heard in Inquiries Act proceedings, which is based on natural justice principles, is part of some uniform standard. What is required by way of natural justice will depend on circumstances. Reference was made in the oral submissions to the familiar proposition set out in *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, which it is worthy of stating:

> "(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

The same point was made many years earlier by Lord Justice Tucker in the case of *Russell v Duke of Norfolk and Others* [1949] 1 All ER 109 at page 118 in a phrase which has frequently been approved of:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

125. The fairness based propositions argued for by Mr Southey therefore require to be assessed in the context of Inquiries Act proceedings and, in particular, the nature of the process created. The crucial point which emerges is the inquisitorial nature of inquiries under the 2005 Act. Although Mr Southey was content to accept that these proceedings should be described as inquisitorial, it is instructive to reflect on the language within which his submissions were framed. He spoke throughout of "the parties". He spoke of one party having "an advantage" over another and of "inequality of arms". At paragraph 20 of his written submissions, he spoke

of the difficulty for Counsel to the Inquiry advancing issues that one "side" wished to raise.

126. All of this language tended to suggest that his submissions were at least influenced by familiar adversarial concepts. This impression came to be reinforced when he sought to identify the role to be played by Special Advocates in closed hearings. As highlighted above, it seems to me to be important to understand that the specific aspects of the right to be heard which are familiar in adversarial proceedings cannot simply be read across to inquisitorial proceedings. With this in mind, the extent to which the two types of proceedings can be seen to differ may help to identify the proper application of natural justice, or procedural fairness, in the latter.

127. The starting place is to identify the distinctions to be drawn between the process of an inquiry and the processes encountered in contested litigation. The first sharp distinction which arises as between inquisitorial and adversarial proceedings, is who controls the process. In adversarial proceedings it is the parties who control the proceedings, either through written pleadings or the evidence they choose to lead. By way of contrast, in inquisitorial proceedings it is the judge, or, in this case, the Chair who does so. The function of the inquiry Chair is not to adjudicate but to investigate.

128. Some statements which highlight the extent of this difference can be identified. In *R(JL) v Secretary of State for Justice* Lord Rodger of Earlsferry made certain observations about the nature of an independent investigation. He was talking about the circumstances of an investigation into a death in prison but what he said was of general application. At paragraph 76 he drew attention to the fact that the next of kin might be in a position to contribute information and to suggest lines of inquiry and made the following statement:

> "Sometimes relatives will be in a position to contribute information about the prisoner's state of mind in the period before the incident. They may be able to suggest lines of inquiry. Being independent, the investigator is free to reject the suggestions if he considers that the inquiries would not be useful. Where the relatives have had little contact with the prisoner and so have no relevant knowledge of the circumstances, the investigator's main duty will be to keep them informed of the progress of the investigation and to tell them his conclusions."

In *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319, the Divisional Court held at paragraph [52]:

> "It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough

investigation. The inquiry has to follow leads and it is not bound by the rules of evidence."

129. The second sharp distinction which arises concerns the role of Counsel to the Inquiry. It is not essential that such a participant be appointed but in an inquiry of any complexity it is inevitable that the opportunity to do so will be taken advantage of. The role of Counsel to the Inquiry is to lead the evidence to be heard by the inquiry. He or she also liaises with the legal representatives for Core Participants in order to understand whether there are any matters that they wish to have explored in particular chapters of evidence. Counsel to the Inquiry might then ventilate any such matters with the relevant witness, or decide to leave the matter to the legal representative to raise in the context of an application for permission under Rule 10. The role of Counsel to the Inquiry is not replicated in any form of *inter partes* litigation.

130. Further important features ought also to be noted. The fact that an inquiry is not determining issues of liability is of real significance in distinguishing the inquisitorial nature of its investigation from the adversarial nature of litigation. This point may be of particular importance when it comes to understanding what is meant by safeguarding the legitimate interests of Core Participants.

131. There are other points of distinction as well. There is no burden of proof to be met in an inquiry and, as noted above, the rules of evidence do not apply. A further highly relevant feature of inquiry procedure concerns the collection and disclosure of evidence. Using the provisions of section 21 of the 2005 Act and Rule 9, the inquiry ingathers documents and information. After assessing and analysing that material it may disclose some, but not all, of it to the Core Participants. It is for the inquiry to decide what is relevant and should be disclosed. There is no right given to a Core Participant to question witnesses or to call evidence on their own behalf.

132. None of this discussion goes to suggest that natural justice, or fairness, has no part to play in Inquiries Act proceedings. Far from it, the duty to act with fairness in making any decision as to the procedure or conduct of an inquiry is embedded in section 17 of the 2005 Act. The point is that the nature of the inquiry process will inform what may be required to comply with the section 17 duty. Furthermore, any assessment of fairness will require to take account of the procedures implemented by the Inquiry. Particular regard should be had to the Protocol Pursuant to Rule 10, published on 9 July 2025. At paragraph 9 that Protocol explains the timetable which will apply in relation to witnesses and their evidence as follows:

"The Inquiry will operate - on a rolling basis - a three staged process in the three weeks prior to the week in which the witness is to give evidence. In summary:

a. During Week 1: the Inquiry Legal Team will circulate an Evidence Outline in relation to each witness who is to give evidence during Week 4

b. Tuesday of Week 2: CP to submit R10 Requests in respect of the proposed questioning of any witness who is to give evidence during Week 4

c. Thursday of Week 3: the Solicitor to the Inquiry will provide a Response to the R10 Request

d. During Week 4: Witness gives evidence"

Paragraph 11 explains what is meant by an Evidence Outline:

"The Evidence Outline will: (i) set out a brief summary of the central evidence of the witness; (ii) provide a short list of the issues or themes the witness will be asked about by Counsel to the Inquiry; and (iii) give references for the documents the witness may be directed to in their oral evidence."

Paragraph 6 makes it plain that the Protocol will apply to evidence heard in either open or closed hearings. In advance of closed hearings, the intention is that the Evidence Outline will conform as closely as possible to the description given in paragraph 11 but may have to take the form of gisting.

133. It is against this background that Mr Southey's submissions require to be assessed. His overarching contention was that the appointment of Special Advocates to represent the interests of the family Core Participants at closed hearings would give effect to their right to be heard, or their right to procedural fairness. These contentions can be considered under three headings:

1. What is envisaged in this right to be heard, or this right to procedural fairness,
2. Does the case of *R (Osborn) v Parole Board* vouch a need for procedural fairness of the sort identified, and
3. Whether the decision in *R (Roberts) v Parole Board* assists.

The right to be heard and procedural fairness

134. The value or otherwise of the Rule 10 protocol, as operating in the context of closed hearings, did not feature in Mr Southey's submissions. His position was that in the absence of disclosure, the family Core Participants would be in no real position to formulate questions bearing on that material, either with or without a Special Advocate. What he saw as the content of the right to be heard was an opportunity to ensure that concerns of a general nature which the family Core Participants might have about, for example, the extent to which intelligence sources were

providing material that was relevant could properly be advanced. Additionally, the appointment of Special Advocates would allow the evidence to be, as he put it, "properly" tested, although there was no criticism of the abilities, independence or integrity of the Inquiry Legal Team. These suggestions seemed to me to align the proposed functions of the Special Advocates with that of Counsel to the Inquiry. I noted that in *R (Associated Newspapers Ltd) v Leveson* [2012] EWHC 57 at paragraph 17, Lord Justice Toulson quoted from Lord Justice Leveson's ruling, where he had said, at paragraph 10:

> "One of the consequences of allowing a journalist to give evidence anonymously may very well be that it would not be fair to allow the name of the title or titles about which the journalist speaks to be identified if only because fairness could then require the facility to challenge the evidence (as opposed to testing it which would be the responsibility of counsel to the Inquiry)."

135. Mr Southey's contentions went further of course. He pointed out that after their many years of campaigning, the family Core Participants had an interest in the outcome of the Inquiry proceedings and might be left with a sense of resentment if key findings were to be made in circumstances where, in the absence of a Special Advocate, they had no ability to influence the outcome. Coupled with this, there would be no opportunity to monitor the operation of the closed hearings, or any decisions made during that procedure. The family Core participants would therefore be denied the opportunity to challenge any of this by judicial review, or to challenge any of the eventual findings made on the basis of evidence heard during closed hearings. Were Special Advocates to be appointed, the family Core Participants would be content to trust their judgement as to whether there was any ground for challenge, even although it was accepted that no explanation of the closed proceedings could be given to them.

136. This monitoring aspect of the right to be heard, or this benefit of what was identified as procedural fairness, appeared to me to go far beyond the application of the principles of natural justice as canvassed in the case law mentioned. The monitoring of the work of the Inquiry by a second tier of legal representatives for possible legal errors seems to me to be quite inconsistent with the core notion of an independent investigation carried out by a Chair with the necessary expertise to undertake the particular inquiry, as is required by section 8(1) of the 2005 Act. This view is further enhanced by the availability of a well-qualified and experienced legal team to assist the Chair. Two observations from discussions on the work of inquiries resonate with these thoughts. The first is to be found in the Effective Inquiries Consultation Paper, at paragraph 90, where the role of the Core Participants was described as being:

> "… primarily to assist the inquiry in establishing the facts, whatever hopes they might have about the outcome of the inquiry."

The second comes from the House of Commons Public Administration Select Committee first report of the session 2004-2005, entitled Government by Inquiry. In that report the Select Committee considered and gave advice upon the Inquiries Bill and set out its conclusions at page 82. In the context of circumstances in which evidence may be led in private, the fourth conclusion included this statement:

> "We recognise that circumstances may sometimes require inquiries to hold all or part of the proceedings in private. Ensuring the independence of the Inquiry will serve to reinforce trust in such circumstances."

137. From this statement it would appear to have been anticipated that the sort of reassurance which Mr Southey was arguing for was to come from the nature of the process, an investigation, coupled with the independence of the Chair and the Inquiry Legal Team. The anticipation set out in that statement can be seen to be reflected in section 8 of the 2005 Act, which enjoins the Minster to ensure that the inquiry panel has the necessary expertise to undertake the inquiry, and section 9 which imposes certain requirements of suitability and independence on the members of the panel.

138. I also consider that Ms Grange was correct in seeking to assess the validity of the suggested monitoring role by drawing attention to how an inquiry Chair goes about his or her investigation. The Chair is unencumbered by the rules of evidence and procedure, such as apply in litigation. The direction of the investigation will be governed by the Terms of Reference, but within those bounds it is entirely a matter for the Chair to determine what material is relevant and what lines to follow. The opportunity for valid challenge is therefore limited. Furthermore, as she rightly observed, the courts have consistently afforded a substantial measure of deference to decisions reached by inquiry Chairs. In these circumstances it would not be surprising if Parliament had decided to address the balance of fairness by relying on the independence and experience of the Inquiry Legal Team, as it had in relation to "restricted proceedings" hearings, rather than by providing for the opportunity to appoint Special Advocates. In this context, it may be worthy of noting that the Effective Inquiries Consultation Paper consistently referred to a requirement to hold proceedings "in private".

Does the case of R (Osborn) v Parole Board vouch a need for procedural fairness of the sort identified.

139. Since particular reliance was placed on what Lord Reed had said in delivering the judgment of the Supreme Court in the case of *R (Osborn) v Parole Board,* it will be necessary to look at the propositions advanced in a little detail. At paragraphs 66 to 71 of the decision, Lord Reed identified the purpose of procedural fairness as comprising at least three aspects. The first was that procedurally fair decision-making contributed to the achievement of better decisions. The second was that justice required a

procedure which paid due respect to persons whose rights were significantly affected by decisions taken in the exercise of administrative or judicial functions. Accordingly, that respect entailed that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. The third aspect concerned the rule of law. As Lord Reed explained, procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions. Each of these was said by Mr Southey to lead to the conclusion that procedural fairness required the appointment of Special Advocates in the Inquiry.

140. Before examining the individual contentions advanced, it is relevant, as always, to bear in mind the background to the judicial guidance being delivered. The opening sentence of the Supreme Court's judgment sets the context which ought to be kept in mind in considering the import of the subsequent statements made by Lord Reed:

> "These three appeals raise questions as to the circumstances in which the Parole Board is required to hold an oral hearing."

The fairness of the Parole Board's procedures was assessed in the context of recalled prisoners who had been deprived of their freedom, and post tariff indeterminate sentence prisoners. Although I recognise that Lord Reed made some general observations about the requirements of procedural fairness, the background context of liberty should not be forgotten.

141. In relation to the first aspect identified by Lord Reed, Mr Southey contended that a Special Advocate would have "detailed instructions" and be able to present legal arguments, including those which Counsel to the Inquiry might think unworthy of being made. Hearing two sides of an issue, it was said, would likely lead to a better decision.

142. In my view, this is a misconceived submission. It seems to me to be wrong to suggest that a Special Advocate could be given detailed instructions, since the Core Participants will not be informed of the material that the Special Advocate is concerned with. Whilst they will be no doubt be able to set out general areas of interest or concern, if the notion of partisan representation is abandoned, there seems no reason why the family Core Participants would be unable to give the same level and type of information to Counsel to the Inquiry, or to me. It might also be thought that value lies in the quality of any legal argument advanced, rather than the simple fact of an opposing submission being made.

143. It is also instructive to return to what Lord Reed said about this aspect of procedural fairness at paragraph 67. What he said was:

> "There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested."

This highlights the importance of context, by bringing into focus the difference between inquiry procedure and the benefits which this aspect of procedural justice would offer in other procedures. An inquiry decides for itself what material it considers to be relevant for analysis at a hearing, and it is one of the functions of Counsel to the Inquiry to test that evidence. Therefore, in this context a Special Advocate adds nothing of substance to what will already be available. The theoretical benefit of a second view in circumstances which cannot be predicted does not require such an appointment.

144. In relation to the second aspect of Lord Reed's analysis of procedural fairness, Mr Southey submitted that the issue which arose was the importance to the individual of being seen to be treated fairly. It was, he said, a real concern where Core Participants believed that their ability to influence the outcome would be restricted because, as he put it, "they have not been able to instruct a Special Advocate", in particular where a Special Advocate had been heavily involved in the previous litigation leading to the Inquiry. These were decisions being taken about things of real importance which the individuals concerned have been campaigning over for 27 years. A sense of injustice would be present in the absence of someone who was there specifically safeguarding their interests.

145. Once again it is helpful to return to Lord Reed's words. At paragraph 68 Lord Reed's statement concerning what was encompassed in the respect which he spoke of, was the ability to participate in the procedure "provided they have something to say which is relevant to the decision to be taken". At paragraph 70 he reinforced the importance of this aspect of procedural fairness by adopting a quote from Lord Phillips of Worth Matravers and recognising:

> "the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result…"

At this stage the importance of context becomes all the more clear. Not only were Lord Reed's general observations expressed against a background of fairness, where the context was a contested hearing about liberty, but the statement by Lord Phillips was made in the context of the previous regime for control orders, where the issue was whether there were reasonable grounds for suspecting that the controlee was involved in terrorism-related activity and he was not provided with the basis of the case against him. Here it seems to me that the submissions advanced were

in danger of drifting far away from the question of what is necessary for procedural fairness in an inquisitorial investigation.

146. What this focus on adversarial and rights based guidance seemed to me to be in danger of clouding, was that what the families had been campaigning for was this very statutory inquiry, not some particular outcome. Having sought an independent investigation into the issue of whether the bombing could have been prevented, there is no basis for anticipating a sense of injustice now that this aim has been achieved. To suggest that the family Core Participants need the protection of Special Advocates in order to avoid a sense of injustice conveys the impression that they, or their legal teams, view the establishing of the Inquiry as something akin to the next step in an ongoing process of conflict and contest. It would be unfortunate if that did reflect the view held, as it would be likely to feed unwarranted disappointment and dissatisfaction with the work of the Inquiry.

147. Before turning to the third aspect of Lord Reed's discussion on procedural fairness, I can draw together the strands of why the underlying reasoning which permeated Mr Southey's submission seemed to me to be misconceived. The family Core Participants cannot give a Special Advocate detailed instructions, a Special Advocate is not instructed by a "party" to the proceedings, and the Core Participants do not have rights which may be significantly affected in the manner canvassed by Lord Reed. By definition, a statutory inquiry addresses events which have caused public concern. The type of interest which the current Core Participants have in the outcome of the Inquiry will be similar to that shared by affected families in any other inquiry into a fatal event. They will all expect a thorough and independent analysis of the Terms of Reference. If the family Core Participants perceive that the function of a Special Advocate is to seek to influence a particular outcome, then that, it seems to me, is a function which exists outside of the structure of the Inquiries Act procedure. Rather than seeking to influence a particular outcome, the interest of family Core Participants, and their legal teams, ought to be in assisting the Inquiry to achieve a thorough investigation of the Terms of Reference.

148. Turning now to the third point identified by Lord Reed, I again find it necessary to remind myself of how he actually phrased the importance of this aspect, as I think that Mr Southey's summary of it may not quite capture Lord Reed's meaning. What Lord Reed said was:

> "Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions …"

Mr Southey's contention here was that it is conceivable that there would be legal arguments which arose in closed hearings and having someone

present to advance those on behalf of Core Participants promoted the rule of law in the way identified by Lord Reed. I do not accept that the potential contribution of a Special Advocate in this manner falls to be described as necessary in order to satisfy the requirements of procedural fairness, as contemplated in this passage of Lord Reed's judgment. The requirement to listen to someone who had something relevant to say cannot extend to the need for the presence of Special Advocates on the theoretical basis that legal argument might arise. If procedural fairness did require such a step to be taken, then it is difficult to see where there would be any room for the exercise of discretion. The appointment of one or more Special Advocates would be a necessary component of any closed hearing conducted under the authority of section 19. It is therefore worthy of noting that in fact no Special Advocate seems ever to have been appointed to appear in a 2005 Act inquiry in which closed hearings were held.

149. The submissions founded on the case of *Osborn* were then taken forward on the premise that where procedural rights were denied on legitimate grounds, there was a duty to instigate steps which would compensate for that denial of normal standards of procedural fairness, with Special Advocates being capable of performing that function. Case law including *R (E(Russia)) v Secretary of State for the Home Department*, *Regner v Czech Republic* and *IR v United Kingdom* was relied upon. This proposition was drawn from decisions in which the requirement of complying with Article 6 ECHR was the issue. I do not see any relevant read across between cases concerning how the requirements of Article 6 can be met and Inquiries Act proceedings. In short, there is no need in inquisitorial proceedings for the type of mitigating balance necessary where Article 6 rights are engaged.

150. In conclusion, I do not accept that the analysis set out by Lord Reed goes to support the view that functions of the sort identified by Mr Southey require to be accommodated in Inquiries Act proceedings in order to satisfy the requirements of procedural fairness.

Whether the decision in R (Roberts) v Parole Board assists

151. The case of *R (Roberts) v Parole Board* came to be seen as having a prominent contribution to make to the question of whether there was a power to appoint Special Advocates within Inquiries Act procedure. It also contributed to the ruling made by Sir John Saunders in the Manchester Arena Inquiry. In summary, the proposition advanced was this. The Parole Board was a body governed by statute with a general power to ensure fairness, an express power to hold closed hearings but no stated power to authorise the use of Special Advocates. The House of Lords decided that the duty imposed on the Parole Board to act fairly extended to an implicit power to appoint Special Advocates, as that would mitigate against the

unfairness suffered by the prisoner who was not allowed access to material being taken account of by the Board. The Parole Board's duty to act fairly was comparable with the duty under section 17 of the 2005 Act. By the same reasoning as adopted by the majority of the House of Lords, there would be power to appoint Special Advocates in Inquiries Act proceedings.

152. Of course, as identified previously (at paragraph 40), Mr Southey contended that the principle of relevance to these proceedings, which it was said could be taken from the decision in *Roberts,* was that:

> "… where there is an express power to withhold material from a party to some form of proceedings, and that results in unfairness, the use of a Special Advocate can to some extent mitigate that unfairness."

The application of that suggested principle flies off if no unfairness to a family Core Participant accrues from being excluded. As I have sought to outline in the previous sections, I do not accept that any unfairness of the sort identified by Mr Southey does arise from the holding of closed hearings.

153. It may nevertheless be helpful to explore the decision reached in *Roberts* in a little more depth. In the first place, although it may not matter much, I am doubtful as to whether Mr Southey's labelling of the Parole Board as an "administrative body" is an appropriate characterisation. By the time that the prisoner came before the Parole Board it was functioning with the attributes of a "court" within the meaning of Article 5(4) ECHR (cf *Weeks v United Kingdom* App No. 9787/82).

154. In *Roberts,* the prisoner, who was serving a life sentence and had passed the point of the 30 year tariff term imposed, became eligible for release on parole a number of years prior to the hearing of the Parole Board with which the House of Lords was concerned. He therefore possessed two important rights:

i. to be released if judged to present no continuing threat to the safety of the public, and
ii. to bring proceedings to challenge the lawfulness of his continued detention.

155. The first came from the Crime (Sentences) Act 1997 section 28, and the second from Article 5(4) ECHR. The majority decision of the House of Lords is to be found in the speeches of Lords Woolf, Rodger of Earlsferry and Carswell. Lord Woolf explained that in the exercise of the first right identified the prisoner was entitled to a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society (paragraph 46). The exercise of the prisoner's Article 5(4) right was seen as requiring an adversarial procedure

involving oral representation and the opportunity to call and question witnesses (Lord Carswell at paragraph 135 and Lord Bingham at paragraph 17, although dissenting on the outcome). There was no question of the ordinary domestic procedure operated by the Parole Board being incompatible with the Article 5 right.

156. The problem which arose was that the Secretary of State wished to place before the Parole Board sensitive information concerning the risk the prisoner was said to pose and to withhold that information from both the prisoner and his legal representative. Each of the judges in the majority held that the Parole Board had express authority to withhold material in this fashion (Lord Woolf at paragraph 65, Lord Rodger at paragraph 105 and Lord Carswell at paragraph 118).

157. In this situation, the prisoner would be left with no representation at what would be a closed hearing and no understanding of the import or nature of the information to be placed before the Parole Board. It would be difficult to see how a decision taken against the prisoner on the basis of the withheld information in these circumstances could possibly comply with the domestic requirement for a procedure fairly reflecting the importance of what was at stake, or with the Article 5 requirement of an adversarial procedure. He had a right to procedural justice in the determination of what was a tangible right of direct application to him in relation to the matter of his liberty.

158. The context and the circumstances inform the reasoning adopted by their Lordships. Lord Rodger noted that an exercise of the power to withhold the information engaged an obligation on the Parole Board to do everything it could to mitigate the potentially serious adverse consequences for the prisoner. The appointment of a Special Advocate would accord him "a substantial measure of procedural justice" (quoting from *Chahal v United Kingdom* (1996) 23 EHRR 413). Paragraph 1(2)(b) of Schedule 5 to the Criminal Justice Act 1991, as amended provided that:

> "It shall be within the capacity of the board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of its functions under Chapter II of Part II of the Crime (Sentences) Act 1997 in respect of life prisoners."

Lord Rodger therefore concluded that the appointment of a Special Advocate would be within the powers given to the Parole Board. Even with a Special Advocate, Lord Rodger acknowledged that the contemplated procedure might not comply with Article 5(4) (paragraph 112). As always, what is necessary for fairness is context driven. In the prisoner's case, that context was informed by the requirements of Article 5, and by the need for a procedure which fairly reflected the importance of what was at stake for him. In the absence of the substantial measure of procedural justice

afforded by a Special Advocate, it would seem clear that neither the domestic requirement of fairness, nor those of Article 5, would be complied with.

159. At paragraph 131 Lord Carswell also saw the same paragraph of Schedule 5 to the Criminal Justice Act as giving the Parole Board the power to appoint a Special Advocate. It seems clear from what he said that such an appointment would be intertwined with the function which the Parole Board was performing. As he noted:

> "The functions of the board are to assess whether it is safe to release offenders or whether they would constitute a danger to the public if set free from prison. In order to discharge these functions it is essential that it has before it all material information necessary for determination of that issue of public safety. If the only effective way to get that information from reluctant informants is to use the SAA procedure, then I consider that the use of that procedure incidental to or conducive to the discharge of its functions."

160. It may be important to understand that the information would have been available to the Parole Board from the informant once it exercised its power to withhold that information from the prisoner and his legal representative. The ability of the Secretary of State to provide information did not depend upon the appointment of a Special Advocate. But in order to allow the Parole Board to perform its function in an effective and lawful manner, there had to be some method of complying with what was seen to be the requirements of the domestic law and Article 5. This, as I understand it, is the basis upon which Lord Rodger and Lord Carswell each concluded that the appointment of a Special Advocate would be conducive to the discharge of the Parole Board's functions. The Parole Board's functions were to provide an adversarial structure within which the prisoner could challenge the lawfulness of his continued detention and to determine whether his right to be released had been engaged.

161. Lord Woolf expressed his decision in slightly different terms but I do not detect any significant difference in effect. As noted above, he proceeded on the basis that the prisoner was entitled to the benefit of a procedure which fairly reflected the importance of what was at stake for him. At paragraph 67 he stated:

> "That the SAA can have a role in appropriate circumstances is inherent in the flexible nature of the requirement that the prisoner is treated with fairness that is the source of the right to an oral hearing."

162. In my view, it would be incorrect to see the decision in the case of *Roberts* as vouching the proposition that a duty to act with fairness in inquisitorial proceedings empowered the appointment of Special Advocates where family Core Participants were excluded from closed hearings. What it does is to provide another example of the appointment of Special Advocates without express authority where the determination of an

individual's rights was taking place (and by a body operating as a court). If I am correct in understanding that *Roberts* was concerned with the protection of specific rights, and the manner in which the lawful determination of those rights could take place, then the decision is far closer to those which consider how an individual's rights in terms of Article 6 could be protected.

The eventual focus

163. As Mr Southey's submissions developed in the debate, whilst nothing was conceded, the force of his contentions concerning procedural fairness came to focus on:

- the need to be able to contribute to any legal issue which might arise in closed hearings;
- the advantage which State Core Participants would have in these circumstances if the families were not represented in any way; and
- the need to monitor the work of the Inquiry and its decision-making in order to permit a challenge by judicial review, if appropriate.

As he put it, the family Core Participants had an interest in ensuring that the Inquiry reached a decision overall that they had confidence in. That would only be achieved by the reassurance which they would gain from the presence of Special Advocates at closed hearings. In that context he also pointed to the need for there to be public confidence in the work of the Inquiry. That, he submitted would likely be diminished or absent if substantial parts of the Inquiry's work was conducted in the absence of the family Core Participants.

164. I have sought to explain why I do not agree that the functions specified are encompassed within the concept of procedural fairness as it ought to apply to inquisitorial proceedings. What was described by Mr Southey had the characteristic of something being imported from adversarial proceedings and inserted as an additional component into inquisitorial proceedings.

165. It seems to me that the measure of what is required for fairness for the purposes of section 17 of the 2005 Act is whether the families are involved in the procedure to the extent necessary to allow them to safeguard their legitimate interests. The ability to be involved in any closed procedures arises from the information to be supplied in advance of such hearings and the opportunity to identify areas of interest or concern to Counsel to the Inquiry, or to me, all as set out in the Rule 10 Protocol. Once the evidence has been led there will be a process in which a gist of that testimony is provided to the Core Participants and published. That will also assist in involving them in this part of the process. At one stage, Mr Southey sought to argue that a Special Advocate would take privileged instructions from the family Core Participants and this that would confer some form of

advantage. When asked to explain what this meant, he restricted the notion to one of having greater confidence in someone that they could talk to in private and discuss what their concerns were.

166. In my view, raising the suggestion of privilege was quite artificial. There is no reason why family Core Participants should be inhibited from communicating their interests or concerns to the Inquiry. They will be able to communicate privately with their recognised legal representatives who, in turn, will be able to convey their interests to Counsel to the Inquiry, or directly to the Chair. There is no reason to distinguish between any relevant and legitimate interest which the family Core Participants may have in investigating the Terms of Reference and the interest which I have in doing so. Throughout the entire discussion very little account appeared to have been taken of my independent investigatory function.

167. As I mentioned above, there is no scope for criticism of the family Core Participants in the course of this Inquiry's examination of its Terms of Reference. I do recognise however that, hypothetically speaking, it might be possible for an excluded Core Participant to be criticised in closed hearings held in an inquiry. I am not persuaded that this possibility demonstrates that there must be a power to appoint a Special Advocate in such a situation. It would remain the case that the excluded participant could not be given disclosure of the relevant material triggering the criticism and could not be informed of the evidence about it. However, the procedural fairness which would require an opportunity to respond is embedded in the Rule 13 warning letter requirement, which applies whether or not the basis for the criticism arises in an open or a closed hearing. Any warning letter founded in evidence heard in a closed hearing might have to be framed on the basis of a gist, but such a procedure could be managed by Counsel to the Inquiry. The inquiry Chair would no doubt take account of the imperfect nature of the opportunity to respond in determining whether any such criticism should be made. I note that the prospect of serious criticism was the basis upon which the application was made before Lord Justice Haddon-Cave. Despite being prepared to assume a power to do so, he concluded that it was not necessary to appoint Special Advocates. As I understood his decision, this was essentially because of the role of Counsel to the Inquiry and the ability of the families to communicate lines of enquiry to him.

168. Having sought to analyse and give due weight to Mr Southey's submissions, I do not accept that a closed hearing in the absence of Special Advocates to represent the interests of family Core Participants would be in breach of a natural justice right to be heard, or of any requirement of procedural fairness as that applies to Inquiries Act proceedings. Nor do I consider that there is any merit in the contention that family Core

Participants would be at a disadvantage as compared to other Core Participants, such as would cause unfairness requiring the appointment of Special Advocates. The family Core Participants are not in a contest with the State Core Participants. All Core Participants are designated in order to provide assistance to the Inquiry. Nor can it be assumed at this stage who would or would not be present at any particular closed hearing. Concerns of this sort, or those flowing from a distrust of State authorities, fail to give due weight to the independent function of the Chair and the Inquiry Legal Team, whose roles would remain constant throughout. I do not accept that a difficulty of the sort mentioned by Mr Southey, as recorded at paragraph 52 above, is of any real concern. The error is to think of Counsel to the Inquiry as questioning on behalf of a party. Where Counsel to the Inquiry considers it relevant to explore an issue brought to his attention by a Core Participant, he continues to do so as part of the inquisitorial investigation. The absence of an opportunity to challenge decisions made by the Chair has to be seen in the context of the process involved, which leaves much to the discretion of the person charged with conducting the investigation.

Part 6 – Discussion and analysis

Article 2 ECHR

169. The remaining submissions concerned the impact of Article 2 ECHR in circumstances where closed hearings were held. The approach adopted by Mr Southey was similar to that which underpinned his approach to procedural fairness, namely to submit that if Special Advocates were necessary in order to comply with the family Core Participants' rights, as envisaged by Article 2, then that would demonstrate that a power must be available in Inquiries Act procedure to allow for such appointments. This of course depends on whether Article 2 does require the appointment of Special Advocates.

170. A proper analysis begins with the implied procedural obligation of investigation. The obligation to protect the right to life under Article 2 of the Convention, when read in conjunction with the State's general duty under Article 1, requires what the Grand Chamber in *Ramsahai v Netherlands* (paragraph 321) described as:

> "… some form of effective official investigation when individuals have been killed as a result of the use of force …"

171. Mr Southey was correct in drawing attention to the fact that in *Ramsahai* the Grand Chamber was concerned with the question of whether the proceedings before the Amsterdam Court of Appeal required to be heard in public and with whether its decision required to be made public. It was not directly concerned with the issue of the next-of-kin representation before that court. Although the initial hearing had been held in chambers, the family's representative had been able to make extensive oral submissions on their behalf (paragraph 244) and the Grand Chamber accepted that they had been able to participate effectively in the proceedings (paragraph 349). To this extent, I accept the accuracy of his submission that the case was not primarily concerned with the protection of legitimate interests.

172. It is, however, important to recognise that the Grand Chamber reinforced its long-standing view that Article 2 does not require all proceedings following an inquiry into violent death to be in public (paragraph 353). There is therefore no question of a closed hearing, which was properly justified according to the provisions of section 19 of the 2005 Act, being itself incompatible with Article 2. The question which Mr Southey sought to focus was that of the rights given by Article 2 to the next-of-kin in relation to such a hearing. This question cannot be addressed without first noting that, as the quote from the Grand Chamber in *Ramsahai* at paragraph 321 makes clear, Article 2 does not mandate any particular type of investigation, far less does it dictate the need for formal statutory based

evidential procedures in the form of inquisitorial hearings as provided for by the 2005 Act.

173. Having set that context, it seems to me that the next point to note must be the recognition by the European Court of Human Rights that the disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects. The consequence which the European Court has attached to this is that it cannot be regarded as an automatic requirement under Article 2 that the next-of-kin be granted access to the investigation as it goes along (*Ramsahai* paragraph 347). The corollary of this has been that the requisite access of the next of kin may be provided for in other stages of the available procedure (*McKerr v United Kingdom* App. No.28883/95, *Armani Da Silva v United Kingdom* App no. 5878/08). How that requisite access is to be assessed can be seen in the phrase consistently stated since the case of *Jordan v United Kingdom* in 2001, that the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. These principles were most recently drawn together by the European Court in its decision of 13 March 2025, in the case of *Vyacheslavova and Others v Ukraine,* App no. 39553/16*,* at paragraph 407 where, under the heading "Involvement of the victims or their next of kin and public scrutiny", the court made the following statement:

> "The Court notes at the outset that Article 2 does not automatically require applicants to have access to police files or copies of all documents during an ongoing inquiry, or to be consulted or informed of every step. Nor does it require the investigating authorities to indulge every wish of a relative as regards investigative measures. What the Court must examine is whether the applicants were involved in the investigation to the extent necessary to safeguard their legitimate interests."

174. The European Court has been careful to frame the test for the requisite next-of-kin involvement in a flexible manner. The appropriate level of involvement will plainly vary according to circumstances, such as the nature of the investigation, the subject matter and what the legitimate interests of the family next of kin are in the particular investigation, or aspect of that investigation. This level of flexibility is obviously necessary given that the requirements of Article 2 are not focussed on one type of investigation. It is instructive to consider some examples of various contexts in which this test has been identified. In *Jordan* itself it was discussed in the context of the pre-existing practice in which there was no requirement to provide copies to the families of the written statements or documents submitted to the coroner during an inquest. In *Vyacheslavova* the families had not been kept aware of the progress of investigations and were unaware of the emergence of numerous other sets of proceedings. Other deficiencies in relation to their involvement included rejecting their requests for the procedural status of victim and failing to deal with their

requests at all. In the domestic case of *R (Amin) v Secretary of State for the Home Department*, where the same test was applied, the context was the fact that the family of a teenager murdered in prison had been unable to participate to any extent at all in an internal Prison Service investigation or in a subsequent investigation conducted by the Commission for Racial Equality. These considerations are of some importance, as none of them are in any way analogous to the situation which arises when family Core Participants are afforded full disclosure and participation in general terms but then legitimately excluded from parts of an inquiry.

175. In *R (JL) v Secretary of State for Justice,* Lord Rodger discussed the varying nature of what is required for an Article 2 compliant inquiry. At paragraph 77 he emphasised the fact that Article 2 did not always require what he called:

> "all the bells and whistles of a full-blown public inquiry".

As he went on to state in the following paragraph:

> "The principal hallmark of an article 2-compliant inquiry is that it is effective".

Drawing on what had been said in *Ramsahai,* Lord Rodger explained that in order to be effective an inquiry required to be both adequate and independent. He also took notice of the next of kin's rights. At paragraph 76 he recognised that they should be given an opportunity to participate but that it was not necessary for them to be given access to all aspects of an investigation, if this might cause prejudice. As the concluding sentence of this paragraph makes plain, Lord Rodger's view was that in some circumstances the next of kin might have no active part at all to play in an investigation which was nevertheless Article 2 compliant.

176. The reasoning which has led the European Court to accept that the non-disclosure of material involving sensitive issues may be appropriate and consistent with Article 2, would apply equally to hearings considering such material. It was not suggested to me that the European Court has ever stated that Special Advocates are necessary to safeguard the interests of next-of-kin where non-disclosure is appropriate in the context of an Article 2 compliant investigation. The approach which acknowledges that the requisite access of victims and relatives may be provided for in other stages of the available procedure contradicts any suggestion that participation or representation is essential during the consideration of sensitive material. Although substantial reliance was placed on what had been said about the need for next of kin involvement in the case of *R (Amin),* it seemed to me important to keep in mind that what Lord Bingham emphasised there was the importance of family involvement as a general principle. Nothing was said in the case about what should happen in circumstances where the family are excluded from hearings for good reason. That was not in issue.

177. Furthermore, the European Court has set out that when determining whether the procedural requirement of Article 2 has been met, it is important to look at all of the relevant aspects of an investigation together, rather than focusing on one aspect. In its decision of 7 July 2022, in the case of *Safi v Greece* (App. No. 5418/15), the Court made the following statement at paragraph 116:

> "The Court considers it appropriate to specify that compliance with the procedural requirement of Article 2 of the Convention is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. *These elements are inter-related and each of them, taken separately, does not amount to an end in itself*, as is the case in respect of the independence requirement of Article 6 of the Convention. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed." (emphasis added)

178. The same statement (with the omission of reference to Article 6 and independence) was set out in the recent case of *Vyacheslavova and Others v Ukraine*. So the question comes to be whether, in the absence of Special Advocates during closed hearings, the inquiry procedures in total will provide family Core Participants with a level of involvement such as is necessary to allow their legitimate interests to be safeguarded. That question requires the whole of the procedures and protocols mentioned previously to be taken account of, including the opportunity to receive a gist of the evidence led in closed hearings.

179. One of the relevant procedures is, of course, the opportunity to have recognised legal representatives appointed. It would be wrong though to think of their function only in terms of appearance at hearings. The legal representatives of Core Participants can, and do, provide advice and guidance in many other ways. They act as marshals of the voluminous documentation that can come to be disclosed to Core Participants. They can advise as to the meaning and import of such documentation. They can identify further areas of relevant inquiry. They can act as conduits for communication and correspondence between the Inquiry and the Core Participants and they can liaise with the Inquiry Legal Team in relation to the leading of evidence. These are important functions, particularly when, as in this Inquiry, the legal representatives can be acting for large numbers of individual Core Participants. So each of these functions goes to feature in the package which makes up the level of involvement provided to Core Participants.

180. It is also necessary to identify what the legitimate interests of the Core Participants are. In relation to the evidence led at closed hearings, the legitimate interests of the family Core Participants will be similar to their interests in relation to the evidence led at open hearings, to have it tested and explored in a thorough manner. In open hearings this can be achieved

by Counsel to the Inquiry, as assisted by any suggested areas of questioning which Core Participants may identify, all in accordance with the Rule 10 Protocol. Practice on the extent to which Counsel to the Inquiry explores the issues raised by Core Participants, and the extent to which inquiry Chairs grant permission to ask questions, varies. It may easily be the case that the legitimate interests of Core Participants are safeguarded in open hearings without their recognised legal representatives asking any questions at all. Such an outcome would not indicate that the legal representatives were ignored or not involved.

181. As discussed previously, in relation to closed hearings, family Core Participants would be limited to suggesting areas of general interest or concern and these can be explored by Counsel to the Inquiry, or by me, if appropriate. Mr Southey did not seriously argue that this was inadequate. His areas of concern were the twofold points now revisited through the lens of Article 2, namely: the inequality of arms which would result if State Core Participants were allowed to attend closed hearings when family Core Participants were excluded, and the absence of an ability to monitor the work of the Inquiry.

182. The first of these points was advanced on the basis of Article 6 jurisprudence which was drawn from cases such as *Regner v Czech Republic*. The contention being that where security information had caused the European Court to recognise that the legitimate interests of the State required to be protected it was necessary to ensure that, so far as possible, adequate safeguards were put in place to preserve equality of arms. In my view, jurisprudence concerning the requirements of Article 6 is of no assistance and this is a submission which receives no support from any of the case law concerning Article 2. It is not helpful to think of the procedures of a statutory inquiry as engaging equality of arms issues. For one, it is not a contest, but perhaps more importantly, that contention fails to recognise the value which accrues to Core Participants in having relevant issues which they have an interest in being explored by Counsel to the Inquiry and by myself. I therefore do not consider that Article 2 assists Mr Southey in this aspect of his submission any more than considerations of natural justice and fairness do.

183. The second Article 2 contention was captured in a repeat of the proposition that in the absence of a Special Advocate at closed hearings there would be no one independently determining whether any error of law was occasioned in the Inquiry's approach to fact finding. I do not accept that this submission correctly identifies a requirement of the implied Article 2 procedural obligation. Article 2 imposes a requirement that there should be some form of effective official investigation. For an investigation to be effective in this sense it is generally necessary for the person conducting it

to be independent from those implicated in the events (*Ramsahai* paragraph 325). There is no sense in which an official investigation will fail to comply with the requirements of Article 2 in the absence of some separate but contemporary process for assessing the effectiveness of the machinery set up to carry out the independent investigation. To put this a different way, it is simply not possible to detect in any of the European case law to which I was directed, nor in the domestic case law discussing Article 2, any suggestion that an effective investigation requires representation on behalf of next of kin in any form of monitoring role such as might be found in contested adversarial litigation where rights are being determined.

184. In my view, Ms Grange was correct to note that the family Core Participants were heavily involved in the proceedings of the Inquiry through the regular communication provided by the Inquiry Legal Team, through the process of disclosure and through the appointment of legal representatives to perform the functions mentioned. At the end of the day, it seems to me that she was correct in submitting that Article 2 adds nothing to the question of whether there is a role for Special Advocates in Inquiries Act proceedings.

185. Before leaving Article 2 considerations it is, however, in my view, worth taking note of the decision of the ECtHR in the case of *Carter v Russia* App no 20914/07. This was the application by Mrs Litvinenko (who, along with her husband, had changed her name after being granted asylum in the UK) in which her claims that the Russian State was in breach of both the substantive and the procedural limbs of Article 2 were upheld. In so doing, the European Court relied on the findings made by Sir Robert Owen in the inquiry which he chaired. To my knowledge, this is the only case in which the European Court has considered and commented upon the operation of the closed hearings procedure authorised by section 19 of the 2005 Act. It will also be remembered that Mrs Litvinenko's application for a Special Advocate was refused by Sir Robert.

186. The relevant aspect of the decision is that it considered Sir Robert's findings that Mr Litvinenko had been poisoned by two individuals who were acting under the direction of the Russian Federal Security Service. In determining whether to rely on these findings, the European Court explained the principle which it would apply at paragraph 98 of its decision:

> "The Court's reliance on evidence obtained as a result of a domestic investigation and on facts established within domestic proceedings has depended on the quality of the domestic investigative process, and the thoroughness and consistency of the proceedings in question."

In order to perform this exercise the Court engaged in an assessment of the adequacy and fairness of the inquiry legal framework, during which it noted that the Chairman and the Minister had power under section 19 to

restrict access and disclosure of evidence (paragraph 81). When it came to assessing the procedure for leading evidence in closed hearings the court said this at paragraph 108:

> "It is true that neither the parties nor the Court have had access to the closed evidence, as this material has been in the exclusive possession of the United Kingdom Government. However, in cases where the Court has not had sight of national security material on which decisions restricting human rights are based, it has instead scrutinised the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned. The Court therefore takes note of the fact that the closed evidence procedure was set out in detail in the inquiry report and the nature of the closed material was described, albeit in broad terms. The Chairman, counsel and the solicitor to the inquiry and the legal team for the Home Secretary were present at the closed hearings. Counsel could make submissions regarding documentary evidence, and witnesses giving oral evidence could be questioned by the Chairman and counsel. Although material subject to a Restriction Notice could not be referred to in the public hearings and had to be redacted from the report prior to its publication, the Restriction Notices were themselves public documents, which were published both on the inquiry website and also as appendices to the report."

187. On the basis of this analysis the court set out the following conclusions:

i. To the extent possible under the circumstances, the taking and use of closed evidence was attended with appropriate safeguards (paragraph 108), and
ii. It had no reason to doubt the quality of the domestic investigative process or the independence, fairness and transparency of the inquiry proceedings (paragraph 110).

188. Whilst I recognise that the issue before the European Court was not identical to the issue raised by Mr Southey, it does seem to me that the case has some value. As Mr Southey pointed out on a number of occasions, the European Court is very familiar with the concept of Special Advocates and their use in closed hearings where Article 6 issues arise. In the *Carter* case the Court was considering closed hearings in the context of Article 2. Its decision can be viewed as a robust endorsement of a process which included substantial closed evidence and hearings conducted in the absence of family Core Participants and without the appointment of Special Advocates.

189. The analysis set out in this part of the ruling brings into focus the underlying question mentioned in the introductory paragraph. For the reasons which I have set out, I do not accept that the implied procedural obligation of investigation contained within Article 2 requires the appointment of Special Advocates in closed hearings authorised by section 19 of the 2005 Act. I am satisfied that the protocols and procedures which

I have outlined are sufficient to allow the family Core Participants to be involved in the Inquiry to the extent necessary to safeguard their legitimate interests. There is therefore no question of needing to look for a power to appoint Special Advocates within the provisions of the 2005 Act in order for the investigation conducted by the Inquiry to be Article 2 compliant

Part 7 – Conclusions

190. My analysis of the various ways in which Parliament's intention in implementing the 2005 Act could be discerned led me to the view that the absence of any reference to Special Advocates was considered and deliberate. Accordingly, I came to the view that there was no power within the 2005 Act scheme to authorise the participation of Special Advocates in closed hearings.

191. Having sought to assess and weigh the various submissions in relation to natural justice and procedural fairness, I have not departed from that view. Nor am I persuaded that any of the issues arising out of a consideration of Article 2 ECHR should cause me to do so. I therefore conclude that Ms Grange was correct in her contention that there would be no proper basis upon which I could issue a request to a Law Officer to make such appointments to represent the interest of the family Core Participants in this Inquiry.

Part 8 The exercise of discretion

192. If I had concluded that it was competent for Special Advocates to be accommodated within the Inquiries Act procedure, I would then have considered whether or not to make a request of the relevant Law Officer. I would have been inclined to think that the Advocate General for Northern Ireland would have been the appropriate recipient of any such request. It may be helpful for me to engage in that exercise now, lest my conclusion on the issue of competence transpires to be incorrect.

193. The first matter to determine in this exercise is the question of the test to be applied. Ms Grange suggested that Lord Bingham's remarks in *R v H* should be given effect to, namely that the appointment of Special Advocates would always be exceptional, never automatic; a course of last and never first resort. As she observed, this test was reiterated by the Court of Appeal in the case of *The Competition and Markets Authority v Concordia International RX (UK)* [2018] EWCA Civ 1881. Mr Southey's submission was that the test should be whether the appointment of Special Advocates was in the interest of justice and whether their appointment achieved fairness. I do not think that any of the other submissions for family Core Participants suggested any different test.

194. On the matter of why any discretion should be exercised in favour of requesting the appointment of Special Advocates, in addition to Mr Southey's contribution, I had the benefit of oral submissions from Mr Kane KC, on behalf of the John McBurney, Solicitors family group and from Mr McAleer on behalf of the Campbell and Haughey, Logan and Corry and Roche McBride group. Their submissions essentially revisited or further developed the points advanced by Mr Southey and there was no substantial difference of approach taken.

195. I also had the benefit of submissions from Mr Mansfield KC, who did not seek the appointment of any Special Advocate. In the course of his helpful contribution he outlined some of the practical evidential approaches which had been taken in other statutory inquiries in relation to material which potentially engaged section 19 of the 2005 Act. He also drew attention to a concern which the Core Participant whom he represented held. Mr Mansfield noted that any Special Advocates appointed would likely require to familiarise themselves with most, if not all, of the open material in addition to the closed material provided to them. This would be necessary in order for them to understand the relevance and importance of the issues raised in closed hearings. Such a process might lead to substantial delay.

196. If I assume that a discretionary power to seek appointment of Special Advocates is available, then the family Core Participants' reasons for seeking appointment and the perceived benefits of having Special

Advocates participate need to be assessed. Although expressed in great detail, and with clarity, the reasons can be summarised as being: the wish to have their own interests represented, so as to provide them with a sense of fairness and reassurance in the context of the importance to them of the Inquiry proceedings. In so far as the benefits are concerned, it is thought that Special Advocates will assist the investigation, ensure that the views of the family Core Participants are advanced, create equality of representation, provide reassurance and enable legal challenges to be promoted.

197. When it comes to identifying the correct test to apply, there is likely to be a difference of approach between requesting appointment in statutory proceedings which explicitly provide for the appointment for Special Advocates, such as proceedings before the Special Immigration Appeal Chamber, where the nature of the proceedings suggest that appointment is likely to be a regular feature, and the exercise of a discretionary power assumed for the purposes of Inquiries Act proceedings. There are a number of authoritative statements which support the approach suggested by Ms Grange. In *Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin) at paragraph 102 it was stated that:

> "It should always, however, be borne in mind that it is exceptional to appoint a special advocate outside an applicable statutory scheme."

On the other hand, more recently, in *R (on the application of Commissioner of the Police of the Metropolis) v Crown Court at Kingston-Upon-Thames v Trevor Scott* [2023] EWHC 1938 (Admin), the court was of the view that a shorthand label such as exceptional was not helpful. Instead, it preferred the approach of saying that appointment should only be made if truly justified and in cases where there is a clear justification. The approach argued for by Mr Southey and the other applicants engaged what is perhaps a rather lower standard. Nevertheless, if I approach the question of exercising a discretion on the basis of the test suggested to me by Mr Southey, I will, in essence, be revisiting the various points in relation to fairness and functions which he identified in the course of his arguing the point of competence. Assuming that the power to appoint is available, the reasons which I set out for rejecting his submissions that fairness requires the appointment of Special Advocates remain in place and demonstrate that the test for the exercise of discretion which he and the other family Core Participants argued for is not met.

198. Nevertheless, some further observations of relevance in relation to the issue of discretion may be identified. One issue raised by Mr Kane was that Special Advocates would have a particular set of skills gained through experience of working with closed materials, such as might not be available to the Inquiry Legal Team. That point having been raised, it may be

informative to set out that members of the Inquiry Legal Team were involved in all three of the previous inquiries in which applications for the appointment of Special Advocates were made: The Litvinenko Inquiry, The Manchester Arena Inquiry and The Independent Inquiry Relating to Afghanistan. They have extensive experience of working with and seeking out closed materials and have acted as Special Advocates in other procedures. The many other statutory inquiries in which members of the Inquiry Legal Team have had involvement in include:

- The Baha Mousa Inquiry
- The Al Sweady Inquiry
- The Rosemary Nelson Inquiry
- The Leveson Inquiry
- The Jermaine Baker Inquiry
- The Jalal Uddin Inquiry
- The Grenfell Tower Inquiry
- The Independent Inquiry into Child Sexual Abuse
- The Undercover Policing Inquiry
- The UK Covid Inquiry
- The Post Office Horizon IT Inquiry
- The Thirlwall Inquiry

199. In addition to having other extensive experience of cases involving the UK intelligence community, members of the Inquiry Legal Team were also involved in the inquests into the Ballymurphy shooting in 1971, the Birmingham pub bombings in 1974, the Hillsborough stadium football disaster and the London Bombings of July 2005. The Solicitor to the Inquiry was also appointed as a consultant to the inquiry team conducting the inquest into the terror attack occurring in Christchurch New Zealand.

200. It can therefore be seen that the Inquiry Legal Team has available to it a vast breadth of experience to draw upon, which will more than adequately equip it to properly test and explore any of the issues which may arise in relation to closed materials. Just as importantly, this breadth of experience in participating over many years in a number of the most significant inquiries and inquests conducted in the UK ought, on any reasonable view, to meet the need for the sort of public reassurance in relation to the independence and effectiveness of the Inquiry which was identified by Mr Southey.

201. In this vein, it is also important to recognise the limited scope for communication which would be available as between Special Advocates and family Core Participants. It would not be possible for Special Advocates to communicate anything about the content or conduct of closed hearings. To

simply say that the families would be content with the reassurance flowing from the presence of Special Advocates adds nothing of a tangible nature.

202. For the various reasons which I set out in Part 5 of this ruling, I am satisfied that Counsel to the Inquiry will be as well placed as any Special Advocate to properly test and explore evidence led in closed sessions. There will be a mechanism in place which will allow any information which could be provided by family Core Participants to Special Advocates to be conveyed just as straightforwardly to the Inquiry Legal Team. Furthermore, Counsel to the Inquiry will not be prohibited from further communication with the Core Participants in the same way as Special Advocates would be.

203. It is in the nature of a closed hearing that some Core Participants will be present and others not, but that ought not to be perceived as the procuring of an advantage. My interest and that of Counsel to the Inquiry will be to fully explore the Terms of Reference by way of investigation. We will not be assisted in that exercise by the presence of Special Advocates who are no better informed than I, or my Counsel can be, with the assistance of the family Core Participants.

204. Whilst I accept that I may be susceptible to error, the experience of my legal team, who will act solely in the interests of the Inquiry, will help to guard against that. Having regard to the duty to avoid any unnecessary cost, it would not be proportionate to request the appointment of Special Advocates in order to perform a monitoring function. That conclusion becomes all the more self-evident when one takes account of Mr Mansfield's observation, which is likely to be correct to some extent, that Special Advocates would require familiarity with the open as well as with the closed materials. That requirement has implications for cost as well as delay.

205. The conclusions which I have reached demonstrate that, in my view, the appointment of Special Advocates would result in duplication of the work of Counsel to the Inquiry and, to some extent at least, also of the open counsel instructed on behalf of the family Core Participants. The cost implications of appointing one, far less three or four, Special Advocates are very significant. Since, in my view, they are not required to ensure fairness I would not request their appointment in the exercise of an available discretion. I could not do so whilst acting consistently with my duty to have regard to cost. Since I see no proper and distinct function for Special Advocates in this inquisitorial process, I would not request their appointment.

Rt. Hon. Lord Turnbull
Omagh Bombing Inquiry
17 November 2025