THE INQUIRY RESUMED ON TUESDAY, 22ND JULY 2025 AS FOLLOWS:

SUBMISSION BY MR. SOUTHEY (Cont.)

09:56

CHAIRMAN: Good morning, Mr. Southey. Would you mind just giving me a moment to make sure my computer is ready?

MR. SOUTHEY: Of course, sir.

CHAIRPERSON: Thank you. 09:58

MR. SOUTHEY: Thank you.

Can I just start with two things really that arise from yesterday. Firstly just to respond a little more on Carter v Russia, having reviewed it again - and 09:59 apologising again because in one sense I had forgotten it; it wasn't that it was unfamiliar but I had forgotten it in the context of the question - in our submission, in one sense it is of limited significance to the issues I raised and the submission I made about 09:59 the key test essentially being whether or not steps had been taken to ensure that the next of kin were able to safeguard their interests because, of course, in that case the question was whether the victim in that case was able to rely on the findings of the public inquiry. 10:00 The question was the admission of the evidence into the proceedings in the European Court. One sees that at paragraph 110. That meant, in simple terms, the victim was happy with the findings, they weren't complaining

about whether or not they were able to safeguard their legitimate interests.

So, nothing in that case undermines the real point I was trying to make yesterday, which is that the test we say applies by reason of Article 2 is whether the next of kin were involved to a sufficient extent to safeguard their interests. I'll come back to that in a moment because the second thing I want to address in a moment is the questions that were asked about whether or not effectively the Special Advocate adds anything to counsel to the Inquiry. 10:00 10:01

The second thing I would point out: My memory of yesterday is that you raised, sir, the issue of Carter in circumstances where I had raised the Article 6 case law, recognising that Article 6 wasn't directly in issue. It may be of some relevance that the European Court in Carter in fact cited Yam - you see that at paragraph 108, which is an Article 6 case - and so certainly regarded it of some relevance, the Article 6 case. 10:01 10:02

Of course, the point I drew from the Article 6 case law, which is sort of why in one sense we've taken the position we have, which is not to challenge in one sense the principle of a closed hearing but to argue a Special Advocate is needed as a mitigating factor, the point I was making about the Article 6 case law was 10:02

that the European Court has recognised that the State may need to withhold things from a procedure at times but, at the same time, has indicated that it is important that there are mitigating steps taken to balance the issue or the unfairness that arises from that. 10:02

Really in one sense, to pick up from what I just said about Carter v Russia, it remains in our submission - and just to summarise where we are because I want to come back to the second issue in a moment, which is the advantages of a Special Advocate over counsel to the Inquiry - our submission, in summary, when looking at case law, the legislation I took you to yesterday, is that Article 2, the factors you need to consider or the test you need to apply, sir, in our submission is if Article 2 is engaged, whether without Special Advocates essentially, there is sufficient involvement by the family to ensure that they can safeguard their interests - putting it in an alternative way but to the same effect - whether the Special Advocates are needed to safeguard the interests, the legitimate interests, of the family. 10:03 10:03 10:03

The domestic law test, we would submit, may depend on the interpretation of Section 19. We made the point effectively that restrictions have to be minimised in terms of Section 19. To the extent that submission is accepted, our position would be that denial of a 10:04

Special Advocate, because it is an enhancement of rights, would need to be justified in Section 19 terms.

If that's not correct, in any event what we submit is that the key issue based on the cases I have highlighted is fairness, and is an appointment needed essentially to ensure fairness? 10:04

That's then where I come to the second issue I wanted to sort of return to from yesterday. 10:05

CHAIRMAN: Are you moving on from the Article 6 discussion?

MR. SOUTHEY: Yes. Yes.

CHAIRMAN: There is something I just wondered about, and I'd be grateful for your assistance with. 10:05

MR. SOUTHEY: Yes.

CHAIRMAN: I understand the point you make about Article 6 and the various case law where the Court has made it plain that in derogating or in providing circumstances which are less than adequate, some kind of compensatory mechanism can be put in place. Now, that's all been discussed in the context of Article 6 but I wonder if there is not some discussion of it in the context of Article 2 as well in the European case law? I'm thinking about a number of cases, but perhaps two in particular, where the Court has observed that Article 2 doesn't automatically require next of kin to have access to police files or copies of all the documents during the course of an ongoing inquiry, or 10:05 10:05

to be consulted or informed of every step.

Now, that has been said on many occasions, and perhaps very recently this year in perhaps Vyacheslavova v Ukraine. (I'm not sure of the pronunciation.) But it was also articulated in the case which you presented, Armani Da Silva, where the Court reiterated its approach to the procedural requirements involved in a case where Article 2 was engaged. It commented that disclosure or publication of police reports and investigative materials may involve sensitive issues, with possible prejudicial effects on private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. It said: 10:06 10:06 10:07

"The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure."

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MR. SOUTHEY: Sir, that in one sense goes back to the submission and it's linked back to the submission, and it's why I took you through, in one sense, the detail of Amin because if you remember in Amin, when Lord Bingham looked at the various stages, he started with the police investigation. In the context of the police investigation, he said absolutely no criticism of the fact there was no public or family involvement in that, for understandable reasons, because police 10:07

investigations, as we all know, need to be conducted in private. He then went on to look at the processes which are perhaps more analogous to the sort of process we're talking about because it's expected to be in public. He looked at, if you remember, the Bert investigation which was more of a sort of -- I think it was Bert, I can't remember the name of the individual, I may have got that wrong. But it was more of a lessons learnt, lessons for improvement type exercise. He looked at the CRE process, which was similarly, and he was critical -- not critical but he was saying they were in adequate for Article 2 purposes because they didn't involve the family and didn't involve adequate public concern. 10:08 10:08

The question is, and it comes back to, in one sense, what is it that's distinct - and this is why I was trying to draw, why I went back to the test and went back to Amin - what is it that means the families don't have any right, for example, to participate in the police investigation but do have a right to participate in the processes like the CRE. The reason, we would submit, is the only way in which that can be assessed, because it's the only test certainly we have been able to identify, is the legitimate interest test. Why is there a legitimate interest in the CRE process in a way that there wasn't in the police investigation in Amin? The reason, we submit that, is that in the Amin -- in the police process rather, what is the purpose of the 10:09 10:09

police process? It is to bring a prosecution if there is sufficient evidence. That would be potentially undermined by family involvement.

In the lessons learnt process, which is more analogous to this, there is a legitimate family interest because, going back to the purposes of the Article 2 investigation set out by Lord Bingham in Amin, the families have an interest in ensuring that lessons are properly learned so that they can have that reassurance going forward that things won't repeat themselves. So, that's the distinction we draw. We recognise it's not necessarily every stage that there needs to be involvement, and there is, in particular, a difference between police investigations and what I have described as the lessons learnt stage. But that equally the fact that families don't necessarily have a right to be involved in police processes doesn't mean they don't have a right to be involved at other stages. The question that arises is what the test is. As I say, certainly we have not been able to identify in the case law any test other than are they involved to an extent necessary to safeguard the legitimate interests.

CHAIRMAN: So that's the measure of the fairness test?

MR. SOUTHEY: That is the test that seems to apply at this stage, yes.

CHAIRMAN: And that's how you measure fairness?

MR. SOUTHEY: That's how you measure... I am sort of slightly reluctant to use the language of fairness

because it's not really the language in Article 2 case law, as I see it.

CHAIRMAN: No, but it is the point you were focusing on yesterday?

MR. SOUTHEY: Yes, exactly. That's the point we -- yes. That's why, when I was summing up a moment ago about what we say the tests are, to some extent I used the language of fairness as a matter of domestic law because that's what comes from cases like Roberts, but equally I use the involvement to the extent necessary to safeguard their legitimate interests in the context of Article 2. 10:11 10:11

One thing, though, just on that that I would also emphasise from my submissions yesterday is although case law makes clear it is not a freestanding requirement, one touchstone by which one measures potentially that issue of protection of legitimate interests is public confidence. I drew attention to the case law yesterday that makes it clear that one of the purposes of the Article 2 investigative obligation is to ensure that there is public confidence in the rule of law. So, looking at and going back to the distinction I just drew between police investigations and lessons learnt investigations, is it going to undermine public confidence that family aren't involved in a police investigation? We would submit we would accept it won't undermine it because it's normal practice for the police to conduct their investigations 10:12 10:12 10:12

in private, for good reason.

Does it undermine public confidence if the family aren't able to raise issues they want to raise in a process like the CRE investigation? It does have the potential to undermine that because it looks as though, effectively, the analysis essentially of what lessons need to be learned is being conducted in secret. That's where -- so public confidence is important. It's not a freestanding test, I am not suggesting it is a freestanding test, but it is part of the context in which one should look at that issue. 10:13 10:13

That's the context in terms of the second thing I wanted to come back to from yesterday, which is the question being how can a Special Advocate assist in a manner that counsel to the Inquiry cannot? Can I just say that I think in answering those questions yesterday, I, perhaps for understandable reasons, focused on sort of in one sense the principled arguments regarding that rather than the specific arguments in the case. I think I would submit, and we've made this point in our written submissions, it is important not to lose sight of the fact that the Core Participants I represent obviously do seek the instruction or the appointment of Ashley Underwood King's Counsel, and his junior, based on their previous experience in the case. 10:13 10:14 10:14

Mr. Underwood, just to put this in context, first became involved in this case about 12 years ago. He was first instructed -- in fact, he was first instructed as the Open Advocate in the case in about 2013. He was instructed as the Open Advocate, and then 10:15
became the Special Advocate when the initial Special Advocate was appointed to the High Court bench in Belfast. That means that certainly as far as the families are concerned, they both believe he has a depth of knowledge of the case and they have confidence 10:15
in him. They believe he is an effective advocate on their behalf. That is important obviously, we submit, particularly in the context of a case where the reality is obviously a lot of material is going to be -- a lot of the issues are going to be considered in private. 10:15

Now, obviously the Terms of Reference are wider than the issues that were found to be arguable by Horner J, as he then was, but one shouldn't lose sight, for example, of the fact that all of the issues that were 10:16
found to be arguable in terms of State failings - grounds 2, 6, 7 and 9 - all essentially related to intelligence. That means sensitive material was likely to be central to all of them. That means, we would submit, that it's not surprising that there is a belief 10:16
among the families that Mr. Underwood must have played a significant role in achieving this public inquiry.

That's in part why confidence - and I've made the point

that it's not a freestanding issue but it is the context - confidence issues arise in this case.

I think when the Inquiry broke yesterday, I was making submissions about one particular important role being effectively confirmation of whether or not there were grounds of challenge. One of the things that I think I should have made clearer perhaps, or certainly should have addressed, was that, of course, when one talks about potential grounds of challenge in this context, one is not necessarily just talking about a challenge at the end of the process. Grounds of challenge can arise in relation to decisions made regarding disclosure. One of the problems, for example, we discussed -- or there were submissions yesterday on disclosure, and you fairly put to me, sir, I think, that counsel to the Inquiry will, of course, be arguing for disclosure. But suppose there is a situation which is, we would submit, not unrealistic where counsel to the Inquiry argues for disclosure, the Inquiry rejects those arguments having heard argument from State Core Participants; it may be there are arguments that the decision in those circumstances are flawed but the family Core Participants will have, without a Special Advocate, no way of knowing whether that's the case. Having a Special Advocate, particularly an experienced Special Advocate who has their confidence like Mr. Underwood who doesn't at any stage say there is a problem in relation to disclosure, as he would normally

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be entitled to communicate, gives people confidence that effectively the disclosure process is working as it should do. I mean the problem would be without that, counsel to the Inquiry may strongly believe that their arguments should have been accepted, that there is a legal error in rejecting them, but there is no obvious way that that can be advanced because their duty is to the Inquiry. 10:19

If there were to be a judicial review in those circumstances, they would probably have to defend your ruling, sir. Perfectly properly. That's one of the reasons why confidence -- if you look at that using the test, if one considers the test I have just outlined, which is safeguard their legitimate interests, they have a legitimate interest in ensuring that everything that should be in open is in open. 10:19

Public confidence depends effectively on that. If there is an independent mechanism - effectively someone representing their interests who is able to assess essentially whether there is legal error in the approach that's being adopted to that - it gives confidence. Remember, as I say, the point there is also an inequality, which is that State Core Participants will be seeking to withhold that material should. Should you order disclosure, it would be open to them to potentially bring judicial review proceedings; it would potentially be open to Sir Ronnie 10:20 10:20

Flanagan to bring proceedings, if he is a party. I am going to come onto the issue of Sir Ronnie Flanagan because it is particularly important, in a moment.

But all of those things, the families wouldn't have that safeguard which, as I say, state Core Participants would have. They would be able to understand your reasoning, they would be able to assess it; if they felt it was appropriate, they would be able to challenge it 10:20 10:21

CHAIRPERSON: There is something I wanted to ask you about in relation to Mr. Underwood.

MR. SOUTHEY: Yes.

CHAIRMAN: Since you mentioned him, this is perhaps as good a point as any to do it. I understand very well why you would like the appointment of Mr. Underwood and Mr. Kennedy, given their previous involvement in the proceedings. 10:21

MR. SOUTHEY: Yes.

CHAIRMAN: But in terms of the process, you correct me if I'm wrong, but as I would understand it, the relevant law officer would identify a list of suitable counsel -- 10:21

MR. SOUTHEY: Yes.

CHAIRMAN: -- and he would then make that list available to the parties, to the Core Participants, and they might be given the opportunity of choosing from within that list. But in order for any individual Special Advocate to be put on that list, the law 10:21

officer would have to be satisfied that it was appropriate to appoint that individual.

MR. SOUTHEY: My sort of experience of the process is rather what normally happens is that the full list is made available to the parties, they identify people they want on it, and it then goes for tainting at that stage. You might say I would like person X off that list, it goes back to the Security Services for a tainting check. 10:22

CHAIRPERSON: Well, you'll appreciate that I've seen the closed Horner judgment? 10:22

MR. SOUTHEY: Yes.

CHAIRMAN: And also the closed material that was presented to the judicial review.

MR. SOUTHEY: Yes. 10:22

CHAIRMAN: If, hypothetically, there was intercept material included within the closed judicial review proceedings, then that material would have been disclosed to the Special Advocates by virtue of paragraph 7 of Schedule 3 to the Investigatory Powers Act. 10:23

MR. SOUTHEY: Yes.

CHAIRMAN: Now, if we assume for a moment that Special Advocates were appointed in the Inquiry proceedings in relation to an ordinary Restriction Order, then they would, of course, receive disclosure of the material covered by that order. 10:23

MR. SOUTHEY: Yes.

CHAIRMAN: But intercept-related conduct could only

feature in the Inquiry if a Restricted Proceedings Order was made as contemplated by paragraph 23 of the schedule.

MR. SOUTHEY: Yes.

CHAIRMAN: One conceivable outcome of these hearings is that I conclude that a Special Advocate may be appointed for hearings in general conducted under the authority of Section 19, but that no such Special Advocate may attend at restricted proceeded hearings as governed by Schedule 3. Now, in the event of that outcome, would Mr. Underwood and Mr. Kennedy not be tainted on the assumption they had seen material in the judicial review proceedings which would not be available to them in the Inquiry proceedings? 10:23 10:24

MR. SOUTHEY: Well, two things firstly. This isn't answering your question but it might minimise the risk of that. We would certainly submit that obviously the 2016 Act needs to be potentially read compatibly with Article 2, and if the appointment of Mr. Underwood and Mr. Kennedy was necessary for public confidence, the interpretation we gave - or we've argued for, rather - in relation to the sort of catch-all provision -- I can't remember the provision but you will remember what I described as the catch-all provision should potentially incorporate them. But let's assume for the moment that that argument is rejected, the tainting process ultimately is normally concerned, as I understand it, with the idea that because a Special Advocate will normally spend time in open, it's 10:24 10:24 10:25

important they don't have knowledge of something that they may inadvertently divulge that is meant to remain secret. In this case, we have expressly accepted, of course, that for Mr. Underwood and Mr. Kennedy to be appointed to Special Advocates, they wouldn't be able to go through an open process because of the knowledge they've got.

It's difficult, we would submit, to see why they should be disqualified on the basis of knowledge that they've got that is sensitive but which they couldn't effectively deploy in closed proceedings. I mean, they have that knowledge. They are expected and understood to be able to do other work despite having that knowledge, because the concern normally underlying these processes is they will disclose something inadvertently to the people who can only remain in open. Because they won't have contact, it's difficult to see how that's the issue.

One of the problems anyway with the tainting process is ultimately there is a veto effectively for the Security Services in relation to this, and I don't know how that would play out. In one sense it would be speculative, we would submit, to essentially refuse to appoint them in these circumstances where we don't know whether there is an objection, we don't know whether it's a legit objection from the Security Services.

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CHAIRMAN: So you say that might not necessarily be an impediment?

MR. SOUTHEY: It might not be an impediment because, as I say, certainly my understanding -- well, I am effectively perhaps in one sense giving evidence, but certainly my experience of the tainting process is the tainting process is about ensuring that material isn't disclosed to someone who isn't security cleared inadvertently. 10:27

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I think I have probably covered to some extent what we say the role of the Special Advocate would be. I think I have touched up those. I have touched upon, though, on the position of Sir Ronnie Flanagan and its relevance because I think I need to be clear about what is our position because it is, in our submission, of real importance when looking at the issues of fairness and looking at the issues of effective participation. 10:28

Sir Ronnie Flanagan's letter, or the letter written on his behalf dated 15th April this year, makes it clear that because of his prior knowledge of some of the sensitive material, he seeks to participate in closed proceedings. We recognise that it may be difficult to -- I say difficult; that suggests as though you might have a sort of underlying intent. We recognise rather that the terms of Section 19 suggest that he should be potentially able to participate in the closed proceedings on the face of it. If he has the necessary 10:28 10:29

security clearance and he has the knowledge of closed material, it's difficult to see what justification there is for excluding him from a closed process.

Now, if that is correct, it does create, we would submit, an inequality in circumstances where obviously there is -- there have been criticisms made by family Core Participants in the past of Sir Ronnie. As I say, it's not simply that he is in a position to, for example, question through his lawyers witnesses when the family Core Participants aren't. He is in a position to assess whether there is any challenge he would wish to make to rulings of the Inquiry, particularly including in relation to disclosing things into open, and also on the substantive merits. He has that advantage which, without a Special Advocate, we submit, the family Core Participants will not have. 10:30 10:30 10:31

Of course, there is a second alternative, which is that although we've said it would appear difficult to see what justification there is for excluding him, if he were to be excluded, that potentially makes it difficult for counsel to the Inquiry because they would then potentially have to question on behalf of parties who have conflicting interests. That may be an issue anyway because, as is clear, family Core Participants, although largely aligned on many issues, are not completely aligned. 10:31 10:32

The position of Ronnie Flanagan does add a complexity to this case which perhaps wasn't present in some of the other cases. It, we would submit in summary, either poses a problem in the sense that it gives a perception that he as an individual Core Participant is at an advantage, or it causes a problem for the counsel to the Inquiry because they then have to look after the interests of a number of people who are excluded from the closed proceeding who have potentially quite conflicting interests. 10:32 10:33

That last point about conflicting interests does mean, in our submission, it is difficult to draw any assistance from the comparison that is drawn in some of the pleadings to the role of counsel to the Investigatory Powers Tribunal. The statutory framework and the context is very different. In a complaint to the Investigatory Powers Tribunal, what will happen effectively - certainly seems to be envisaged by the rules and seems in practice to happen - is that an individual will submit a complaint against the Security Services, the Security Services will be able to present their material confidentially, and the individual will quite often be excluded from that process because of the need to protect security. So, it's not multifaceted in the way that an inquiry such as this is; there is one person excluded and one party that is able to attend and present their case. In light of that, it is not surprising that effectively, although 10:33 10:34 10:34

the position is named counsel to the IPT, counsel quite clearly have specific duties to protect the interests of the person who has made the complaint.

It may be worth just looking at the framework because it is very different to the framework in this case. If you go to the authorities bundle tab 4 page 39, this is Section 69, which is the rule-making power in relation to the tribunal, you will see in (3) that the rule-making power, particularly (b) and (c) of subsection (3), the rule-making power is specifically established to enable the protection of the complainant. 10:35

The rule, and this is quite a different rule to the rule that obviously applies in this context, the rule is then tab 10 page 104, the relevant rule that provides for counsel to the tribunal. You'll see that although there is a broad discretion to appoint a counsel to the tribunal, the three specific circumstances in which the power arises are all ones where effectively the complainant is at a disadvantage. And the functions of counsel to the tribunal, in addition to sort of perhaps what one might expect including things like pressing for disclosure, specifically require counsel to the inquiry to identify any arguable error of law in a decision of the tribunal. So, although they are described effectively as counsel to the tribunal, they are specifically 10:35 10:36 10:37

required to effectively provide the safeguard that we submitted is particularly important, about identifying whether there is some basis for challenging the conclusions of the tribunal.

That contrasts, in our submission, with the role of counsel under The Inquiry Rules. The Inquiry Rules obviously contain less detail about what the role of counsel is. The Rules themselves essentially provide, as you'll be aware, the relevant Rules - I think they start at page 55, I probably don't need to go to them - under Rule 2, it is you who appoint the Chair; they ask questions effectively on your behalf. That's Rule 10. 10:38

There isn't any further guidance on it but as you'll be aware - we put it in our application, we haven't produced it because it is only in draft - the Cabinet Office have suggested that effectively questions are being asked on your behalf and legal advice is being provided to you by counsel to the Inquiry. All of that indicates that, unlike the Investigatory Powers Tribunal -- 10:39 10:39

CHAIRMAN: Would that legal advice not include the question of whether or not I had made an error?

MR. SOUTHEY: Well, but the point about -- I mean obviously if counsel to the Inquiry believes you have made an error, I would expect them to give you that advice. What we're talking about here with counsel to the Investigatory Powers Tribunal goes beyond that in 10:39

that the whole point of it is it is not just whether you have made an error, whether the tribunal has made an error, it is about whether there is an arguable error. There is then a process essentially, and I didn't perhaps file it like that; perhaps I should have done.

CHAIRMAN: I understand that there is a process for bringing that to the attention of the court.

MR. SOUTHEY: Yes, exactly. Exactly. As effectively your legal adviser, it would be a very odd position for counsel to the Inquiry to be in a position -- and this is what effectively would be required, it would for counsel to the Inquiry to say to you, well, I think the law is X but there is an argument the law is Y; if you adopt X, I've then got to tell the Core Participants that although you've ruled X and I will argue in the High Court it is X, I believe there is an argument of Y. That is a very odd position to be in and it's a very uncomfortable position we would be in, and it would certainly need some sort of authority, which is what you see in relation to the IPT.

It goes back to the point I made earlier, which is if counsel to the Inquiry was some sort of panacea, why is this room full of all the lawyers that are present? In part, we would submit, that is for two reasons. Firstly, and one shouldn't lose sight of that, even if it's a situation where -- and in relation to a case like this, or an inquiry like this in open - this may

often be the case - even if Core Participants can't bring any particular knowledge about a topic, obviously lawyers can potentially identify, based on the evidence, issues to be investigated.

But secondly, and probably equally importantly if not more importantly, they provide a safeguard from the Core Participants' point of view. They are able to advise as to whether or not there are flaws in the way in which the matter is proceeding. As I say, that second point becomes even more important when matters go into closed, because there is then a very important issue from the families' point of view, which is actually is there proper legal justification for withholding material. 10:42

CHAIRPERSON: Some might say that it begins to sound a bit uncomfortable if you start with the premise that you have full confidence in the Inquiry, in the independence of the Inquiry, the independence and competence of the Chair and the team, and yet the core argument in favour of a Special Advocate is to ensure they don't do something wrong. 10:43

MR. SOUTHEY: Well, I wouldn't necessarily accept that because obviously, as I submitted yesterday, the best inquiry in the world, the most able lawyers in the world, make errors; we all make errors. 10:43

CHAIRMAN: I understand that but I'm just wondering just how far that goes. One wouldn't, for example, contemplate just a secondary process of representation

just on the off chance that somebody along the line made a mistake. I'm just wondering how it might sound to others, to observers, to hear the proposition that everybody thinks the Inquiry is independent, everybody thinks that the Inquiry is capable of doing a good job, 10:44
everybody thinks that counsel to the Inquiry are experienced in this field, everybody thinks they are very well qualified, everybody thinks they are very diligent, but we need this second tier of representation just to make sure they don't do anything 10:44
wrong.

MR. SOUTHEY: But I do drew the analogy with, or I do make the point, as I have just made, that all of those things would apply in open, but if they are sufficient effectively to enable - to use the Article 2 language - 10:44
the families to safeguard their legitimate interests, in one sense why am I going to be here for attending hearings, for example? The reason for that, in our submission, is in part -- as I say, fundamentally it's for two reasons. One is it gives a voice to families 10:45
who can advocate for certain things during the process, who can seek to have questions asked et cetera et cetera. Secondly, just it gives them reassurance if they are advised - and that is likely to be the advice - if they are advised actually this process, even if 10:45
you are unhappy with some of the findings, it is a proper process, it is reliable a process et cetera et cetera. It gives reassurance.

That reassurance, the reason I'm focusing on that, is 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. That is likely to be frustrating. Despite all the points you have just made, it is frustrating for the individuals because they want to know the truth, they want to know that whatever findings are made are reliable. They would normally be able to do that in one sense by attending, by viewing, by making sure that they see what questions are asked, they understand what is being said, they can follow the process and then have confidence in the outcome. When things go into closed, they can't do that. But if they have someone who they have confidence in who is present, who is effectively saying there is no problem here, that adds to confidence in the process, particularly in circumstances where, as I say, the State parties are present, the State parties will have that advantage.

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As I say, it's not about doubting anyone's confidence, anyone's commitment, anyone's integrity or anything along those lines. It's about a process which is inherently frustrating, inherently limiting the participation, the legitimate participation, of the family members, and the need for confidence in that process.

It is striking, as I say, that there has been a Special

Advocate involved in the judicial review. There is likely to be a Special Advocate involved should it proceed to trial in civil claim, and I think you're aware of the civil claim that challenges the adequacy of the investigation. Certainly that has been raised as being a possibility during hearings this year.

CHAIRMAN: But that's only striking if you don't take account of the difference between the adversarial and the inquisitorial nature of the proceedings. I mean, it's not really fair just to merge them altogether like that. These proceedings are not in any sense the same as a judicial review proceedings, where all that was happening was that a contested claim was being argued to a point of arguability, not even to a point of determining. And once the bar of arguability had been reached, it was handed over to an entirely different process to carry out an actual independent investigation into those matters. So, it's a completely different process.

Now, I readily understand why you say you would like to have a Special Advocate in these proceedings but I don't accept that it's striking that there might not be because of the difference in the two sets of procedures.

MR. SOUTHEY: Except, and this is why I was drawing the analogy, this: In one sense, if you focus on the judicial review at the moment because obviously that happened, in the judicial review, why was a Special

Advocate needed? A Special Advocate was needed to ensure that firstly as much as possible was put into open. That is a role or that is a function that needs to be undertaken. I will accept obviously counsel to the Inquiry will seek to perform that role as well but the Special Advocate, as I say, has advantages, including the advantage that they are able to say to the families I think there has been a flaw or an error in the approach that's been adopted to that. 10:49

Special Advocate was there to advance arguments about what the closed material shows. Those arguments are potentially important from the families' point of view in the context of the Inquiry. While obviously counsel to the Inquiry will be seeking to make, will undoubtedly make submissions about what the material shows, they are not specifically instructed effectively to advance the interests of the family. They will have to balance, they will potentially have to balance the interests of others such as, I have already indicated, Sir Ronnie Flanagan. 10:50 10:50

In the judicial review they had the advantage of being -- the Special Advocate had a potential role, had the judicial review been rejected, of advising on an appeal or indicating whether there were closed grounds of appeal. That role, as I have already indicated, is not obviously an appeal but it is a judicial review, but that role potentially is also of importance in this 10:51

context.

The analogy I draw is although the process is different, the functions that a Special Advocate potentially would need to perform are similar. 10:51

One thing that has been touched upon by counsel to the Inquiry is why is this Inquiry different to other inquiries where there hasn't been a Special Advocate. One firstly needs to be a little cautious about looking 10:52 at other inquiries, partly because the rulings don't necessarily set out all the arguments so it is unclear what arguments were presented. It is unclear, for example, if the concerns I have just raised, and raised on a number of occasion about legal advice, were raised 10:53 in those other inquiries.

But what are the differences? Firstly, we would submit that one shouldn't lose sight of the context of Northern Ireland, the particular concerns or suspicions 10:53 of the position of the State, which are enhanced in this context, we would submit, by the fact that it has taken so long to get to where we are now.

Secondly, there is the history of the use of the 10:53 Special Advocates. Of course, Horner J did seem to suggest that they might be appointed in the Inquiry. I recognise that there is a very real limit to what weight can be placed on those remarks of Horner J.

They were formally obiter. I obviously have the advantage of what was being argued; I don't remember anything being said in argument about the use of Special Advocates. I don't know whether there was any. Certainly there was reference to the need for a closed procedure but I can't remember whether anything was said about Special Advocates.

But those remarks do suggest that Horner J, who had obviously seen the Special Advocate's function, and you, sir, obviously have an advantage over me in the sense that you have seen the closed judgment, but I do suggest that he regarded the role of the Special Advocate as being of an advantage.

10:54

Another significant difference is the potential central role of closed material. To use the Manchester example, obviously in Manchester there was an important closed issue, I can't deny that, but equally there were plenty of fully open issues. Here, the Terms of Reference, we would submit, on a fair reading make it clear that closed is likely to be at the heart of almost all, if not all, of the key issues of preventability.

10:55

There is then the issue of the potential conflicts that arise because of the position of Sir Ronnie Flanagan.

Finally, we do submit, because of the need potentially

to reflect public confidence, we do submit that it is appropriate to take account of the fact that it is clear that a number of the Core Participants clearly have very strong views in favour of the appointment of a Special Advocate, which links back possibly to the previous role played by Special Advocates.

The issue of delay has been raised. How significant delay is, in our submission, is perhaps difficult to assess at this stage. It may depend, for example, on who has been appointed. If Special Advocates from the judicial review are appointed, potentially in conjunction with somebody else, they clearly bring a significant amount of knowledge of the closed material into play; that's likely to speed matters up. They've also been sought at a relatively early stage. As far as my understanding of what the Inquiry has said about listing, at this stage we are still at a stage where there are no closed hearing dates.

In any event in our submission, if I'm right that the tests are as I have described, which is whether the appointment is necessary for fairness, whether it's important to ensure that legitimate interests of the Core Participants are protected, in our submission delay can't be a justification for refusing to appoint Special Advocates.

Now, one aspect that has been touched upon in relation

to the delay is the particular issues that arise in relation to the facilities available for Special Advocates in Northern Ireland. I think you're aware, sir, that there is an ongoing judicial review - it's still ongoing - that challenges the resources that have been provided to Special Advocates in Northern Ireland, and I'm instructed for the applicant in that case. The latest position on that, because there has been recent correspondence on it, is that there is still no firm date as to when SASO will have dedicated premises in Northern Ireland for Special Advocates to view papers. However, we would submit it's unclear why that-- 10:58 10:58

CHAIRMAN: Is the intention that they will have dedicated premises?

MR. SOUTHEY: Yes, there is a commitment to provide. I'm talking from memory at the moment, but the plan is at the moment that they hope to have premises that are signed off by the end of the year, I think it is. The premises have to be modified, as I understand it, and then have to be approved by the Security Services, as I understand it. But there is no firm date, I accept that. 10:59 10:59

However, what is clearly happening at the moment is that Special Advocates are effectively using the premises of PSNI and the MoD, as I understand it, to view materials. Presumably the Inquiry - because otherwise it's difficult to see how it could function - has facilities available to it that enable security 10:59

sensitive material to be viewed. It is difficult to see why a Special Advocate can't view the material there.

Clearly the issues that arise, although they have caused delay, are not preventing progress being made in closed procedures. In this context, where it is victims and survivors who seek the appointment of a Special Advocate, it is a bit, we would submit -- well, it doesn't sit well for effectively State parties to say, well, there will be delay because of the failure of the State to provide resources to enable Special Advocates to fulfil their role. But, as I say, in any event we would assume, and this is something as open advocates it may be difficult for us to understand, we would assume that whatever facilities are available to the Inquiry could be used by Special Advocates to view papers. 11:00 11:00 11:01

I have made reference obviously to the appointment of Mr. Underwood and Mr. Kennedy. I've argued why they would be of an advantage. We recognise that, of course, one of the problems with them being involved is that whilst some Core Participants have been able to instruct them and have had in the past meetings with them, et cetera, giving them instructions, that isn't true of all Core Participants. The solution to that that we've proposed, based on experience of other cases where there has been a development, a very significant 11:01 11:01

development which means further instructions need to be given, is that an additional Special Advocate can be instructed to effectively join the team. That means that there is an opportunity for that additional Special Advocate to be given instructions in open; they then join closed, and you have a combination of updated and fresh instructions with the prior knowledge of the existing Special Advocates.

CHAIRPERSON: So does that mean there would be three Special Advocates? 11:02

MR. SOUTHEY: Well, what has actually happened in some cases I have been involved in, and I don't want do Mr. Kennedy out of a brief, but junior Special Advocate has effectively been dismissed, a new junior Special Advocate is brought in as replacement as a way of 11:02 getting instructions so they can work with the senior who has knowledge, or you make it three, which would not necessarily be disproportionate given the volume of the material. One way or another, what you're looking to do is bring together the existing knowledge of the 11:03 Special Advocates which is of value with someone who can come in from open and bring in fresh instructions from those who haven't been... That's the mechanism that certainly I have experienced in practice.

11:03

The final issue that's been raised in terms of practicality is the issue of cost. Now, I should say in terms of cost, as with other issues, our basic point is that practicalities shouldn't drive the outcome of

this; practicalities, there must be a solution to these. If you look at the cases, one of the things that you can potentially draw from R-v-H, where there was no system in place, was that ultimately a solution was found to practicalities because fairness required it. The key question is what does fairness require; what does Article 2 require? In our submission, if it requires the appointment of Special Advocate, solutions have to be found to these issues. 11:04

Correctly, we submit, PSNI in its submissions recognises that, in general, it is the public agency that is seeking to rely on closed material that ends up paying for the Special Advocates, but says there is a distinction because these are inquisitorial material. In our submission, the problem with the PSNI submission -- in one sense it perhaps isn't very much different from an applicant's point of view because ultimately the State has to fund this in one way or another if it is needed for fairness. The problem with the PSNI submission is that actually the test, and one sees this from T -- it may be just worth looking at this because it makes it good. 11:04 11:05

If you go to page 897 of the bundle, which is tab 33, T was a case where there was a question about who pays for the use of sensitive material in family proceedings -- the use, rather, of a Special Advocate in family proceedings. The ruling ultimately of Cobb 11:05

J, as you see at para 28, was the agency that held the material that should pay for the Special Advocate, and that was the police. The police obviously aren't a particular party. It's not like for example SIAC, where the State is bringing proceedings against the individual and wants to rely on closed material, ultimately in the family proceedings the reason the closed material was needed was because the Court had duties to ensure that the best interests of the children were being protected. It wasn't a situation where, if you like, the police were raising a positive case. 11:06 11:06

Ultimately, in our submission, that must be the correct approach because if one thinks about what will happen in this case, the reason why material will be confidential is because the Inquiry has concluded - for legitimate reasons, one assumes - the Inquiry has concluded that an application made by a State party for a Restriction Order is a valid one. It's the State that is seeking to benefit from the Restriction Order by protecting its, and it seeks to benefit from it because it seeks protection of its legitimate interests. If that requires additional cost, then it should be the State, because it's the State that is seeking to withhold the material that it's paying for the Special Advocate. But as I say, we submit in one sense that can't drive matters. The key issue is what does fairness require, or what is required to ensure 11:06 11:07

that legitimate interests of family members are protected.

The final thing, I should say, is you'll notice that I haven't gone into any great detail about the judgments, 11:07
or the decisions rather, that were reached in the three inquiries where consideration has been given to the use of Special Advocates. The reason for that is that although obviously, in one sense, two of them might be said to be supportive of my arguments because two of 11:08
them have been found there probably was a power, we recognise that ultimately they are not binding. It's unclear, certainly from our reading of the decisions, what arguments were advanced. Looking at where we are now, you will have, by the time this hearing finishes, 11:08
have had extensive arguments about a number of issues, some of which don't seem to have been considered in the earlier Inquiry decisions, and so you hopefully, if counsel have fulfilled their task, will be in a better position to consider these issues than perhaps previous 11:08
Inquiry Chairs where.

CHAIRMAN: I think that's undoubtedly going to be the case, Mr. Southey.

MR. SOUTHEY: That why I haven't spent a huge amount of time on it because ultimately I hope you will be in a 11:09
better position to reach the correct conclusion, whatever that may be.

CHAIRMAN: I think I agree with you entirely on that. There is really not enough in the decisions themselves

to gain much insight about what the reasoning was.
MR. SOUTHEY: No.
CHAIRMAN: There is a small matter, though, that I did want to bring to your attention just in case it is of any significance. I don't think it is. In paragraph 35 of your own submissions, you draw attention to what was said in the Afghan ruling about Sir John Saunders' reliance on AHK. 11:09
MR. SOUTHEY: Yes. Sorry, yes.
CHAIRMAN: Now, you then deal with the impact that Al-Rawi has on that, which is not the point I want to draw to your attention. There is a quote in paragraph 5 of the Manchester Arena Inquiry decision which is said to be from AHK. It is that quote that's then referred to by the Chair in the Afghan Inquiry. All I want to bring to your attention is that as far as I can see, the quote doesn't in fact come from AHK at all, it comes from the second first instance case in the Competitions and Market Authority series of litigation. 11:09 11:10
MR. SOUTHEY: Okay. I don't think I spotted that. As I say I can't see why that would make any difference. 11:10
CHAIRMAN: It doesn't make any difference. I just wanted to make sure that we didn't go through this whole procedure without that not being identified.
MR. SOUTHEY: Yes. I don't think I spotted that but I don't think anything matters in relation to it. 11:10
CHAIRMAN: It doesn't add anything, but the judge in the first instance Concordia case was His Honour Judge Matthews. He gave an ex tempore judgment and there was

no authority cited.
MR. SOUTHEY: Yes. Thank you. That covers everything.
CHAIRMAN: Could I just ask you about one final thing then, please?
MR. SOUTHEY: Yes. 11:11
CHAIRPERSON: You mentioned during the course of this morning's discussion that a significant part of the consideration which I should bear in mind concerns the issue of public confidence, and I understand why you make that point. 11:11
MR. SOUTHEY: Yes.
CHAIRMAN: You say, and I think rightly, that it is not something which is a standalone consideration.
MR. SOUTHEY: Yes.
CHAIRMAN: Does the same apply then to the interests of 11:11
the next of kin, in other words that they are not a standalone consideration? The reason I ask that is, as we discussed yesterday, the requirement under Article 2 is to provide, in the language of the European Court, some form of effective investigation. 11:12
MR. SOUTHEY: Yes.
CHAIRMAN: A component of an effective investigation is obviously the involvement of the next of kin.
MR. SOUTHEY: Yes.
CHAIRMAN: They require to be involved to the extent 11:12
necessary to safeguard their legitimate interests; that's the test we have been canvassing.
MR. SOUTHEY: Yes.
CHAIRMAN: So that's a component of an effective

inquiry. But the fact that involvement on the part of the next of kin is but one component then raises the question of what weight might have to be given to that component as compared with others. I want just to ask you to look with me at Safi-v-Greece. It's again a point that has been made a number of times, I think, in the European Court. It's a 2022 decision, paragraph 16. It says, in exactly the same language that has been used elsewhere, most recently in the Ukrainian case from 2025 that we touched on: 11:12 11:13

"The Court considers it appropriate to specify that compliance with the procedural requirements 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 interrelated 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." 11:13 11:13

Now, there is nothing to quarrel with there, is there?

MR. SOUTHEY: Well, I'm not going to disagree with the -- well, I am not going to disagree with the European Court of Human Rights, certainly at this 11:14

stage. What I would say about that is that that is, in broad terms, expressed -- because what's being said is you look at matters such as the involvement of the family.

The case law does -- and I took you to Amin but there is Strasbourg case law, Strasbourg judgments one after another. The case law does go, we would say in relation to the family, a little more specific in the sense it does repeatedly use this language of "involvement to the extent necessary to protect legitimate interests." 11:15

CHAIRMAN: Yes.

MR. SOUTHEY: It is difficult in those circumstances to see how, for example -- 11:15

CHAIRMAN: That's the very language used in Safi.

MR. SOUTHEY: I don't have it in front of me but I thought it was slightly different in terms of the family.

CHAIRMAN: It is: 11:15

"... compliance with the procedural requirements 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." 11:15

I mean, it just seemed to me the question then comes to

be does that mean that fairness is a question of balance?

MR. SOUTHEY: Well, the reason firstly just that I made the point about language is the language there is simply is talking about the involvement of the family. 11:16
Now, if you look at those parameters. Taking another of those, independence, while there may be a degree of overlap, as the Court says, and each in their own is not an end in itself - to use that language - it's quite clear - Ramashai being an example - that you can 11:16
have violations simply because an investigation isn't independent, to use that as an example. Ramashai, you may remember, was the one where the initial police investigation was conducted by the police force that was being investigated. So, that paragraph can't be 11:17
read as meaning you can't find a violation effectively on the basis of any of those individual criterion. We would say, because it has been said repeatedly, similarly if there is insufficient family involvement, that is a standalone basis. That was effectively the 11:17
basis upon which the challenge succeeded in Amin.

Yes, there is a degree of overlap; yes, there is a degree of balance because we've accepted, for example, that the requirement for legitimate involvement doesn't 11:17
mean you can't have a closed procedure, but the balance comes in because once you depart from, if you like, the normal model, and the normal model being attendance; that's the way as a matter of domestic law we comply

with Article 2 within the United Kingdom. If you depart from that, you need safeguards in place that ensure that those interests, those legitimate interests, are safeguarded. That's the way which, in our submission, one needs to assess it. 11:18

Yes, it's not one-model-fits-all, there is plenty of case law that makes that clear, but if the State is departing from normal standards, safeguards need to be put in place that ensure that basic principle of 11:18
legitimate interests is safeguarded.

I hope that answers the question.

CHAIRMAN: It does, thank you. I'm most grateful to you, Mr. Southey, your submissions have been 11:18
particularly helpful.

MR. SOUTHEY: Thank you, my Lord.

CHAIRPERSON: I think it would probably be helpful, Mr. Greaney, if we take a short break?

MR. GREANEY: It would be helpful sir, yes. When we 11:19
return, there is going to be a change to the running order in that, for good reason, we will hear next the short submissions of Mr. Skelt on behalf of Sir Ronnie Flanagan.

11:19

AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

CHAIRMAN: Good morning, Mr. Skelt.

SUBMISSION BY MR. SKELT

MR. SKELT: Thank you very much, and thank you to my colleagues for accommodating me out of order. I very much appreciate it. Thank you. 11:34

Thank you. On behalf of Sir Ronnie Flanagan, sir, we have considered in detail the submissions made by the other Core Participants, both from the victims and also from the State agencies, together with the very helpful 11:34 documents from the Inquiry's legal team.

Sir Ronnie has read with particular care the submissions by the victims groups, particularly where they seek the appointment of Special Advocates. I 11:34 should make this clear, that he is entirely sympathetic to their requests, and acknowledges why they seek and why they feel that there is a need for the appointment of Special Advocates. Mr. Southey has already covered that in some detail. It includes, of course, ensuring 11:34 that everything is done to put information into the open. And if there has to be a closed process, then it should be, as seems likely, as limited as possible. And secondly, to ensure the interests both of the victims and wider public are protected within those 11:35 closed proceedings.

Nothing I say on Sir Ronnie's behalf should be taken to undermine any of the submissions made by the victims

groups. Indeed, I note that in some respects, for example in Mr. Southey's submissions, reliance was placed on Sir Ronnie's position in support of the submissions that the victims have made.

11:35

Sir, as you will have seen from our short submissions, Sir Ronnie does not himself seek the appointment of a Special Advocate, subject to one caveat that I'll mention in a moment. It's very important, lest it be misunderstood that Sir Ronnie's submissions on the 11:35
appointment of Special Advocates for him reflect his position as having been the Chief Constable at the material time of the bombing, thus having had the authority at that time to view much of the closed material. That puts him, it may be thought, into a 11:36
slightly different category. We submit, sir, that it is not unusual, in fact at all, for somebody in his position in a later inquiry to have some role in closed proceedings necessarily dependent on the individual circumstances of an inquiry and the issues that a 11:36
witness or a Core Participant has to address.

With respect to the questions that we were asked to comment upon, we do not intend to add to the extensive submissions you have in writing and orally on whether 11:36
Special Advocates can lawfully be appointed, and indeed by what process. We mean no disrespect by not adding to that weight of learning.

The central point we make, sir, is this: If there is a power in law to appoint, that should only be exercised where it is necessary to do so, and that in Sir Ronnie's case, it is not necessary to appoint a Special Advocate to represent his interests. Therefore, in the absence of there being such a need, there is no justification for appointing one, certainly at least not at this time. 11:37

The basis for that submission is, as I have alluded to already, Sir Ronnie is in a somewhat different position to the other Non-State Core Participants at this Inquiry on principally the issue of the protection of sensitive information. As the Chief Constable at the time of the bombing, Sir Ronnie is likely to have had authority to view the majority of the closed material back then. Further, he may well have seen some of the actual material to be considered in closed at this Inquiry. He may be required to give evidence in closed proceedings. We respectfully submit that as a requirement of basic fairness, if he is expected to give evidence in closed, he cannot simultaneously be excluded from those same closed proceedings. 11:37 11:38

Moreover, and this has been touched on already, I think, through Mr. Southey's submissions, if there is material on which findings may be made which touch upon directly or inferentially Sir Ronnie, he is required to be given some notice of it and the ability to comment 11:38

on it. Of course, we cannot know at this time whether he will be required to give evidence in closed or whether there is material to which he should be given some access, but for the reasons I have just summarised, we respectfully submit there is no basis to exclude him from those aspects of closed proceedings that are relevant to him in the way that I have already summarised. Therefore, there is no necessity for the appointment of a Special Advocate for Sir Ronnie. 11:38 11:39

We acknowledge, of course, that there may be classes of material in the closed proceedings that he did not have authority to see, even when he was Chief Constable, and cannot properly be shown now, although of course that cannot be known as yet. 11:39

We acknowledge, of course, that the State Core Participants will have legitimate concerns about the control of sensitive information but in Sir Ronnie's case, we respectfully submit that is capable of relatively straightforward conventional case management, and orders around such matters as document handling are entirely commonplace in inquiries that have a closed element to them. As we have alluded to in our short submissions, written submissions, members of the legal team representing Sir Ronnie would, we anticipate, have the necessary clearance level to see the closed material or the majority of the closed material in this case. 11:39 11:40

Sir, should you agree with our analysis - again to make it entirely clear - Sir Ronnie is content that the Inquiry legal team deal with the issues in closed but that any closed material which is relevant to Sir Ronnie is brought to his attention. We refer to Sir Ronnie here meaning both him and his suitably cleared legal representatives. That would, we submit, mean Sir Ronnie has some involvement in closed proceedings, should there, in fact, be the material that requires his input, but only on a limited basis. 11:40 11:40

Similarly, if he is asked to give evidence in closed, then he should be cited on the material relevant to that process, and be legally represented. None of those submissions, we hope, suggest or are intended to suggest that an adversarial approach is taken to this Inquiry, nor that Sir Ronnie himself is taking an adversarial approach to this Inquiry. 11:41 11:41

We respectfully envisage that Sir Ronnie's role as described can be readily managed on an ongoing basis. Again, if that is right, we submit there will be no necessity for a Special Advocate to be appointed for him. 11:41

For the avoidance of doubt, we do not hold the view or make the submission that Sir Ronnie and his legal team should be given access to all the closed material, it

is only that that would touch on him and his necessary level of involvement in the closed process. He has no interest in having wider access to or sight of all of the closed material.

11:42

We are particularly mindful, sir, that the appointment of Special Advocates necessarily carry advantages but they also come with difficulties and restrictions, many of which are very helpfully summarised and identified in the Inquiry legal team's notes on the issue of appointments on Special Advocates; I needn't repeat those. But certainly in Sir Ronnie's case - and again I focus entirely on him - for a Special Advocate to be appointed for him, we envisage that those restrictions are likely to cause more problems than the appointment of a Special Advocate would cure, and that, properly managed, he can have a level of involvement in closed proceedings that are free from the restrictions that arise from having a Special Advocate appointed on his behalf.

11:42

11:42

11:42

Sir, for those reasons we do not respectfully see the necessity for a Special Advocate to be appointed to represent Sir Ronnie's interests. In the absence of that identified necessity, we respectfully submit it would be wrong to appoint one for him. However, the caveat that I mentioned earlier is this: In the event, sir, that the Inquiry decides to exclude Sir Ronnie from all closed process and from all closed

11:43

information, Sir Ronnie may have to ask for some person to represent his interests in closed process beyond the assistance that would be given by the Inquiry legal team. The only obvious option for that would be a Special Advocate. We say that position is not necessary to be reached in his case, but if you were to go through a process that resulted in his exclusion, and also that you were minded to appoint Special Advocates for others, then one indeed may be mandated for Sir Ronnie. 11:43

We do not wish to introduce in any way the language of conflict at this early stage but we readily envisage that there may be difficulty in one Special Advocate or one team of Special Advocates representing the interests of the victims groups and also simultaneously Sir Ronnie's interests. Indeed, there may be a requirement, should the interests of the victims groups not be sufficiently aligned, for different Special Advocates even to be instructed for groups of victims. We wouldn't presume to comment for them, they are all represented and can make their own submissions on those issues. 11:44 11:44

Sir, that is essentially all we would wish to say, brief though it is. We submit that there is no necessity to appoint a Special Advocate for Sir Ronnie, certainly not at this time. He can and should properly be granted a role in closed proceedings, although it is 11:44

too early to precisely define what is and the ambit of it. And that any security concerns arising can be easily managed along entirely conventional grounds in this Inquiry, and others.

Short though that is, sir, I hope that is of assistance

CHAIRMAN: Thank you very much.

MR. SKELT: If there is anything that we can try and assist with any further.

CHAIRMAN: I am grateful to you. Thank you. 11:45

MR. GREANEY: Sir, it would be good idea to have a short break so that advocates can exchange positions. May we suggest just a couple of minutes, following which we will hear from Mr. Kane, who will make submissions on behalf of the bereaved families and 11:45 survivors represented by John McBurney Solicitors.

CHAIRMAN: Right.

AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

11:47

CHAIRMAN: Good morning, Mr. Kane.

MR. KANE: Good morning, sir.

SUBMISSION BY MR. KANE

11:49

CHAIRMAN: When you're ready.

MR. KANE: Sir, you've got the submissions which we have made in writing, and we wish to rely essentially on that written submission.

Further, our position is that Mr. Southey has very ably and comprehensively covered the majority of the legal points which we made, together with many others which were contained in his submission, and we gratefully adopt his arguments in those respects which support our position. There will be one or two matters which I will touch upon in our brief submission orally. 11:50

Can I first of all, just by way of preliminary, say that you raised, or rather counsel to the Inquiry indicated that if the Attorney refused to appoint a Special Advocate, that things would get messy. Yesterday, you, sir, used the procedure whereby appointments were made. While we made an application for a Special Advocate, we do agree with your interpretation that essentially you make a request and not an appointment, and we are at ease with that. 11:50 11:50

But we also say, however, that whether or not things might get messy, whether there might be legal arguments to be made, would not be a reason for the refusal of the application for a Special Advocate. 11:51

CHAIRPERSON: It was Mr. Southey, I think, who said it might get messy. 11:51

MR. KANE: My recollection is not always the best at my age but I thought it was Mr. Greaney.

CHAIRMAN: Because I raised it with Mr. Southey as a question about --

MR. KANE: Right.
CHAIRMAN: -- who would actually do the appointing, whether it would be me or whether it be the relevant law officer. Now, I think we are at one, it should be the relevant law officer. 11:51
MR. KANE: Yes.
CHAIRPERSON: If it's messy for him, that's his problem.
MR. KANE: That's succinctly put, sir. I agree with that. My apologies if I'm wrong about it being 11:51
Mr. Greaney but there you are.

There was much discussion about the conflating of adversarial description and the inquisitorial role of the Inquiry. Can I say, sir, that obviously that 11:52
formed part of the debate yesterday. 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. We're content to say that as the Act suggests, you have to look at fairness. Much was 11:52
said yesterday, many cases were cited, and the issue of fairness in various contexts arose, but we say it's for you as chairman to look at fairness; to have a feel for fairness; to consider the essence of fairness in the context of this Inquiry, gleaning assistance from all 11:53
the help which you obtained yesterday from the various authorities which were opened, and which you may or may not obtain from what the various representatives may say to you.

We do say that we've no doubt as to the role which we have in representing our clients, bereaved families and injured survivors. In the course of this Inquiry, there will be disappointment, there will be disagreement, and that can cause an adversarial mindset to wrongly develop but we fully accept it does not change the nature of the process. 11:53

We make these submissions to you today from an invited position to do so, to make an application for a Special Advocate, and thereafter we hope to assist you to reach a decision on that matter. But we would, however, also invite you to take the view that it is best to go forward clothed with the support, confidence and trust of the families, feeling that fairness has been involved and is paramount in reaching the decision on the question of Special Advocates. 11:54 11:54

We also say there are certain core values at play in this application which could potentially be at risk because of the prominence of the many legal arguments. Our application is not for some sort of trumping one argument over another, but I want to say to you this, sir: What I say is based on firm instructions taken after lengthy and detailed consultation with our clients, and they may appear as if they are, for want of a better word, lay submissions almost, but they are core values which they feel are at stake. Essentially 11:55 11:55

their wish would be, all things being equal, to see all the relevant evidence after 26 years.

However, if there must be closed material as is provided for by Section 19, then we say it should, where possible, be kept to a minimum. As I said to you, sir, in the course of my opening statement, if judgments are to be made, then close calls must fall on the side of disclosure rather than being hidden from our families' view. 11:55 11:56

I want to make this clear as well: They view a Special Advocate not as some extra bonus nor as a challenge to the Inquiry legal team, but as something which should be granted, as they see it, as an additional assistance to them in shining light on any material which is withheld as closed by the State authorities, and to assist in the challenges to what material, if any, should be open. They have that legitimate interest, we say, and that certainly is a matter, not only of public confidence, but in particular the confidence of the families. 11:56 11:57

Regrettably, the indications already given by State Core Participants, as referred to also in my opening statement, do little to inspire confidence in the approach of those Core Participants to dealing with material which is 26 plus years old. 11:57

Sir, my clients' instructions on Special Advocates were very simple, uncomplicated, and easy to follow. Essentially if it's help additional to the Inquiry legal team, then they want that help as additional, supplementary and complementary, and it should not be seen as a challenge to anyone in this room or to any authority.

We recognise, sir, that you have a very wide discretion. Discretion has been defined as to do as I please. Now, obviously within this context, it's just not as wide and there has be an exercise of discretion within lawful parameters, but the Inquiries Act did not legislate either way on the issue of Special Advocates.

You, sir, under the Act, control not only the procedure but also the conduct of this Inquiry. The families look to you on this issue and say that the decision on the application of Special Advocates is a critical decision, it's for you to take, and it's within the ambit of the conduct of your Inquiry.

CHAIRMAN: Well, that's what they say; I understand that very easily. The more difficult question might be for me to determine whether or not that's the right question.

MR. KANE: Yes, but it must be against that background. We welcomed once again, what you said very clearly and in very simple language yesterday when you said "I am not the State". We essentially are saying to you

exercise the very wide powers which you have to assist the legitimate interests of the families in this situation, and not to look at it that it's adversarial against inquisitorial but that it's of assistance.

12:00

The point has been made that Special Advocates aren't necessary because of the task which the Inquiry legal team can do, but we've already reached the situation where the families are legally represented. If that argument was taken to an illogical end, then we'd only have you, sir, and counsel to the Inquiry and solicitors. What we're saying is that, by its logical extension, should mean that Special Advocates are granted.

12:00

The families posed a simple question to us and we feel under a duty to replicate that to you. That is, what's the rationale in allowing us their legal representation to assess material which is open and has been open to the world for years, but then seek to deny us, as their representatives, the Special Advocates as their representatives, access to the closed material, albeit accepting that there are necessary limitations to the role of a Special Advocate?

12:01

12:01

Again, put simply from their point of view, they will look around at everyone else in this room and they'll see they are all going to get into the room with the closed material and they are being excluded.

CHAIRMAN: Well, sometimes what happens is that the benefit of legal representation is that legal advice can be given and procedures can be explained to lay clients. One of the things which I'm sure you will explain to your clients is that we are dealing here not with some form of ad hoc procedure but with a statutory procedure governed by the Inquiries Act and the Rules. Accordingly, all of us, myself included, are required to conduct the proceedings in accordance with the law. So, that puts a boundary and a limitation on everything that we can do. 12:02 12:02

It would be a wonderful world if we could just say to the families we are entirely sympathetic to your circumstances, we cannot imagine how difficult it must have been for you all of these years, and we will do absolutely everything we can to try and help you. We are not in that situation. We are in the situation in which the Secretary of State has convened a statutory inquiry, and we are governed by it. 12:02 12:03

MR. KANE: Yes, and all of that has been explained. Likewise, we have great difficulty in saying, well, there is the Act which says there's no Special Advocates allowed, and we say to them that is why we are having these arguments and these debates and discussions over these two days. 12:03

CHAIRMAN: And we will find what the answer is. The point I am trying to make it is a legal answer, it doesn't depend on what my own personal preference might

be. It doesn't depend upon what I would like to be able to do in these circumstances. It depends upon my interpretation of the competing legal submissions which I'm hearing, which include the proposition that there is no power to appoint a Special Advocate. 12:03

Now, we'll see how this all unfolds. But if that's right, if it's right that there is no power, then there is nothing I can do about that. That is a legal conclusion that requires to be arrived at, regardless 12:04 of whether one likes it or not and regardless of whether it's the outcome which the families would wish. Regardless of whether it is the outcome I would wish for them, it is a legal issue. All I'm saying is that yes, of course I understand you tell me what the 12:04 families want, but what the families can get is governed by the legal rules.

MR. KANE: We fully know that. The families will have had the opportunity to hear very extensive legal argument yesterday, and what they are saying is they 12:04 are relying upon your judgment and the wide discretion which you have within the Inquiries Act framework.

CHAIRMAN: It might well be right that I have the power and it might well be right that I have the discretion.

MR. KANE: I would sincerely hope that it will be. 12:05

Dealing with the practicalities perhaps of Special Advocates, can I just say that our submission is that

Special Advocates do have special skill sets born of experience in dealing with similar issues over the years, or having been involved with particular branches of State authorities over the years. Sir, it is not analysing what is on the table that has to be analysed but it is what is capable of being seen as behind the material on the table. It's knowing what should be on the table and it's knowing to ask for it. 12:05

So, they have a very critical role to serve on behalf of the Core Participants who are the bereaved families and injured survivors. I'm not saying this as a criticism but I'm saying this as not knowing, and that is we do not know the scale and depth of the Special Advocate experience of the members of the Inquiry legal team. All I would say is that being vetted and being approved for such work does not equate with years of experience, or expertise. 12:06 12:06

Going on from that point, sir, I want to make a point again which I do hope is not taken by anyone in the wrong way, as we would say in this part of the world, and that is that much has been made of the expressions of confidence in the Inquiry legal team. Can I say this, and it's not to introduce a discordant note, confidence in any situation is never unconditional. Confidence is an ongoing matter and it may ebb and flow as to the level of the confidence which exists. 12:06 12:07

We have to say, and I want to be quite frank with you, sir, that we put in our written submission on 14th April; on 15th April, the Memorandum of Understanding was published. I do have to say on behalf of the people whom I represent that that did dent the confidence of our clients in the Inquiry, and the decision to sign up to the Memorandum of Understanding, and that's something which may ebb and may flow. 12:08

We also say that our trust in how the Inquiry will progress may ebb and flow depending upon what is essentially seen over the course of the next number of months and years. Again this is not to be taken as a criticism, we do also have concerns about the enormity of the work of the Inquiry, and we do see our role not as challenging in a negative sense but in assisting the Inquiry. We have already been doing that. We have sent various queries which we have identified, for instance, in the tranches of documents where we have identified documents which were incomplete or missing. We don't view that or do that out of criticism or lack of confidence but we do that to assist. The point that I am making is that it's not unconditional confidence. 12:09 12:09

Can I say that at this point there is, as it were, a situation where it's a chance, it's the best possible chance, to ensure that in the exercise of your discretion, ultimately Core Participants should not be 12:09

left with doubts about the work of the Inquiry, or, at the end of it all with, "if only" misgivings about why they had not any representation separately at the closed hearings. That's against the background where previous reviews and reports have left a bad taste in the mouth of the victims of Omagh, where corners have been cut and hard questions were ducked by other bodies.

12:10

Finally, sir, can I deal with the practicalities of separate representation for differing Core Participants. I accept totally that if you are of a mind that Special Advocates should be appointed, or recommended for appointment, that the question as to how many or in what shape they should take will have to be considered. But again I want to say this with sensitivity: The Core Participants of bereaved families and survivors have been and will always remain united in grief, but we all have to acknowledge that there are differences that have emerged over the past number of years, and those differences have evolved as to emphasis, priorities and concerns regarding certain matters.

12:11

12:11

12:12

You will know from the various hearings which have already taken place that the Core Participants we represent have a very distinctive view in the issue concerning the involvement of State authorities in the Republic of Ireland, and you will have heard in my

12:12

opening statement that we encourage the Inquiry to have particular emphasis on the Terms of Reference at paragraph 2I.

There are, as I say, various emphases which are shared by various groups. For those reasons, it's our submission that our group should have a Special Advocate separate from others. No one group has a monopoly on the appointment of any particular Special Advocate. That would be, in our view, discriminatory. We're happy to liaise to prevent duplication of effort. We accept that imaginative practical solutions can be reached so that, for instance, we could provide summaries of open material as part of the instructions to Special Advocates, or indeed draw their express attention to full documents. But, of course, that's within the context of speculating on how much closed material there is likely to be. I think the bottom line is that we, as Core Participants, are requesting that we are not necessarily tied with a Special Advocate of someone else's choice. I think that Mr. Southey acknowledged that in the course of his submission, that the answer to that question is the appointment of more than one. 12:12 12:13 12:13 12:14 12:14

Those, sir, are the concerns which we wish to place with you. We wish you well in drawing together all the various strands which will go to your decision as to where fairness leads you on the question of Special

Advocates.

Thank you very much.

CHAIRPERSON: Mr. Kane, I think what you've said to me today is largely directed towards the question of discretion. In terms of whether I have a power, I think you adopt what Mr. Southey has to say? 12:15

MR. KANE: I do, yes.

CHAIRMAN: There is just one question I'd like your help with, if I may, and it related to something I canvassed with Mr. Southey and I think it would be helpful to try and get to the bottom of it. 12:15

In paragraph 11 of your submissions, you explain that you would see the authority for requesting appointment to lie in Section 17 of the Act. You give some examples of where Special Advocates have been appointed in other circumstances. One of which is the case of Tariq. Now, as I would understand Tariq, there was power within the Employment Tribunal rules of procedure to order that there should be a closed hearing, and then the Employment Tribunal's national security rules of procedure, which were then in force, specifically gave power to the Attorney General to appoint a Special Advocate when a closed hearing had been fixed. So, specific power to order closed hearings and specific power to appoint a Special Advocate, all in the context of adversarial proceedings. 12:15 12:16 12:16

So, in the case of Tariq, we have an example of proceedings in adversarial context which provide for both closed hearings and the express appointment of a Special Advocate. By way of comparison, in the Inquiry Act proceedings, we have an example of inquisitorial process providing for closed hearings but making no express provision for the appointment of Special Advocate.

I rather suspect the Secretary of State might say that that's an example of a comparison between one set of provisions governing closed procedures and another set which demonstrates the absence of a power to appoint in the second set. So, why do you say that Tariq, in fact, does the opposite and vouches the presence of a power? 12:17 12:17

MR. KANE: Yes, I understand that, sir. I suppose the bottom line is - and that's why we have focused on the discretion which you have - you're not tied by a decision in an adversarial situation. It is an example; all those examples which are given, we relied on one or two there Mr. Southey relied on a lot more. What essentially we are saying is you, sir, can draw from those decisions what you feel is fair in the present context. None of them are prescriptive; Tariq is not prescriptive, none of them are prescriptive. If they were, we would simply be getting up and saying well, sir, you are bound by such and such a case. 12:17 12:18

All we are saying, I think after all was said and done by Mr. Southey, they are examples from which you can distill certain features which help you to reach a decision to allow Special Advocates because of the power which you have to exercise fairness. 12:19

CHAIRPERSON: All right. Thank you.

Should we adjourn briefly again?

MR. GREANEY: Sir, yes, just for a few moments, following which we will hear from Mr. McAleer, who will address you on behalf of the bereaved families and survivors represented by Campbell & Haughey Solicitors, Logan & Corry Solicitors, and Roche McBride Solicitors. 12:19

CHAIRPERSON: Thank you.

12:21

AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

CHAIRMAN: Mr. McAleer, good afternoon.

SUBMISSION BY MR. McALEER:

MR. MCALEER: My name is McAleer, I appear along with Mr. McGuckin, led by Mr. Toal. As you are aware, sir, we are instructed on behalf of Core Participants represented by Logan & Corry Solicitors, Roche McBride Solicitors, and Campbell & Haughey solicitors. 12:24

Can I say, sir, we are grateful and indebted to Mr. Southey and the Fox Law team for their detailed and

comprehensive submissions, and we wish to adopt those on behalf of the Core Participants for whom we appear. Given the change in the running order this morning, we have also had the benefit of submissions by Mr. Kane, and I endorse those fully in respect of our Core Participants in respect of what he has said, for fairness, your Worship. I beg your pardon, Chairman. 12:24

Unless you, sir, have any questions for me, those are the limit of the submissions I intend to make. 12:24

CHAIRPERSON: There are a couple of things I wanted to ask you about that I would be grateful for your help with.

MR. MCALEER: Yes.

CHAIRMAN: It really arises from what you set out in paragraphs 6 and 7 of your written submissions. It's really just a question of what you want me to take from these submissions, because you tell me in paragraph 6 that: 12:25

"The deep mistrust and suspicion of the State that exists in this country will never be fully allayed unless it is confirmed that every single document and piece of information is placed into the open."

In paragraph 7, you say:

"Whilst others may concede and accept that closed procedures are necessary", that's not the view of your

Core Participants.

Now, I really just need to understand what you want me to take from that. Why do you tell me that every single document or piece of information needs to be placed into the open? 12:26

MR. MCALEER: Can I say, Chairman, we respect the powers and processes of the Inquiry. The effort behind that paragraph, or certainly the intention behind that paragraph, was to reflect the effective scepticism based on experience by the Core Participants because of the series of revelations over the years since the bomb which has served to undermine their trust in the State. 12:26

Now, we fully accept that the obligations under Article 2 do not require all Core Participants public access to all parts of the Inquiry proceedings. We are simply trying to convey, as Mr. Kane did a few moments ago, the primary view, or perhaps aspiration, of the Core Participants we represent, is that this Inquiry should be in public in everything that it does. We accept, as I say, there is a limitation on that. That paragraph is an attempt to address that so that you, sir, are aware of what our instructions are from the Core Participants we represent. 12:26 12:27 12:27

CHAIRMAN: Well, you presumably accept that I must conduct the Inquiry according to the provisions of the law?

MR. MCALEER: Absolutely, sir.

CHAIRMAN: Just to take an example, if there was, for example, intercept material to be led, is it not clear that the law doesn't permit that type of evidence to be led in open sessions in an inquiry?
MR. MCALEER: I agree. The IPT is clear on that. 12:27
CHAIRMAN: It must be part of your function to explain the legal rules that apply to the Core Participants, mustn't it?
MR. MCALEER: I agree, my Lord.
CHAIRMAN: So what am I to make then of the proposition 12:27 that every single document and piece of information has to be placed into the open?
MR. MCALEER: Again, I don't want the perhaps clumsy expression to take away of either our faith in the team appointed or in the processes which this Inquiry must 12:28 adopt. The intention behind those paragraphs, as I say, my Lord, is to try and address the concerns expressed by our Core Participants that things will never be made known to them which should be made known to them. 12:28

The corollary of that or the potential assistance that a Special Advocate would provide is that there will be reassurance given to the Core Participants that there is someone present at those hearings specifically 12:28 tasked with protecting their interests.
CHAIRMAN: All right. You tell me two other things which I'd like to ask you about. You tell me that the power to appoint Special Advocates is obvious from the

case of Roberts. You tell me that in closed hearings, it's necessary that there should be every possible layer of protection for the Core Participants' rights, and that obviously includes the use of Special Advocates. 12:29

Now, I canvassed the case of Roberts with Mr. Southey yesterday, and maybe it's clear that what you say is obvious about Roberts may not be quite so obvious to others. Is there anything further that you want to say about Roberts to help me to understand why it's obvious that the power to appoint Special Advocates is evident there? 12:29

MR. MCALEER: Can I say, sir, that I accept your comments. It's effectively an overly ambitious expression of the submission we intended to make, and I regret that the document doesn't say a power could be read across from Roberts as opposed to being expressed in the terms that it is. Effectively, we are relying there on the judgment from Woolf LJ, Lord Chief Justice at the time, I think it's paragraph 83 at page 282 of the bundle, where he identifies the power expressed or implied exists to appoint Special Advocate. 12:29 12:30

The issue we are trying to address is that if there is a principle - I am very ably assisted by Mr. Southey in his submissions - that where there is a procedure where it will be restricted access in restricted hearings in respect of certain material and there is a right or a 12:30

duty for fairness, then if there is another measure that may assist those persons who are excluded from those hearings, then when one looks at the test of fairness, all measures should be considered. I put it no further than that, sir. 12:31

CHAIRPERSON: All right. Thank you very much, Mr. McAleer.

MR. MCALEER: Thank you, sir.

CHAIRMAN: Mr. Greaney.

MR. GREANEY: Sir, again we would invite you to rise for a few moments, following which we will invite Mr. Mansfield instructed by Elev8 Law to address you on behalf of the Rush family. 12:31

CHAIRMAN: Thank you.

AFTER A SHORT BREAK, THE INQUIRY RESUMED AS FOLLOWS:

SUBMISSION BY MR. MANSFIELD KC

CHAIRMAN: Good afternoon, Mr. Mansfield. 12:35

MR. MANSFIELD: Good afternoon.

CHAIRMAN: Mr. Mansfield, I know you injured your ankle.

MR. MANSFIELD: Well, it was my knee but don't worry.

CHAIRMAN: Would you be more comfortable sitting down? 12:35

MR. MANSFIELD: I can stand for the moment. If I suddenly disappear, perhaps you'll...

CHAIRMAN: Please, whatever feels more comfortable.

MR. MANSFIELD: It's better to stand, if I may, because

as you will anticipate from our written submissions, they are very short indeed.

CHAIRMAN: Yes.

MR. MANSFIELD: I appear on behalf of Laurence Rush and his family. We have made it very clear that we are not - and I'll put it carefully in terms that you have already been describing - namely, we are not asking you to ask the law officer to appoint a Special Advocate for the purposes of the Rush family, although they are clearly in the history of this matter in the forefront of asking the questions you're going to ask. I'm not pursuing that. Therefore, I think it's probably diplomatic, if not otherwise, for me to say little on the question of the power, unless you want me to, or the exercise of a discretion in relation to that because we are not asking for that. 12:36 12:36 12:36

Implicitly, obviously, there are various matters that can be inferred from our not asking. But there is one caveat to that, if I may just develop it, because listening carefully to arguments that have already been put before you, I think the Rush family are concerned in relation to if you have or consider you do have the power and you do exercise the discretion to appoint Special Advocates, the problem that the Rush family would like you to consider alongside - I'm sure you will - is the question of delay. Because you have heard a situation described, in fact this morning but also before today, and Mr. Greaney has already 12:36 12:37

indicated it, we would say it's inevitable there is going to be delay if there are going to be Special Advocates because you can see that there can either be the original Special Advocates that may be re-employed. On the other hand, if they are going to be tainted, it can't be them, there may be new ones. In the light of Mr. Kane's submission, there may be a multiplicity of them because certain families will feel they need separate Special Advocates to the ones representing other families. 12:37

That in itself, that is the number of advocates that may be involved in the process, but then there is the premises. We've heard about predictions of when things will become available in the past. Again, there is a commitment but again it's not entirely clear whether it will be available. You have not only the number and identity, but also the premises. 12:38

Of course, the actual operation is also subject to delay because I want to posit the situation, which I hope is a practical one, whereby let us suppose there is bound to be more than one Special Advocate, they are going to have to read the material. Now, in this case the Terms of Reference are important because they are very focused, they are very clear what they concern, and that is the central issue of preventability. The Terms of Reference - I'm not going to read them out because you are very clear about what they are - but in 12:38 12:38

each case, in each of the terms as spelt out, it will be necessary for the Special Advocate to know about all the other material as well because he or she is not going to be able to make an assessment about an issue of disclosure unless they know what's already there and what isn't there. 12:39

So the process, even once they are appointed, even when they've found premises, there is going to be the risk of more delay while these matters are read up, as it were. There is in some of the authorities the suggestion that Special Advocate turns up to the open hearings and listens to -- well, in adversarial how the case is put, but in this one it would be the context in which materials are being not disclosed or disclosed, because the very first Term of Reference deals with a risk assessment. So, if there is closed material in relation to that, you have to know what the risk assessments were saying. 12:39 12:39

CHAIRMAN: This is the issue I was touching on with Mr. Southey yesterday as to whether the Special Advocates would have to have access to all of the open material. 12:40

MR. MANSFIELD: My answer would be yes. Far be it for me to say what a Special Advocate should do but I think it would be desirable for a Special Advocate to have traversed most of the open material. There may be sections that perhaps don't pertain but in this particular case, it being closely defined and a series 12:40

of interrelated issues, it would be very difficult to select some and not the rest. So, that whole layer of - can I put it as an investigation in a sense - and representation, inevitably is going to cause, we say - dare I say it - for the benefits that might accrue, a disproportionate amount of time is going to be spent by counsel having to, as it were, go through all of that procedure. 12:40

This leads into - and I assure you now I am going to finish before lunch, well before lunch - it leads into a co-related issue. It is, I think, part of Mr. Kane's written submissions, that his primary contention - and we would agree with this - is as much material as possible should be held in open, for obvious reasons. I don't need to elaborate, you have already mentioned them yourself. 12:41 12:41

CHAIRMAN: That is, in effect, what Section 19 tells us, isn't it?

MR. MANSFIELD: Yes. It is because of public confidence and all the other explanations that have been put before you. We would say this gives rise to -- and a sense I am trespassing on things that might come later but it may be important to raise them now because we're dealing with a situation which is over 25 years ago. Leaving aside the materials that arise out of intercept - I'll leave that as a category - but a much bigger category than intercept, there is all the other materials, government departments, Ministry of 12:41 12:42

Defence and so on may be saying they are having a Restriction Notice preparatory to a Restriction Order and there may be a need for argument in that area. We say given the history here, namely this is, unlike Litvinenko and a case which I have been involved in and I still am, which I want to mention in one second, the Novichok Inquiry, they were dealing with very serious current risks. So, it was fairly obvious to all that it would be virtually impossible for those conducting those, particularly the Novichok one since it concerned threats to security from Russia, it was unlikely that much of that could be in public. 12:42 12:43

Whereas in this case as you will go through the Terms of Reference, one hopes that the mantra that is often put up, namely it is not in the interests of national security, you will apply a framework, a template of rigorous scrutiny as to whether that really is the case after all these years, that assessments that were made nearly 30 years ago have a risk to national security now. I don't need to go further because I think the point makes itself. 12:43 12:43

If I may just deal with this as an add-on to that. The questions that would arise in relation to any documents can be dealt with in this case, we say, not only by Mr. Greaney himself - I have made that clear already - but there is a procedure which perhaps I'm sure you will have read but you might like to bear in mind. 12:44

It's in the Afghan case, which you have already been directed to but not the section that I want just touch upon. It's item 48 in the index; that's the Afghan Inquiry. It's paragraph 158.

12:44

The point about the paragraph at 158 is that the law officer who would be now responsible was making an argument for a particular procedure. The importance of this is that what happened in the Novichok case - we are still awaiting the report - but it is important to 12:45
recognise that what actually happened as a matter of practice is one of the reasons - not the only one - that we are not asking you to ask - well, the Attorney General now but at the time representing certain parties on that inquiry - what we are not asking is a 12:45
procedure was adopted in Novichok, we didn't apply for special advocates. In fact, there was no argument about it at all although in fact the team of lawyers I was working with, one had been on Litvinenko so he was fully aware of possibilities. 12:46

But paragraph 158 onwards, Mr. Hermer suggested:

"A solution to the admitted problem of the need to protect national security material was the proposal of 12:46
holding hybrid hearings with military witnesses" - most of them were concerned with that in the Afghanistan one - "with military witnesses giving evidence partly in open and partly in closed."

Then the arguments are set out on that page 1293, an analysis.

Again, to save time I don't read them all out but you will see the arguments in favour of a hybrid hearing do apply to this particular inquiry, the one that you are handling yourself, because we say not all the witnesses are going to be in the same category. 12:46

What happened in Novichok was this: That Hughes LJ, who was chairing, where the issue was exactly the same as this one, preventability, developed. I think it wasn't the subject of discussion, it just happened rather like Topsy, that once I started asking questions, for example, police officers in charge of the scene in Salisbury - one of the two scenes, the other one was Amesbury - what was allowed in our case was since I was dealing with preventability, it was agreed that I could ask the questions in public myself on behalf of the family as to what questions had to be answered. Obviously I wouldn't necessarily get an answer each time. The Chair would say 'I think Mr. Mansfield, no, or yes or whatever'. It was done very much on an informal basis but it worked in the sense that occasionally a witness would stop, the Chair would say, well, I think you can answer that one, or there would be a gist, I would be given a gist of what was, you know, the material that I couldn't see. But 12:47 12:47 12:48

it progressed speedily, it didn't hold the inquiry up, no one complained about it. The same applied to the intelligence community, I was allowed to do the same, ask the questions, didn't always get the answers but occasionally you got a bit more than you bargained for, which was a bonus. 12:48

Now, it's akin to a hybrid hearing of the kind that is set out here, although it was rejected for reasons that it would be really impossible to operate in the Afghanistan case. But we say in this case, that system could be operated, as it were, as a kind of back-up to the argument. I don't predispose what your decision would be as to whether you can appoint as a matter of power and whether you are going to as a matter of discretion in particular cases. I am not going to preempt that, I am just suggesting in terms of the cases I am putting, namely I am not asking for a Special Advocate and I am not saying provided I can ask these questions either, but this is a potential further down the line that we would want to be arguing, as I did in Novichok, because you might get a category of document that I'm told about - I am not told what they are, just a category - and then I could make submissions on the category. Even if it was going to save time, I would tell Mr. Greaney, for example here, what the concerns would be that I can't air them publicly but he could deal with it in a closed session. 12:48 12:49 12:49

So there are practical ways, we say, within the law that will provide the family I represent with the necessary reassurance that they already have from your presence and Mr. Greaney's presence.

That is all I would want to say at this stage

CHAIRMAN: Thank you, Mr. Mansfield, that is helpful. I will give you close consideration to your explanation about the hybrid system, and I'll read what was said in the Afghan case about that. Thank you. 12:50

MR. MANSFIELD: Yes, certainly.

MR. GREANEY: This would seem to be an appropriate time to break for lunch. Could we return at about 1.45, please?

CHAIRMAN: Yes. Thank you. 12:51

THE LUNCHEON ADJOURNMENT

THE INQUIRY CONTINUED AT 1:45 P.M.

13:40

CHAIRMAN: Mr. Greaney.

MR. GREANEY: We'll hear now the submissions of Mr. McKay on behalf of the Police Ombudsman for Northern Ireland.

CHAIRPERSON: Good afternoon Mr. McKay. 13:45

SUBMISSION BY MR. McKAY

MR. McKAY: Good afternoon, sir. You have the

submissions for the Police Ombudsman for Northern Ireland on the issue of the appointment of Special Advocates, and public inquiries, dated 15th April 2025 at pages 57 to 75 of the bundle of submissions.

The Police Ombudsman, as you know, is neutral on the question of whether a Special Advocate or Advocates should be appointed, although it is submitted it is open to you to appoint if you consider it necessary to do so. The written submissions and these additional short oral submissions are designed to assist the Inquiry in identifying the relevant legal principles and contribute to your resolution of the issues as set out in the series of questions posed by the Inquiry legal team. 13:46

Can I emphasise if you do not think they assist you, please, of course, disregard them.

The Inquiry has invited submissions on three broad areas. First, the existence or not of a power by an inquiry established under the 2005 Act to appoint a Special Advocate. Second, if there is a power to do so the factors relevant to the exercise of that power. Third, the practicalities of doing so. 13:47

The following submissions augment and clarify where necessary the Police Ombudsman written submissions.

As to whether there is a power, it is the common position of all parties that there is no express legislative provision in the 2005 Act providing for the appointment of a Special Advocate. There is specific statutory provision for the appointment of Special Advocates in certain types of closed proceedings. 13:47

Of the many examples provided, none serve a like purpose to the 2005 Act, which, as the explanatory note to the legislation makes clear, is "provide a comprehensive framework for inquiries set up by ministers to look into matters of public concern." 13:48

Like its predecessor, the Tribunals of Inquiry Evidence Act 1921, there is a presumption in favour of public access. The Select Committee report on Government by Inquiry published in January 2005, which was one of the catalysts for the introduction of the 2005 Act, included at paragraph 86 under the heading "Public v Private", the following summary of some of the evidence that it had heard. 13:48 13:48

"Lord Salmon's observation on public versus private evidence gathering was succinct. Secrecy increases the quantity of the evidence but it debases its quality. The counsel on tribunals considered that in principle, it seems right that an inquiry into a matter of public concern should itself be conducted in public unless there is a strong public interest in the Inquiry or 13:49

part of it being held in private for reasons such as national security. Aside from any other consideration, public hearings go a long way towards reassuring the public that the subject matter of the Inquiry has been fully investigated and that there has been no cover up." 13:49

CHAIRMAN: I'm just a little behind you, I think, Mr. McKay. Are we looking at the Effect of Inquiries consultation paper? 13:49

MR. MCKAY: Sir, we might be looking at the final report after the consultation.

CHAIRMAN: The final report.

MR. MCKAY: That's the one dated January 2005. Or the Government's response, it may be titled. I don't have it in electronic form in front of me, unfortunately. I understood it was the same one that you may have mentioned yesterday but there were a series of reports in response to the consultation. I can get the reference, sir, after you have heard my submissions. 13:50

CHAIRMAN: Yes. Yes, that's fine.

MR. MCKAY: The stated aim of the 2005 Act and the way Section 19 is drafted, in my submission, imply the powers of the Inquiry chairman to make a Restriction Order, or the minister to issue a Restriction Notice, are to be used only after the most exhaustive consideration of the applicable criteria and, therefore, likely sparingly. 13:50

The provision in Section 19 is far more onerous than Section 2 of the 1921 Act, which enabled an inquiry established under that legislation to restrict public access in the public interest only.

13:51

The avowed aim, of course, of this Inquiry has been as much of the evidence will be heard in public as possible.

Making express provision for the appointment of a Special Advocate in the 2005 Act would be, in my submission, to acknowledge that the use of restriction orders or notices would be sufficiently prevalent such that provision was a necessary prerequisite. This would be inconsistent with its legislative purpose and could undermine public confidence.

13:51

13:51

There is a distinction between the legislation referred to in counsel to the Inquiry's note dated 17th June 2025 and a statute that has the investigation of matters of public concern at its heart. Lord Bingham at paragraph 21 of R-v-H - I don't need you to look it up, sir, unless you want to but it's a case I know you are very familiar with after the submissions you have heard - the page reference is 215 of the bundle of authorities. In that case, Lord Bingham recognised this distinction between proceedings brought under several of the statutes referred to by counsel to the Inquiry that at least existed at the time H was

13:51

13:52

decided, and that which his Lordship described as "the position of a defendant in an ordinary trial."

If there is commonality, this is to be found to a limited extent not in the raft of statutes that expressly provide for the appointment of Special Advocates, but in the criminal trial and inquiry under the 2005 Act. Both proceed, in my submission, on a presumption of open justice and to get to the truth, even if they do so in different ways through adversarial and inquisitorial modalities. 13:52

For these reasons, it is submitted that no significance should be given to the fact that the 2005 Act is silent on the use of Special Advocates on a basis to infer that one or more could not be appointed. Indeed, the omission of express permission to do so is in harmony with the expectation that a restriction or notice will be used as the exception and not the rule. 13:53

The Police Ombudsman, in her written submission, submitted that your power to appoint, and it is submitted you do have such a power if it becomes necessary to use it, derives from Section 17(1) and (3) of the 2005 Act. It is very familiar to us all but it's worth repeating: 13:53

"The procedure and conduct of any inquiry are such that the Chairman of the Inquiry may direct. And,

(3) in making any decision as to the procedural conduct of inquiry, the Chairman must act with fairness and with regard also to the need to avoid any unnecessary cost."

13:54

The appointment of a Special Advocate is procedural in nature. Chahal v UK at 131, which has not, in fact, made its way into the authority bundle but is cited by a number of the other cases including Roberts at page 278 of the bundle makes this plain. This is the Court in Chahal: 13:54

"The Court recognises that the use of confidential material may be unavoidable when national security is at stake. This does not mean however that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved, but there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information, and yet accord the individual a substantial measure of procedural justice." 13:54 13:54

You are, therefore, sir, the master of your own procedure subject only to a requirement to act compatibly with the Human Rights Act 1998, and the usual well-established public law standards. 13:55

Section 17, in my submission, provides the margin of appreciation within which you can exercise your discretion in a human rights compliant way. The Convention imposes on you, amongst other things, the obligation to ensure a substantial measure of procedural justice is accorded to Core Participants where they are excluded from the proceedings.

The appointment of a Special Advocate for --

CHAIRMAN: What's the authority for that, Mr. McKay? 13:55

MR. McKAY: I beg your pardon, sir?

CHAIRMAN: You say the Convention imposes an obligation to ensure a substantial measure of procedural justice is accorded; what's the authority for that?

MR. McKAY: Sir, perhaps the qualification would be the 13:56
Convention jurisprudence and authorities is Chahal as a principle. Chahal is very different in circumstances but I say that you can export that principle where a right is being restricted of access to a court. The principle is providing you accord some procedural 13:56
fairness to the individuals affected by that derogation.

CHAIRPERSON: But I am not a court.

MR. McKAY: No, you are not but you are a public authority for the purposes of the Human Rights Act, 13:56
sir.

CHAIRMAN: What is necessary for procedural justice in a court is not necessarily the same as what's necessary for procedural justice before an inquiry.

MR. McKAY: I entirely agree, but the principle remains the same that the justice must be afforded to those affected. I wouldn't have thought that is a controversial proposition based on the submissions that you have heard. It would be an extraordinary position if --

CHAIRMAN: Justice must be afforded to those affected; who are those affected?

MR. McKAY: Well, those affected by the derogation, sir.

CHAIRPERSON: It's a very broad concept to say that justice must be afforded. Justice is something that is usually achieved in the context of a contested litigation. What I'm required to do is to provide an effective form of investigation in which the next of kin are able to participate to the extent necessary in order to safeguard their legitimate interests.

MR. McKAY: Sir, yes.

CHAIRMAN: I'm not sure that's just exactly the same as saying --

MR. McKAY: It isn't, sir. In a sense it's almost a consequence of the protection of their legitimate interests, in my submission. One way those legitimate interests are protected is to accord them procedural justice or fairness. Fairness is probably a more neutral term because it adopts the language, of course, of the Act.

CHAIRMAN: Yes.

MR. McKAY: The appointment of a Special Advocate or

Advocates is one measure available to you but it is only one. It may be novel, as Mr. Greaney KC observed yesterday, but as Lord Bingham noted in R-v-H at 22 - and again I think this is a broad enough principle to export across to the current situation - "novelty itself is not an objection." 13:58

Sir, the Police Ombudsman also explored as an alternative position whether Section 18 of the 2005 Act could, if necessary, be read down in accordance with Section 3 of the Human Rights Act to permit the appointment of the Special Advocate. This was in response to the question posed by the Inquiry legal team exploring possible legal bases for appointment, and was designed to assist. Counsel to the Inquiry has questioned whether this submission is correct. In light of the role the Police Ombudsman is attempting to play in these proceedings, and in particular on this issue and her position on the scope of Section 17, it is not a submission I propose to pursue as it strikes me that it is now, if it ever was, unlikely to assist you. 13:59 13:59 13:59

CHAIRMAN: All right. Thank you.

MR. McKAY: The related question arises, couched with appropriate care by your legal team, that if such power existed to a point and you exercised it in favour of the appointment, understanding the process associated with that that you discussed, of course, with other advocates so far who have made submissions, could there 13:59

be disclosure of intercept product to them if hypothetically this was required.

CHAIRMAN: If you are moving away from the power to look at the 2016 Act, there is a couple of things I'd just like your help with -- 14:00

MR. McKAY: Of course, sir.

CHAIRMAN: -- before we do. You're overarching submission, of course, is that there is power within the 2005 Act and the Rules to appoint Special Advocates. You draw my attention to Section 17 of the 14:00 act; I understand that. At paragraph 12, though, you say that the inquisitorial nature of the Inquiry is not relevant to the question of whether a power exists, and I just wondered why that was because is it not the case that every other statutory scheme which provides for 14:00 the appointment of a Special Advocate is a scheme which operates under adversarial proceedings? I can't think of one.

MR. McKAY: Is this paragraph 12 of the written submissions, sir? 14:01

CHAIRMAN: In paragraph 12 you tell us that Section 17 gives a power, in your submissions. Then at paragraph 16, you say it's not relevant to the question of whether a power exists that the Inquiry operates on an inquisitorial basis. What I was -- am I misreading 14:01 you?

MR. McKAY: Sir, I am just trying to get the reference. Paragraph 12 of my submissions are in response to the question posed by the Inquiry.

CHAIRMAN: You say the power could arise from Section 17.
MR. McKAY: Yes. That's in response to the third question proposed by the Inquiry team given the absence of an expressed power. 14:01
CHAIRMAN: Yes. Is there a power; is that what it comes to?
MR. McKAY: Yes.
CHAIRMAN: Then following that through, you say that it's not relevant to the question of whether a power 14:02 exists that the process is inquisitorial.
MR. McKAY: I don't think it's relevant to whether the existence of a power exists. I do think it's relevant to how you exercise the power.
CHAIRMAN: I follow what you say but what I am 14:02 wondering about is why it's not relevant to the question of power because unless I'm wrong, it seems to me that every other statutory scheme which provides for the appointment of a Special Advocate is a scheme which operates within adversarial proceedings. Now, is that 14:02 right, do you think?
MR. McKAY: I think that happens to be the pattern of the way that the law has evolved. I think it's a feature of public inquiries or inquiries under the Act that they are not adversarial and, therefore, this 14:03 issue arises when it has in the various inquiries that have been referred to. I also think it's why some of those inquiries have reached the conclusion that the power exists, but I don't think one could identify as a

principle that the power only can arise in adversarial proceedings.

CHAIRPERSON: Well, it occurred to me that perhaps what was in Parliament's mind was that you need a Special Advocate in adversarial proceedings because of the particular function of the judge, which is just to adjudicate, whereas in an inquisitorial proceedings, the function is to investigate. So, Parliament may have taken the view that it's not necessary to have a Special Advocate in inquisitorial systems. 14:03

MR. McKAY: That certainly may be the position, sir. The difficulty one has is drawing it as a firm conclusion based on the various decisions that have been reached and the way the legislations drafted in different circumstances. A lot of legislation, of course, predisposes that closed sessions are an inevitability. Of course, they come from different perspectives. I think the reason why the provision in Section 17 is couched in the broad terms that it is is because there are certain circumstances, even in inquisitorial proceedings, where the need might arise. It's not a foregone conclusion. 14:04

CHAIRMAN: You also seem to suggest something which I think is additional to the route suggested by the families as to how a Special Advocate might be available. What I think you suggest is that under Rule 6, a Special Advocate could be appointed as the recognised legal representative for the purposes of closed hearings only. Or, alternatively, that a 14:04

Special Advocate could be appointed as part of the legal team in terms of Rule 8?
MR. McKAY: Yes.
CHAIRMAN: That's a route to appointment of Special Advocate, you would say? 14:05
MR. McKAY: Well, sir, can I say this: The approach that's been taken by the legal team in the exploration of these issues is a Q&A approach and it's very helpful and very constructive. One of the things that certainly the Police Ombudsman took from that is there 14:05 should be an effort to consider all of the options. What she isn't doing in a partisan way is making representations or submissions to you that this is definitely a route or it's one that commends itself to you, but in a sense they are considerations that need 14:05 to be given.
CHAIRMAN: Well, I understand that. That's why I'm asking you about it because if this is a route, then I'll need to give consideration to it. I realise you are not saying to me this is the route you should 14:06 necessarily follow, but if it's a route that's conceivably available, then I should think about it.
MR. McKAY: Yes.
CHAIRMAN: So Rule 6, you say, could allow a Special Advocate to be appointed as the recognised legal 14:06 representative for the purpose of the closed hearing. I struggle with that because it seems to me to be inconsistent with the fact that Special Advocates can only be appointed by the relevant law officer, and that

there is no ordinary professional relationship between a litigant and a Special Advocate. So, there are no circumstances, it seems to me, in which a litigant or a Core Participant could appoint a Special Advocate.

MR. McKAY: There isn't, that's correct. That's a correct statement of law, sir, yes. 14:06

CHAIRMAN: Well, you seem to say that you could under Rule 6 for a limited purpose?

MR. McKAY: If you don't find that submission helpful, I abandon it, sir. It was an exploration of whether or not there was an ability to read the Rules in such a way that would facilitate the appointment, if that was a conclusion that you reached. 14:07

CHAIRMAN: You are not pressing that?

MR. McKAY: I'm not pressing it. In fact, sir, can I say this: I am not pressing any of the points that the Ombudsman makes, they are all purely designed to try and assist. We are in a very unusual position. 14:07

CHAIRMAN: We are and I am only asking you about them so I that I am sure I am clear there is a route that may be additional to the one suggested by the family or not. But if you accept that that's not a particularly powerful suggestion, we can just move on. 14:07

MR. McKAY: Yes. I think the primary position of the Ombudsman has always been that Section 17(1) provides the power. The mechanics of that were explored. If you don't find them attractive or helpful, please disregard them. 14:07

CHAIRMAN: You want to look at the 2016 Act?

MR. McKAY: I do, sir, because I hope that this is one area where I can assist you --

CHAIRMAN: Good.

MR. McKAY: -- more constructively than I have a sense I have so far. 14:08

The position of the Police Ombudsman is this: If a Special Advocate is in principle capable of being appointed, we agree with the analysis provided by counsel to the Inquiry that paragraph 22 of Schedule 3 of the Investigatory Powers Act 2016 does not empower you as chairman to make a disclosure to a Special Advocate. That would contravene Section 56 of the Act. Section 56 makes provision, of course, for the exclusion of material derived from interception related conduct subject to Schedule 3. However, sir, as I have identified in the submissions, I think there is a potential route to enable such a disclosure to be made, albeit not by you but by your legal adviser. 14:08 14:09

Assuming hypothetically the existence of intercept arises in this Inquiry and you order disclosure of it to your legal advisers in accordance with paragraph 22(1) of Schedule 3, consideration could be given as to whether a disclosure by the solicitor to the Inquiry to a Special Advocate would be permissible. Can I invite you, sir, to turn to page 74 of the bundle of authorities? This is section 57 of the 2016 Act. 14:09

CHAIRMAN: I will just use my printed copy, if that's

convenient.
MR. MCKAY: Absolutely.
CHAIRMAN: So section 57?
MR. McKAY: Section 57. I'll read in for the record the relevant parts of that provision. 14:10

"Section 57, duty not to make unauthorised disclosures. 57(1). A person to whom this section applies must not make an unauthorised disclosure to another person. (2) a person makes an unauthorised disclosure for the 14:10 purpose of this section if (A), the person discloses any of the matters within (4) in relation to (i), a warrant under chapter 1 of this part." That's part one of the IPA -- sorry, part 2 of the IPA. 14:10

"Or, a warrant under chapter 1 of part 1 of the regulation of Investigatory Powers Act 2000. And (2) the disclosure is not an accepted disclosure. (3) this section applies to the following persons: (f) any person to whom any of the matters within (4) have been 14:11 disclosed in relation to a warrant mentioned in subsection 2(a)."

Just pausing there, sir, the warrants mentioned in 2(a) do not include a warrant under the 1985 Interception of 14:11 Communications Act. But can I point this out in the hope that it assists: There is a deeming provision in the Regulation of Investigatory Powers Act at 82(4), which deems in certain circumstances a warrant under

the 1985 Act to be an interception warrant for the purposes of the 2000 Act. That would require an examination by you or your team in due course.

CHAIRMAN: Where is the deeming provision?

MR. McKAY: It's 82(4) of RIPA 2000. 14:12

CHAIRMAN: I wonder if that then ties in with something I was uncertain about. You tell us that Section 56(4)(d)(ii) applies to the incompetent inquiry?

MR. McKAY: That's the provision in relation to conduct under the 1985 Act. 14:13

CHAIRMAN: Yes.

MR. McKAY: Yes.

CHAIRMAN: So what we see in Section 56 is that a reference in (1) of Section 56, which is the prohibiting provision, also applies to the making of an 14:13 application for a warrant or the issue of a warrant under the Interception of Communications Act 1985?

MR. McKAY: Yes, sir.

CHAIRMAN: And because of the timing of the material we are dealing with, we are likely to be dealing with 14:13 material covered by the '85 Act rather than later legislation?

MR. McKAY: Or potentially both, yes.

CHAIRPERSON: Yes.

MR. McKAY: Depending on the investigative elements 14:13 that you will no doubt examine, it is theoretically possible that we might be dealing with the period after 2nd October 2000 when the Regulation of Investigatory Powers Act repealed the 1985 Act and comments to have

effect.
CHAIRPERSON: Why does section 57(4)(b) not apply?
MR. McKAY: 57?
CHAIRMAN: 56(4)(b).
MR. McKAY: It could apply, sir. I hope I haven't suggested that it -- I hope my submission doesn't just suggest that the -- 14:14
CHAIRMAN: Well, you said it doesn't in paragraph 25, you've said the conduct set out in 56(4)(b) does not arise. 14:14
MR. McKAY: Sorry, yes, that's because the offence in the 1985 Act was different to the offence in the subsequent legislation. I think the offence in the 1985 Act was to intercept; the interception, unlawful interception, without a warrant. There would be no question here of interception taking place without a warrant. 14:15
CHAIRMAN: It was conduct that would be unlawful in the absence of a warrant?
MR. McKAY: Yes. 14:15
CHAIRMAN: Is that not the same as what we have in Section 56(2)(a)?
MR. McKAY: Well, Section 56(2)(a) deals with the concept of lawful authority, which didn't exist in the 1985 Act, and which makes provision for a number of forms of lawful authority, one of which does include a warrant that has been properly issued under the Act. 14:15
CHAIRMAN: It tells us what interception-related conduct is. It is conduct that is, or in the absence

of lawful authority, would be an offence.
MR. McKAY: Yes.
CHAIRMAN: And that's what Section 1 of the 1985 Act said as well, is it not?
MR. McKAY: Could you give me a moment, sir, to look at the '85 Act? One of the disadvantages of working from electronic copies is that you don't always have it readily to hand. I apologise. 14:16

Yes. The offence under Section 1 of the 1985 Act was that a person who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunication system shall be guilty of an offence. And a person shall not be guilty of an offence under that section if it was interception in accordance with a warrant. 14:16 14:17
CHAIRPERSON: So that means that intercept would be unlawful unless it was covered by a warrant?
MR. McKAY: Correct.
CHAIRMAN: Is that not the same as 56(2)(a)? 14:17
MR. McKAY: Yes, but it doesn't arise in this case is the point I think I am trying to make. There is no question that -- any interception which hypothetically occurred, there is no question that it happened unlawfully. 14:17
CHAIRMAN: Sorry?
MR. McKAY: There is no question that it would have happened unlawfully.
CHAIRPERSON: What difference does that make?

Disclosure, if we're talking about --
MR. McKAY: The prohibition on disclosure, we're not concerned about any issue that arises where you can disclose because the offence has been committed. The way that the offence was structured was -- 14:18
CHAIRMAN: No, the Act prohibits disclosure of intercept-related conduct --
MR. McKAY: Yes.
CHAIRMAN: -- regardless of whether it was done lawfully or unlawfully, unless we are talking about 14:18 prosecution.
MR. McKAY: Yes. Yes. Quite, yes.
CHAIRPERSON: So you are going to explain to me why it is, I think, that the solicitor to the Inquiry can make an accepted disclosure? 14:18
MR. McKAY: I am certainly going to do that if it assists, sir, yes. May I just try and find my place on the original document?

So, the solicitor in such circumstances as a person to 14:19 whom section 57(3)(f) of the 2016 Act might apply. Of course, that's not something I or any of the other parties would know. Any disclosure by him to a Special Advocate would be unauthorised unless it was an accepted disclosure; that's the effect of Section 57. 14:19 I will invite you to then go to page 77 of the bundle, or Section 58 of the Act.
CHAIRMAN: Yes.
MR. McKAY: Section 58 is entitled "Section 57:

(Meaning of accepted disclosure)" Section 58(1):

"For the purposes of Section 57, a disclosure made in relation to a warrant is an accepted disclosure if it falls within any of the heads set out in (c)(5) legal advisers." 14:20

Then, sir, if you drop down to (5), head 3 is:

"A disclosure made by a legal adviser (1) in contemplation of or in connection with any legal proceedings." 14:20

CHAIRMAN: And you would say that disclosure by the solicitor to a Special Advocate would be in connection with legal proceedings? 14:20

MR. McKAY: It's a very broad definition that's given to legal proceedings, sir. Any legal proceedings.

CHAIRPERSON: Well, the difficulty with that is that Section 56 in (1) appears to distinguish between legal proceedings and Inquiry Act proceedings. It says: 14:21

"No evidence may be adduced, questions asked et cetera in connection with any legal proceedings or Inquiry Act proceedings."

MR. McKAY: Yes. 14:21

CHAIRMAN: So they seem to be different things. Then when we get to Section 58(9), we find it tells us:

"Nothing in this section affects the operation of

Section 56," which, amongst other things, "prohibits the making of certain disclosures in, for the purposes of and in connection with legal proceedings."

MR. McKAY: Yes.

CHAIRMAN: So if you just read the words of the section, there is no accepted disclosure in relation to what the legislation calls Inquiries Act proceedings? 14:22

MR. McKAY: Well, sir, if your view is that legal proceedings, any legal proceedings, is qualifying legal proceedings with Inquiry Act proceedings, then that's a point that I would concede. But the terminology is -- 14:22

CHAIRPERSON: It is not my view, I'm just looking at the words and trying to make sure I'm not missing something. So, there is no reference to what you've just described as "any legal proceedings" other than what we see in Section 56(1) where it tells us "in connection with any legal proceedings or Inquiry Act proceedings." 14:22

MR. McKAY: Yes.

CHAIRMAN: That would seem to be a disjunctive description. 14:23

MR. McKAY: Yes. I would have to concede that then in those circumstances. If you were of the view that that precluded Inquiry Act proceedings, then that would be the end of the potential route to disclosure to a Special Advocate. 14:23

CHAIRPERSON: All right.

MR. McKAY: But, of course, I think that would be the extent of my submissions, sir.

CHAIRPERSON: The deeming provision I am just trying to find that you mentioned, did you say it was in the 2000 RIPA Act?
MR. McKAY: Yes sir.
CHAIRMAN: I have Section 82 but (4) seems to be amended or deleted. 14:23
MR. GREANEY: It seems to us to have been repealed by the Act of 2016.
MR. McKAY: The IPA, yes.
CHAIRPERSON: So there is no deeming provision then? 14:24
MR. McKAY: Not any more, but I was attempting to explain why a warrant under the 1985 Act did not appear in that part of the IPA. Of course, if it has been repealed - I'm looking at the original act, I apologise for that, sir - if it has been repealed, then of course 14:24 that point falls away as well and I am singularly failing in my duty to be of assistance to you.
CHAIRMAN: All right. Never mind. That probably takes us to the end of that discussion about the --
MR. McKAY: It takes us to the end of that discussion, 14:24 sir, yes.
CHAIRMAN: All right. Thank you. Was there anything else you wanted to mention, Mr. McKay?
MR. McKAY: Not in relation to route to disclosure to Special Advocate in those circumstances, sir. I have 14:24 some remaining short submissions to make on the exercise of your discretion.

Any derogation from open justice should always be the

exception and only where strictly necessary. Balancing the effect of derogation through the appointment of the Special Advocate is, and has consistently been held to be, exceptional. You need to consider whether you can, to quote Baroness Hale, "do justice according to law not only by arriving at a just result but arriving at it in a just manner". 14:25

The appointment of a Special Advocate is only one measure at your disposal. There are others, some contemplated by the European Court of Human Rights in Carter v Russia, and referred to you by you yesterday. Concessions, admissions made by Core Participants, summaries, gists or other forms of words; indeed, even as Mr. Mansfield has canvassed, a confidentiality ring, although that has not always found favour with courts and tribunals; or a hybrid version of the confidentiality. Or, indeed, even your team agreeing with Core Participants the questions, concerns or areas that they want to see raised in closed session. 14:25 14:26

I should deal with, and do so with some caution, the issue of content of intercept. It is the submission of the Police Ombudsman that the content of intercept communications is, and always has been, capable of being disclosed, providing - emphasis on that word - providing that it does not offend against the prohibition. That's the position that's existed since the 2085 Act. 14:26

Reference is made to Preston. There is some disagreement between the Secretary of State and the Police Ombudsman on that point but I don't think it's a disagreement of significance. He relies on the speech of Jauncey LJ in Preston which says effectively, yes, it can be but the difficulties are almost insurmountable, and we would agree with that.

CHAIRMAN: Has it not, for practical purposes, been replaced by paragraph 21? 14:27

MR. McKAY: 21?

CHAIRMAN: Of Schedule 3.

MR. McKAY: Yes. I was about to get to that, sir, yes. Things have moved on essentially, and we are now in a position where these things are managed under, as you say Schedule 3, and before that Sections 17 and 18 of RIPA 2000. For the avoidance of doubt, the latest code of practice on the interception of communications also emphasises that that remains the case. 14:27

14:28

Incidentally, the discussion between Mr. Southey and you yesterday about whether a Special Advocate could have a role in the Section 18 type situation, it seems to us doesn't arise because of the way that section is drafted. The very purpose of Section 18 is to make sure that the prosecutor, as I think you provisioned yesterday, can discharge his or her responsibilities to disclose relevant material in a way that doesn't offend the prohibition. There could conceivably be no role 14:28

for a Special Advocate in those circumstances.
CHAIRMAN: That's a paragraph 21 point, is it?
MR. McKAY: Yes.

When exercising your discretion, consideration may be given to whether any lesser measures can afford the necessary procedural justice or fairness to the Core Participants before considering an appointment. It may well be that your own counsel can provide the necessary safeguards in respect of all, many, or some of the issues that need to be aired in closed proceedings but not necessarily all. That is a decision that you make at an appropriate stage of the Inquiry. 14:28 14:29

If an appointment of a Special Advocate or the appointment of Special Advocate is necessary, the appointment can be limited to discrete aspects of the closed proceedings in theory. 14:29

Sir, we refer to the case of Chief Constable and AA v YK & Ors 2010 AER D59 at page 583 of the bundle of authorities, although it's not the full report in the bundle. In that case, Mr. Swift KC, as he then was, identified four matters which he thought the Court should consider before the appointment of Special Advocate in a non-statutory case was necessary, those four being the purpose for which the Special Advocate has been requested, parenthetically for example for the purposes of assisting the court on a determination on a 14:29 14:29

PII application but one could substitute there in the present context any procedural issue, including disclosure. Or was it for the purposes of a hearing on a substantive issue and, if so, what is the substantive issue. Secondly, the situation which had arisen in the proceedings before it which had caused the request to be made. Three, the reasons why the Court had concluded that the appointment of a Special Advocate was necessary rather than some other step within the Court's own powers. Fourthly, the ways in which the Court considered that a Special Advocate would address the procedural difficulty that existed. 14:30 14:30

Adopting those factors or some variation of them would enable the principle approach to be taken to the range of different circumstances where the question of appointment of a Special Advocate might arise in the present case. They could also assist you to determine whether the particular circumstances require an appointment or multiple appointments of Special Advocates, or none. 14:30 14:31

If you reach the conclusion that a Restriction Order is necessary and that fairness demands that you put in place measures to accord the necessary procedural justice or fairness to the Core Participants - and it is a fluid concept sir, not, as you referred to yesterday as an inanimate object sitting on a shelf - then the practicalities in whatever form need to be 14:31

confronted and dealt with. Such assistance that the Police Ombudsman can give are set out in the written submissions filed on her behalf.

The final submission that the Police Ombudsman would make is really just one of emphasis, that any derogation or the derogation from open justice does not demand of one single solution. There are a range of measures available to you to attempt to redress the balance. 14:31 14:32

I end the submission as a former Special Advocate myself with the observation that appointment of a Special Advocate is not a panacea. For many of the reasons set out by Mr. Greaney KC yesterday morning, and it may be and indeed is likely to be while Bingham LJ in R-v-H described their use in that case as a course of last and never first resort. 14:32

Sir, those are the submissions I have made on behalf of the Ombudsman. I don't know if there is anything else arising. I apologise if at times I have been less helpful than I would have liked to have been. 14:32

CHAIRMAN: Thank you, Mr. McKay. You have been very helpful. 14:33

MR. GREANEY: Sir, the next advocate to address you will be Ms. Grange on behalf of the Secretary of State for Northern Ireland. It is probably more convenient if we take a break of 10 minutes or so now for the

stenographer so that we do not have an interruption to Ms. Grange's submissions.

CHAIRPERSON: Yes. Thank you.

AFTER A SHORT ADJOURNMENT, THE INQUIRY RESUMED AS FOLLOWS: 14:33

SUBMISSION BY MS. GRANGE

CHAIRMAN: Ms. Grange, good afternoon. 14:43

MS. GRANGE: Good afternoon, Mr Chairman.

CHAIRPERSON: So when you're ready.

MS. GRANGE: Yes, thank you.

I appear on behalf of His Majesty's government in his proceedings. I am leading Mr. David Reid of junior counsel. My submissions are going to be divided into the two key topics: The question whether there is power to appoint a Special Advocate, and then whether, assuming there is such a power, you should exercise your discretion in order to request the appointment of Special Advocates. 14:44 14:44

Our position on these two key questions is that the language of the statutory scheme, the purpose and the context of the legislation, and Parliament's intention as demonstrated in subsequent legislation, all strongly suggest that no such power exists. 14:44

Alternatively, we submit that even if such a power existed, it would not be necessary or appropriate for the Chair to make any such appointment in this Inquiry.

No Inquiry has taken that step to date, even inquiries with a very substantial closed national security element to them. There is no justification from departing from that approach, we say, in this particular case 14:45

We have detailed submissions in writing. I don't propose to repeat all of those. I will try to focus on the key points.

Turning then to the power to appoint a Special Advocate. In seeking to persuade you, Mr Chairman, that there is no power to appoint Special Advocate, it is important to look at three key topics. First, the expressed language used in the statutory scheme. Secondly, the statutory context as principally revealed by a consideration of the words used in the Act itself. Thirdly, Parliamentary intention as evident from changes made to the legislation, including in the national security sphere since the coming into force of the 2005 Act. Then, I'm going to briefly address you on why we say that Articles 2 and/or 3 of the ECHR, and/or Section 3 of the Human Rights Act 1998 don't affect the analysis of whether you have the power to request the appointment of Special Advocates. I'll 14:45 14:45 14:45

briefly address you on the rulings that have been made by other chairmen in this area.

On the discretion question, I'm going to be making eight key points as to you shouldn't exercise your discretion. 14:46

Turning now to the expressed statutory language, it is our submission that when you are exercising your powers under the Act and the Rules, you are exercising statutory functions, and your powers are limited to those conferred on you expressly or, by necessary implication, by the statutory scheme. Indeed, the test of necessary implication is a demanding one. You get that from Carswell LJ in the Roberts case at paragraph 131. I think you have your own version of Roberts, but if you will recall, Carswell LJ at that point said "implication, it's a demanding test." 14:46 14:46

I don't understand Mr. Southey or anyone else to be contending that there is some kind of independent source of common law power which you should use in which to say you have the power to appoint Special Advocates. It is either got to be in the express language of the Act or by necessary implication. 14:47 14:47

Importantly we say that the statutory scheme provides a comprehensive code for the conduct of a public inquiry including, where necessary, restricted or closed

hearings. The question whether a particular power exists must be looked at with all of those provisions in mind, not just reading powers of isolation. One key observation we would make is that in the submissions you have received so far urging you to find that there's power, there is a very limited focus on the words of Section 17 almost in isolation, without looking at what else you see in the Act in terms of what that tells you about Parliament's intention in this very specific inquisitorial context. 14:47 14:48

We submit that neither the Act nor the Rules make any provision, either expressly or by necessary implication, for the appointment of Special Advocates. On the contrary, what the Act and the Rules do is provide you for a comprehensive regime for the withholding of closed material as necessary; 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 is principally to be found in Sections 19 and 20 of the Act. 14:48 14:48

It's also important, we say, to recognise Rule 12 of the Inquiry Rules, which I don't think we have looked at in these two days so far. Rule 12 of the Rules, and I'll let you bring it up. 14:49

CHAIRMAN: Yes.

MS. GRANGE: What Rule 12 does is it tells you which individuals can have access to the potentially restricted material. Even persons who would not otherwise be permitted to see it can have access to that material for the purposes of determining whether a Restriction Order or Restriction Notice should be made. So, Parliament is giving you tools but also direction as to how you are to make restriction orders or restriction notices, who is to be there and present and making submissions. It's distinguishing between potentially restricted evidence and restricted material. 14:49

We say that's a complete code. It provides you with the procedural tools necessary to determine whether to and, if so, how to conduct closed hearings. That's also, we say, important to link back to Section 17(1) of the Act which begins with the words "subject to any provisions of this Act or of rules under Section 41." What that's telling you is that you've got to conduct this Inquiry subject to the very specific provisions that Parliament has designed for you and then you've got these broader powers in Section 17. But that's a clear marker in Section 17(1), that where it has given you specific powers, that's where Parliament has chosen to strike the balance. That's where Parliament has decided, if necessary, fairness in certain contexts needs to be determined. 14:50 14:50

If Parliament had intended to include within that detailed scheme a power to appoint Special Advocates, we say it would have said so expressly. The fact that it has not, we say, is a powerful indicator that there is no such power. 14:51

We draw upon some other key aspects of the statutory regime in making those submissions.

The first point to make is the role of counsel to the Inquiry. That role of counsel to the Inquiry is defined in the Act. That includes the ability to pay counsel to the Inquiry, to provide remuneration; that's in Section 39 of the Act. Also, immunity from suit is addressed in Section 37 of the Act. So where there are particular legal officers who are to have a role in an inquiry, the Inquiries Act descends to telling you that you can pay them, and it descends to telling you that they have immunity from suit. 14:51 14:51

If you look at those sections - we don't need to pull them up now, Sections 37 and 39 - they are very specific about the roles of different individuals, different legal officers within an inquiry, including counsel to the Inquiry. We say that the power to appoint Special Advocates has to be looked at in the absence of any corresponding provisions which address immunity from suit, address remuneration in the same way; there is just nothing. 14:52

We say that's particularly odd in circumstances where, as you have already observed today, the Special Advocate role is a very unique and special one. They typically owe no duties to those that they represent in the closed session, and they have no lawyer-client relationship in the way typically understood between legal professionals and their clients. That peculiarity calls out for being addressed and explained. As you've seen in other regimes where the Special Advocate role is identified, those matters are addressed. 14:52 14:53

There is also no provision for Special Advocates to suggest Rule 10 questions, or apply themselves to question witnesses under Rule 10 of the Inquiry Rules. We say this is another key indicator that Special Advocates are simply not part of Parliament's intention in this comprehensive regime. It is only recognised legal representatives who are able to apply to ask questions of witnesses. A Special Advocate cannot be appointed to act as a recognised legal representative in the manner anticipated in Rule 6 of the Rules. 14:53 14:53

Accordingly, there is no provision in Rule 10 or any other provision that would permit a Special Advocate to ask questions, or to apply to ask questions. That would have to be somehow worked out by the Inquiry Chair. We are not saying you couldn't ever work that 14:53

out if in due course you decided there was a power and there was a discretion, but the absence of anything in the Rules along the lines of Rule 10, which is a pretty specific set of Rules as to how that questioning is to happen. That is really because it points to the centrality of the role as yourself as Chair and of counsel to the Inquiry in leading the investigation. That takes you back to the fact this is an inquisitorial, not an adversarial, process. 14:54

CHAIRPERSON: In some of the various other statutory schemes which provide for the appointment of a Special Advocate, there is a very obvious and distinct distinction made as to what the Special Advocate can do. In some cases, for example, he or she can ask questions. 14:54 14:55

MS. GRANGE: Yep.

CHAIRMAN: In other cases, they have to ask permission. Some cases they can lead evidence, some cases they can't.

MS. GRANGE: Yep. 14:55

CHAIRMAN: All of that seems to be in order to tailor the function of the Special Advocate to the needs of that particular set of proceedings.

MS. GRANGE: Precisely, absolutely. And, as you have observed, a set of adversarial proceedings, because that's where we commonly see Special Advocates used. That's where it cries out often for that kind of mitigating balance to be provided in closed where you've got some kind of adversarial process, or some 14:55

kind of criminal or quasi criminal process with allegations being made against an individual.

CHAIRMAN: I have no doubt we could, between us all, devise a protocol for the working of a Special Advocate, if that's where we ended up. The point is that it's another interesting aspect of the structure of the 2005 Act that there is no such guidance. 14:55

MS. GRANGE: No, or any guidance as to how the Special Advocate role fits with the counsel to the Inquiry role, or how that relationship works. As you have seen, as I say, in Rule 10 there is a very careful procedure for the asking of questions or permission to ask questions which keeps control in the Chair and the Inquiry team. 14:56

That brings me on to my second point, which is about the purpose and the context of the Act. It's obviously well established that the purpose and context provide the basic frame of orientation for the use of the language enjoyed within it. We have cited a number of cases. There are many that can be cited to support that proposition. They are cited at paragraph 9 of our written argument. We have to consider the language that Parliament has chosen within the particular context which arises. 14:56 14:57

We focus on two particular features of the statutory context which we say are particularly relevant to whether the Chair has a power. First, we say it's

clear from the context, the background to the Act, and the words of the Act and the Rules themselves that controlling the cost of statutory inquiries was a key priority for Parliament. One need look no further than Section 17(3) of the 2005 Act and the duty on the Chair to conduct the Inquiry with regard also to the need to avoid unnecessary cost. You also have Section 39 which enables the minister to limit the scope of their cost liability if the Inquiry departs from the Terms of Reference. 14:57

One only needs to remember the background to this Inquiry. There was Bloody Sunday, with the costs that arose there. It's in the consultation reports that costs at times had varied but sometimes were spiralling out of control. We say it's no accident that there is a significant focus in the 2006 Rules on controlling the costs and expenditure. Some 16 of the 34 Rules in those 2006 Rules are devoted to the question of costs. Therefore, it's quite clear that that was an important consideration in the desire to update inquiries' legislation. 14:58

One asks again would Parliament have granted the Chair an implied power to appoint Special Advocates without making any provision whatsoever to address the costs consequences of doing so, such cost consequences potentially being extremely significant in an inquiry with any measure of restricted hearings. 14:58

Then secondly, and perhaps more fundamentally, we say that statutory context is an inquisitorial regime. Far from being irrelevant, as some have submitted today, we say that is perhaps the most relevant factor in terms of interpreting the Act. It's a different approach completely to that taken in the context of inter partes litigation, where the need for Special Advocates has usually been identified. A public inquiry does not involve parties pursuing competing pleaded cases or agendas, seeking to pull the investigation in different directions. 14:59 14:59

Really important is Section 2(1) of the 2005 Act which expressly prohibits the determination of civil or criminal liability by a public inquiry. That's really important in terms of the context here. It's important in terms of what fairness requires, because you are never going to be in a position of actually determining what someone's civil liabilities are, or indeed criminal ones. 14:59 15:00

Public inquiries are set up to look at matters of public importance, to look to the past but then look to the future and make recommendations. That is a completely different beast from adversarial litigation. It involves an independent and objective investigation by yourself, assisted by your counsel to the Inquiry, if appointed. The role of yourself in the Inquiry, the 15:00

role of your counsel, all the disclosure provisions within the Act, in the Rules, the Rule 10 process, are all consistent with that inquisitorial focus and inconsistent with anything approaching inter partes litigation. We say it reflects the fact that there is no requirement for partial representation in an inquiry of this nature. 15:01

All of those that are in this room, all of us, are here to assist you in your investigation. We say that having Special Advocates to represent particular interests in the closed proceedings within that process is antithetical to that inquisitorial process, and antithetical to you having control over the investigation with those that you have appointed to lead that investigation. That's baked into the whole scheme of the Act and the Rules. 15:01 15:01

So, we say that context also adds force to the points that we make on the language of the Act. 15:01

Then, thirdly, we say that Parliamentary intention as evident from later statutes reinforces those points. I don't say I need this third strand to my argument but it certainly does confirm the points that I am making. Parliament has made a number of changes to national security legislation to address what material can be seen by inquiry panels and counsel to the Inquiry, and by other inquiry personnel. The first change came 15:02

about in the Inquiry's Act itself 2005, when the prohibition in Section 17 of RIPA 2000 was amended by paragraph 21 of Schedule 2 to the 2005 Act, providing an exemption for material that might reveal the existence of a warrant to be disclosed to a panel of an inquiry where the panel ordered disclosure to itself. So where Parliament chose to start. 15:02

That position was changed in February 2009 by Section 74(1) of the Counterterrorism Act 2008, where such disclosure was also permitted to be made to counsel to the Inquiry as well as the panel. Then we've looked at Section 56 in detail, and Schedule 3 of the 2016 Act. There we have the prohibition on disclosure emanating from interception but subject to certain very clear defined exceptions, which included a panel of an inquiry, or a person appointed as a legal adviser to such an inquiry. That was expressly stated to include the inquiry solicitor as well as counsel to the Inquiry at that point. 15:03 15:03

So, Parliament is looking very carefully at personnel involved in an inquiry and deciding whether this species of closed material can be disclosed to them. 15:03

We can be, we would say, very confident that there was no exception for Special Advocates in the 2005 Act inquiry context, because, as your counsel to the Inquiry has already helpfully pointed out, Schedule 3

to the 2016 Act does refer expressly to Special Advocates in those terms when dealing with other types of proceedings, including civil proceedings where there is a closed material procedure under the Justice and Security Act 2013; including TPIM proceedings - terrorism prevention investigation measures proceedings - where the term "Special Advocate" has been used in Schedule 3. So, it would have been very easy for Parliament to have used the term "Special Advocate" under paragraphs 22, 23 if they had wanted to make an exception for them, and they haven't. 15:04 15:04

We say that that confirms that it is Parliament's intention not to have Special Advocates in this very different type of legal process. 15:05

We also say it's obvious that the phrase that Mr. Southey alighted upon, paragraph 23(2)(e) in Schedule 3, talks about "a person performing functions necessary for the proper functionings of proceedings." We say again it's clear that's not Special Advocates. Parliament would have used the terms "Special Advocates", as it has done elsewhere in Schedule 3. We say that's obviously meant to refer to ancillary personnel that might be necessary when restrictive proceedings are taking place. 15:05 15:05

We say that Parliament has had four opportunities now to indicate that Special Advocates could have such

material disclosed to them in inquiry proceedings but has not done so. We say that strongly suggests that there is no power to appoint Special Advocates. We ask had Parliament thought that the inquiry had the power to appoint Special Advocates, why would it create a 15:06
situation in which the panel, the Chair, counsel to the Inquiry and solicitor to the Inquiry could all be provided with a certain category of closed material but not Special Advocates. We say it just makes no sense and you have to try to interpret this regime 15:06
coherently. There is a coherent explanation and it is that you don't have the power, that's our submission.
CHAIRMAN: What you have been explaining to me just over the last few minutes is how we might identify Parliament's intention by looking to subsequent 15:06
legislation?
MS. GRANGE: Yep.
CHAIRMAN: I can also look elsewhere perhaps to try and identify Parliament's intention, can't I? Mr. Henry helpfully pointed me in the direction of the speech by 15:06
Sales LJ in his written submissions, which in turn took me on to the decision of O v Secretary of State for the Home Department, Hodge LJ giving the decision of the Supreme Court. He was talking there about the importance of understanding Parliament's intention and 15:07
the ways in which that might be identified. At paragraph 30 he talked about how external aids to interpretation are available, although playing a secondary role.

MS. GRANGE: Yep.
CHAIRMAN: What Hodge LJ set out was things like explanatory notes; they have been touched on already.
MS. GRANGE: Yep.
CHAIRMAN: And they talk of a comprehensive scheme. 15:07
MS. GRANGE: Yep.
CHAIRMAN: Other sources as identified by Hodge LJ were Law Commission reports, reports with Royal Commissions, advisory committees, government white papers; all of these may disclose the background to a statute and 15:08
assist the Court to identify not only the mischief which it addresses but also the purpose of the legislation.
MS. GRANGE: Yes.
CHAIRMAN: The context disclosed by such materials, 15:08
Hodge LJ said, is relevant to assist the Court to ascertain the meaning of the statute whether or not there is ambiguity or uncertainty.

We have, for example, the effective inquiries 15:08
consultation papers. It wasn't a white paper, the consultation paper took its place.

I wondered also about whether or not it might be
appropriate and of some value to think about what was 15:08
said in Parliament. Now, I recognise, of course, that one would have to be very careful about that. I think, generally speaking, one would look to statements as to the purpose of a bill that were made by the minister.

MS. GRANGE: Yes, in accordance with the Rules in Pepper V Hart.

CHAIRMAN: So you wouldn't be looking to what the general paramilitary discussion was?

MS. GRANGE: No. 15:09

CHAIRMAN: But it might well be possible to gain something from what was said by the minister who introduced the bill.

When the Inquiries bill came before the Commons for its 15:09
second reading - it started out in the Lords, of course, but it came to the Commons for its second reading - it was introduced by the Undersecretary of State for Constitutional Affairs. As far as I can see, he explained the purpose of the bill as having three 15:09
strands to it. He said the bill was designed to inform the arrangements for conducting inquiries into events of serious public concern. Secondly, he said the bill created a comprehensive framework for inquiries set up by ministers. Thirdly, he said the bill would put on a 15:10
proper, more comprehensive, footing our ability to conduct an effective public inquiry in circumstances where national security issues may well arise.

MS. GRANGE: Yep.

CHAIRMAN: So, those are the three strands of the bill. 15:10

MS. GRANGE: Yep.

CHAIRMAN: Of course, Section 19, although it wasn't numbered in that way, was repeated eventually in the Act as passed. Sorry, Section 19 in the Act was

numbered differently from the bill.
MS. GRANGE: It was.
CHAIRMAN: But the words were the same. What we see is the 2005 bill and Act had in mind a number of fairly straightforward purposes, one of which was to put on a proper footing the ability to deal with national security issues. 15:10
MS. GRANGE: Yes.
CHAIRMAN: Whereas it hadn't been able to do that properly in the past. 15:11
MS. GRANGE: Yes.
CHAIRMAN: So it's not as if Section 19 was some sort of consequential or minor addition, it was a fundamental plank of the bill.
MS. GRANGE: I agree. Parliament faced that squarely and looked at it squarely, and designed procedures meant to address it. They were successful in doing so because the proof of that is the number of inquiries that have happened subsequently with a substantial national security element that have found the tools that are given in the Act, in the Rules, perfectly adequate. They are Article 2 compliant, and I'll come to that. 15:11 15:11

So, when Parliament intended to try and create that comprehensive new statutory framework, it did it. It did it after a lot of consultation and a deep understanding for many years of how inquiries, with all different -- as we know, there were inquiries set up 15:11

under lots of different statutory powers, including ones in this jurisdiction. It gathered all that experience together and it put in place a scheme that has, we say, stood the test of time. Parliament has chosen not to tinker with that either. 15:12

CHAIRMAN: It's also possibly relevant just to bear in mind the timing of all of this because the bill was going through Parliament in the early part of 2005 at a time when there were already in place a number of other statutory schemes which cater for the appointment of 15:12 Special Advocates in a raft of different circumstances - employment, planning, immigration.

MS. GRANGE: Yep.

CHAIRMAN: All of these different areas. One curiosity struck me, which was that, first of all, there were 15:13 closed proceedings available in some planning act proceedings, which came as something of a surprise to me. There are closed proceedings available in the Town and County Planning Act of 1990, the Planning (Listed Buildings and Conservation Areas) Act of 1990, and the 15:13 Planning (Hazardous Substances) Act of 1990. So, from 1990 onwards, in each of these different spheres to do with planning, there were proceedings anticipated in which there could be closed hearings.

MS. GRANGE: Yeah. 15:13

CHAIRMAN: But there was no provision for a Special Advocates until Section 80 of the Planning and Compulsory Purchase Act of 2004, which amended each of those pieces of legislation by adding provisions

allowing the Attorney General to appoint a person to represent the interests of any person prevented from attending the hearing or inspecting the evidence of the Inquiry.

15:14

For all of the years that passed between 1990 and 2004, closed hearings could be held under those proceedings but for some reason when the 2004 Act was going through, it was realised, well, we need to make sure we can have Special Advocates there. That, in terms of timing, just raises the question of could Parliament possibly have been ignorant of the need for Special Advocates in relation to Inquiries Act when it was doing the bill a few months later?

15:14

MS. GRANGE: Yeah, and Parliament would be taken, as a matter of statutory interpretation, to be aware of that, either from the planning context or the immigration context. By that point, you had had the SIAC Act for sometime from 1997.

15:14

CHAIRPERSON: It's the timing that struck me as --

15:15

MS. GRANGE: Yes. It feels very pertinent, yes.

CHAIRMAN: Just all around the same sort of time, they are aware of need for Special Advocates in some circumstances and yet, if aware of them, of the need for them in Inquiries Act proceedings, they leave it unsaid.

15:15

MS. GRANGE: Yes, exactly. We say there is an obvious reason for that: It is because there is a complete code, a complete framework, that enables inquiries to

do what they are intended to do in an inquisitorial way. As I say, Special Advocates are on one view anathema to that because they bring about an adversarial nature to the proceedings which we are meant to try and avoid. That's not the way inquiries are meant to work. 15:15

The high point of Mr. Southey's case, I would submit, is the Roberts v Parole Board decision. It's already been discussed at length. I would just make a number of key points about that. Obviously, I have to accept that that's an example, in a different context, of the Court deciding that it was appropriate in that case to imply a power to appoint a Special Advocate where you had a statutory tribunal rather than a court. Because a lot of the cases that involved courts, it is easy to see, for example, a High Court exercise its inherent jurisdiction -- 15:16 15:16

CHAIRMAN: Yes, it's very different.

MS. GRANGE: -- it is very different. 15:16

Roberts is obviously a case to look at. As you pointed out, it is a case that others chairs in other public inquiries thought potentially relevant to this case.

I would make a number of discrete points. First, the context. The context in Roberts could not be more anxious from both sides of the equation. From a public safety point of view, it was obviously important that

the Parole Board had all relevant material relating to risk of this particular prisoner. He had been convicted of murdering three policemen. So, the Parole Board had to be able to see all the relevant information that was going to go to the risk he would pose if released on licence. 15:17

From the other side of the equation, it involved liberty of the subject; one of the most anxious contexts: Should this man be released from prison after a long spell in incarceration. So, on both sides the stakes were high. As we know, context is everything when it comes to fairness. If you need any more support for that, in Roberts at paragraph 40 Woolf LJ makes those very points about fairness not being a single unwavering standard, it varies according to the nature of the decision, for example, to be made. 15:17

In Roberts there were some express powers which, as you noted yesterday, were quite important when it came to the majority decision. Those powers included the fact that there was power to hold a closed process; to hold material restricted from the prisoner. But also the power to take steps incidental or conducive to the discharge of its functions. As you noted, that was seized upon both by Rodger LJ and Carswell LJ as a key aspect of its express powers which enabled them to imply that there was also the ability to have this mitigating counterbalance in the appointment of a 15:18 15:18

Special Advocate.

So, the express powers of the tribunal were different and were germane to the decision of the majority. It is also worth bearing in mind the two dissenters, 15:19
Bingham LJ and Steyn LJ dissenting. Not insignificant voices but that's another point. I would submit that that was a case where there was an obvious gap in that they could have a closed process, but what was at stake for the individual was so significant that they needed 15:19
to mitigate that, and the obvious mitigation was a Special Advocate.

CHAIRMAN: I wonder if it was even more than that because if you just say that the board is allowed to look at the material and the prisoner isn't allowed to 15:19
participate, then it is patently not compatible with Article 5.

MS. GRANGE: No.

CHAIRMAN: So it fails.

MS. GRANGE: Yes. 15:19

CHAIRMAN: By that stage, the board's procedures had been amended so as to make them compatible with Article 5.

MS. GRANGE: Yes.

CHAIRMAN: So there was no difference between the 15:19
concept of fairness in terms of the board's domestic procedures and what was required by Article 5.

MS. GRANGE: Yes.

CHAIRMAN: So, fairness in terms of its domestic

procedures required an adversarial hearing --
MS. GRANGE: Absolutely.
CHAIRMAN: -- just as Article 5 did. So, it just couldn't work at all --
MS. GRANGE: No. 15:20
CHAIRMAN: -- as a matter of law --
MS. GRANGE: No.
CHAIRMAN: -- without a Special Advocate.
MS. GRANGE: Yes, absolutely. One can see why the Supreme Court was compelled to do what it did. Sorry, 15:20
the House of Lords, I think.

So, when one appreciates all that by way of context, you can see that the force of any read across to this context is very, very limited. 15:20
CHAIRPERSON: Well, I have to look at fairness, of course, but it would be difficult - and I don't think anyone has said this - it would be difficult to suggest that in inquiry procedure, fairness requires a Special Advocate as a matter of law. 15:20
MS. GRANGE: Yes.
CHAIRMAN: We see from other inquiries that it doesn't.
MS. GRANGE: No, no.
CHAIRMAN: So that's the distinct difference between Roberts and inquiry procedure. 15:21
MS. GRANGE: Yes, I agree. That's what we say about Roberts and about whether or not there is this implicit power to imply here the appointment of a Special Advocate.

I am going to deal very briefly with the question of whether Articles 2 or 3 of the ECHR have any bearing on the issues that you're considering. In our submission, the case law is clear that whether it's Article 2 or 3, 15:21
the investigative obligation does not require the public or Core Participants to have full access to all parts of the inquiry proceedings and evidence; and that Strasbourg has on a number of occasions approved the use of closed proceedings where necessary; cases such 15:21
as Amin, Ramashai, JL v Secretary of State for Justice all make that clear. We are left back on the test of next of kin must be involved to the extent necessary to safeguard their legitimate interests.

What we say is there is certainly no case that anyone can point to that says in our inquisitorial context, a Special Advocate must be appointed in order to comply with Article 2. There is nothing approaching that at all. They have to be involved to the extent necessary 15:22
to safeguard their interests. When one looks at it from that prism, they are heavily involved in any public inquiry, the victims, the families. They have a right to legal representation; they will be able to make applications for Core Participants status; they 15:22
will have the ability to work with counsel to the Inquiry, to suggest questions or even to apply to the Chair to ask questions themselves. The way the Section 19 process works is that it's only that material that

they can't see and will never see that has to stay in closed. By definition, that can't be material that they can give instructions on because they are not aware of what it says. Anything, any concerns that they have, any suspicions they have, any lines of inquiry they want pursued can all be pursued by counsel to the Inquiry.

CHAIRMAN: What do you say to Mr. Southey's point, though, that it's part of their interest to be able to ensure that nothing happens in the course of a closed hearing which constitutes an error of law? 15:23

MS. GRANGE: Yes, I say a number of things about that. First of all, this is an inquisitorial process; what you are doing is investigating, essentially investigating facts in closed. You are not reaching any determination of civil or criminal liability. That point is really important. By definition, Section 19 will limit the material that will be covered by that closed process. So, you are not reaching any legal determinations on the closed material; you're not like the investigatory powers tribunal determining whether someone's right to privacy has been breached under Article 8. You are not allowed to make those findings. You are primarily a factual investigator, and then you're going to be assimilating the facts and reporting on those. 15:23 15:24 15:24

CHAIRMAN: I think Mr. Southey saw a legal determination as being something a bit broader than that. He also contemplated the fact that maybe if a

Special Advocate wanted a particular line of inquiry to be advanced and the Chair decided not to do so, that that could conceivably be challenged.

MS. GRANGE: We say next is that Parliament struck the balance. Parliament has decided what fairness primarily requires in this context. It requires you as an independent chair of this Inquiry; it requires counsel for the Inquiry to be appointed who have the experience and the expertise to deal with the issues the inquiry is investigating. Parliament has set up that process. Yes, I accept that by definition that might mean that something happens in closed that the open advocates aren't aware of and can't challenge, but Parliament has decided that the safeguards that it has put in place - your independence, the role of counsel to the Inquiry - mean that its fairness is mitigated to the extent it needs to be mitigated given what you're determining, and you're not determining civil or criminal liability. 15:25 15:25 15:25

CHAIRMAN: Mr. Southey was arguing for what he called an independent mechanism. I did wonder at the time what I was supposed to be if there needed to be yet another independent mechanism. 15:25

MS. GRANGE: Well, absolutely. You can't put checks on all the Inquiry processes. The Inquiry might take a false step, they might take that false step in open and nobody might notice that, but that's the scheme that Parliament has decided is appropriate for determining these issues, given that ultimately it can't pronounce 15:26

on people's liabilities. It's there in order to investigate matters of public importance, to find the facts, but then to make the recommendations for future change.

We say that yes, you don't have someone sitting on your shoulder in closed checking all your homework. Frankly, when one looks at what was intended in the Inquiries Act to create a comprehensive regime but also one that was proportionate in terms of cost, that is simply not necessary. 15:27

CHAIRMAN: Do you say that's the same answer to the point about the need for public reassurance?

MS. GRANGE: It is, and that's what it boils down to. Words that come to mind in the last two days are it's about reassurance, confidence, robustness. One can understand on a human level why those points are being made but, ultimately, you have to have faith in your own appointment, your independence and the skill - and I'll come on to it - of your counsel to the Inquiry. 15:27 15:27

That's clearly where Parliament decided the burden should lie in terms of making decisions about the scope of these investigations, what lines of inquiry to pursue, what was relevant, what was not relevant. 15:27 Inquiries have to make those decisions every day, and someone might second guess them.

The other point I would make is if we look at the case

law, it is very, very rare for the Court ever to sit in judgment on judgment calls that have been made by an inquiry chair or their team. There is a lot of case law to the effect that an inquiry has to go very wrong before the Court, the administrative court, would decide that there was an error of law. They give a huge amount of discretion, of latitude, to inquiry chairs and to their counsel to conduct matters, both procedurally and substantively, in the way that you consider is most effective. So again, I think that's relevant to, well, do you need someone sitting on your shoulder checking your homework in closed, given how hard it is to challenge decisions that are made by public inquiries. 15:28 15:28

That's for good reason. It is again for the same reason, that deference, that latitude that courts give is enshrined in the Act. It reinforces my point about the way in which this is a very unique statutory scheme. 15:29

We say in terms of previous rulings by inquiry chairs, and with no disrespect to those chairs and those that were making legal submissions, the arguments that you have heard in writing and over the last two days go way beyond anything that we see in those decisions. I am afraid they do look quite superficial now given the depth of argument that you have had, and the number of points, including the points about the 2016 Act and the 15:29

limitations of Special Advocates that don't appear to be taken into account in those decisions. Whilst of course you should have regard to them, we say they are of very limited persuasive effect.

15:30

Sir, if I can now move on to deal with my eight points, and I'll do this as efficiently as I can, as to why you should not exercise your discretion. I'll try not to repeat myself because some of the points that are talked about in terms of discretion, in fact, I would say is go to is there a power at all in the first place. 15:30

First and most importantly, this is an inquisitorial process. We have laboured that point; I have laboured that already. 15:30

Secondly, you and your team of counsel to the Inquiry will test the evidence given in the closed hearing with the same diligence, care, and objectivity that you bring to the open hearings. 15:30

You have an experienced and capable legal team behind you, in front of you, expert in dealing with closed as well as open material. Your lead counsel to the Inquiry and one of the silks assisting him and your solicitor to the Inquiry all acted in the Manchester Arena Bombing Inquiry, which heard closed evidence in restricted hearing. 15:30

CHAIRMAN: Amongst many others.
MS. GRANGE: Pardon?
CHAIRMAN: Amongst many others.
MS. GRANGE: Amongst many others, I'm sure that's right. 15:31

Your solicitor to the Inquiry also has experience of the Litvinenko Inquiry and various inquests, including the 7/7 London bombings. That's relevant to whether or not you need to exercise your discretion to have 15:31 another legal officer inputting into the closed sessions.

Thirdly, all of the Special Advocate regimes, and it is not in contention here, contain express provision to 15:31 the effect that Special Advocates cannot communicate to the specially represented persons after they have had sight of the sensitive material. That being so, the instructions given by Core Participants could not go beyond a general instruction to test the evidence 15:31 carefully in order to establish whether there may have been missed opportunities to prevent the bombing, and to pursue certain lines of questioning emerging from the open evidence. 15:32

That's precisely the task that can be undertaken by Counsel to the Inquiry informed by the Rule 10 applications that may be made in the open hearings. The open advocates can prepare a detailed list of

questions that they want put in open and in closed; that can be provided to Counsel to the Inquiry. Obviously Counsel to the Inquiry will take those into account when they approach their preparation for the closed hearings. 15:32

Indeed, Counsel to the Inquiry is going to be in an arguably better position than any Special Advocates here because they can continue to communicate with the Core Participants for the families despite having seen the closed material. 15:32

Fourthly, there will be a duplication of function between counsel to the Inquiry and any team of Special Advocates. We say that's inevitable. Given your duty under Section 17(3) to avoid unnecessary cost, we say that you would have to identify something very particular, very special, that meant that Special Advocates could do something which your team of Inquiry counsel could not. 15:32 15:33

Special Advocates are a scarce and precious resource. They are needed across lots of different jurisdictions in very anxious contexts. We would say there is no justification for the Inquiry, or anyone else, incurring that expense in circumstances with the duplication with the role of counsel to the Inquiry is so obvious. 15:33

Fifthly, as we have already seen, there are some family groups that would -- well, one family group would like their own Special Advocate separate from the Special Advocate that was appointed in the judicial review proceedings. That gives rise to the prospect of multiple Special Advocates. Even if you try and keep that confined, you certainly can't achieve it with the appointment of one or perhaps even two people. It's likely to have to be more than that. 15:33

15:34

Sixthly, delay. We say delay is really important, and obviously you have heard Mr. Mansfield's submissions on delay. Promptness is a key consideration in an Article 2 investigation.

CHAIRMAN: I think you need to stop there. That's going to go down badly given the amount of time that's passed before we get to an inquiry. 15:34

MS. GRANGE: I was just about to make that very point. I was about to say I am on slightly shaky ground here when I talk about promptness. Nevertheless, that doesn't mean that you don't sit here now and say to yourself is this a step that is or is not going to cause delay. Clearly you have to factor delay into any decision you make. We say it's obvious that if Special Advocates are appointed, they'll need time to prepare; they'll need time to read whatever open material they feel they need to read before going into closed; they will need time to take instructions, and then they will need time to input into the closed process. It will 15:34 15:34

increase the time that the closed hearings will take, and all of that will mount up in terms of the point at which you can get to a report writing stage.

Seventhly, any such appointment, we say, is likely to make the hearings very complicated. I make this very special point, particularly where you've got some closed material that Special Advocates couldn't see and some that they could see, that raises the spectre of having two types of closed process. What we say about that is that actually makes things very complicated, not just for the legal teams but actually for the witnesses who are giving their evidence, to be told, well, when you're answering these questions, you can only refer to this corpus of material; when you are answering these questions, you can now refer to this wider corpus of material. Actually what we say you should focus on is what is going to give you the best evidence and what is going to put those witnesses in a position to give you the best evidence. Having that kind of confusion, on top of the length of time that has passed since these events, we say could really cause a lot of complexity, hypothetically assuming that we have that type of material. For the avoidance of doubt, we neither confirm nor deny, as was put in our written submissions, whether there is such material in our submissions. I think as you said earlier, you were testing this out on a hypothetical basis that if there was such material, how would things work.

15:35 15:35 15:36 15:36

Finally, while it is accepted that each case is different and requires individual consideration, we say it's significant that a proportion of those public inquiries which have included closed hearings have been concerned with fatalities and have had bereaved families as Core Participants. What we say is there is no difference, we would, say between, for example, the families in the Manchester Arena bombing situation and the families here. And no previous inquiry has identified the need to appoint a Special Advocate. 15:37 15:37

As to the test that should be applied, we submit that nothing less than the high bar identified by Bingham LJ in R-v-H should apply. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. We note that that test was reiterated by the Court of Appeal in the Concordia case as recently as 2018. Even if the test is better expressed as one of necessity, which some Core Participants have submitted, we submit that it also fails to meet that similarly high bar. We would say that nothing that has been submitted to you would satisfy that necessity test. 15:37 15:38 15:38

As to the position of the former Chief Constable, we submit that it's premature to start speculating in any detail precisely who will be present at which hearings and which witnesses might see any closed material.

Those questions will have to await a lot of stages that will need to be gone through before that process. So, we don't think that that is a material consideration at this stage.

15:38

As to practicalities of the appointment, those practicalities would need to be worked out depending on what the identified need for such an appointment was, as articulated in the Chairman's request. It is our position that it would have to be a request to the 15:39
Advocate General of Northern Ireland who is responsible for making those appointments. You will have to identify whether you say there's a power and, if so, what you are doing in terms of your discretion. If you do request the appointment, you will give reasons for 15:39
that, but then the Advocate General will have to take a separate decision as to whether or not to appoint them. He will obviously have to take into account the reasons that you give. It will be a separate decision by him as to whether or not he is prepared to make that 15:39
appointment.

On cost, we also say it's premature at this stage to tie yourself down in terms of cost. That will have to be worked out, again depending on the identified need, 15:39
how many Special Advocates. There are various options that have been posited in the submissions. We submitted in our main submissions that this certainly wasn't an obvious case where simply the provider of the

material would have to pay the costs. There are potentially other options for that. We say those are practicalities that can be worked out once your in-principle decisions has been taken.

CHAIRMAN: But wherever the cost burden falls, it is bound to be public purse? 15:40

MS. GRANGE: Yes. Mr Chairman, is there anything else I can assist you with? Otherwise, those are our submissions.

CHAIRMAN: Thank you. 15:40

MR. GREANEY: Sir, could we have what will be, I expect, a final break, following on which we will hear from Mr. Henry on behalf of the Police Service of Northern Ireland.

15:41

AFTER A SHORT ADJOURNMENT, THE INQUIRY RESUMED AS FOLLOWS:

SUBMISSION BY MR. HENRY

15:51

CHAIRMAN: Mr. Henry, good afternoon.

MR HENRY: Good afternoon, sir.

CHAIRPERSON: Yes.

MR HENRY: Sir, you will have seen very lengthy written submissions put in on behalf of the PSNI. It's not my 15:51 intention to read that out, or even to summarise it. I'm conscious that a lot of the ground that is covered within that note has also been covered over the course of the last day and a half or so. I am happy to adopt

that submission, that written submission, as the PSNI's position. I'm also equally happy to address any specific questions that might arise from that or from other points which have arisen during the exchanges between yourself and other counsel. Otherwise, I would have nothing in particular to add. I'd be covering old ground. 15:52

CHAIRMAN: Well, as I mentioned earlier, I was grateful to you for your suggestion that I look at Sales LJ's speech, I found it interesting. Also for the pointer in that speech to the case of O. I've considered the rest of your submissions with care, and I rather think everything has been canvassed one way or the other during the course of the discussion yesterday and today. From my own part, I don't have anything in particular I would like to raise. If you are content to simply adopt the submissions, I'm happy with that also. 15:52

MR HENRY: Thank you very much, sir. I am content with that. 15:52

CHAIRMAN: Thank you. Yes, Mr. Greaney?

MR. GREANEY: Sir, we have then managed to conclude this important hearing in the course of two days.

It remains for us finally to thank all Core Participants for the care that they have taken over their written submissions and oral submissions, and for the clarity of them. We, for our part, consider that you are now well equipped to determine the important 15:53

issues that this hearing has presented for you.

We do anticipate that there will be a further procedural hearing at some stage between now and the commencement of the Chapter 3 oral evidence hearings. 15:53
Sir, we will communicate the date of that hearing and its length to all Core Participants at some point in the future.

CHAIRMAN: Yes. Thank you, Mr. Greaney.

In terms of the hearings yesterday and today, I am very grateful to all of the counsel for the submissions which they have presented. The issue which has been raised is both important and interesting. It's necessary that I take care to reflect on all of those 15:54
submissions, and I will produce a written decision in due course.

MR. GREANEY: Thank you, sir.

THE HEARING ADJOURNED TO A DATE TO BE FIXED 15:54

I n d e x