

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

3
4 SUBMISSION BY MR. SOUTHEY (Cont.)

5
6 CHAIRMAN: Good morning, Mr. Southey. Would you mind
7 just giving me a moment to make sure my computer is
8 ready?

9 MR. SOUTHEY: Of course, sir.

10 CHAIRPERSON: Thank you.

11 MR. SOUTHEY: Thank you.

12
13 Can I just start with two things really that arise from
14 yesterday. Firstly just to respond a little more on
15 Carter v Russia, having reviewed it again - and
16 apologising again because in one sense I had forgotten
17 it; it wasn't that it was unfamiliar but I had
18 forgotten it in the context of the question - in our
19 submission, in one sense it is of limited significance
20 to the issues I raised and the submission I made about
21 the key test essentially being whether or not steps had
22 been taken to ensure that the next of kin were able to
23 safeguard their interests because, of course, in that
24 case the question was whether the victim in that case
25 was able to rely on the findings of the public inquiry.
26 The question was the admission of the evidence into the
27 proceedings in the European Court. One sees that at
28 paragraph 110. That meant, in simple terms, the victim
29 was happy with the findings, they weren't complaining

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

3
4 So, nothing in that case undermines the real point I
5 was trying to make yesterday, which is that the test we 10:00
6 say applies by reason of Article 2 is whether the next
7 of kin were involved to a sufficient extent to
8 safeguard their interests. I'll come back to that in a
9 moment because the second thing I want to address in a
10 moment is the questions that were asked about whether 10:01
11 or not effectively the Special Advocate adds anything
12 to counsel to the Inquiry.

13
14 The second thing I would point out: My memory of
15 yesterday is that you raised, sir, the issue of Carter 10:01
16 in circumstances where I had raised the Article 6 case
17 law, recognising that Article 6 wasn't directly in
18 issue. It may be of some relevance that the European
19 Court in Carter in fact cited Yam - you see that at
20 paragraph 108, which is an Article 6 case - and so 10:02
21 certainly regarded it of some relevance, the Article 6
22 case.

23
24 Of course, the point I drew from the Article 6 case
25 law, which is sort of why in one sense we've taken the 10:02
26 position we have, which is not to challenge in one
27 sense the principle of a closed hearing but to argue a
28 Special Advocate is needed as a mitigating factor, the
29 point I was making about the Article 6 case law was

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

10:02

7
8 Really in one sense, to pick up from what I just said
9 about Carter v Russia, it remains in our submission -
10 and just to summarise where we are because I want to 10:03
11 come back to the second issue in a moment, which is the
12 advantages of a Special Advocate over counsel to the
13 Inquiry - our submission, in summary, when looking at
14 case law, the legislation I took you to yesterday, is
15 that Article 2, the factors you need to consider or the 10:03
16 test you need to apply, sir, in our submission is if
17 Article 2 is engaged, whether without Special Advocates
18 essentially, there is sufficient involvement by the
19 family to ensure that they can safeguard their
20 interests - putting it in an alternative way but to the 10:03
21 same effect - whether the Special Advocates are needed
22 to safeguard the interests, the legitimate interests,
23 of the family.

24
25 The domestic law test, we would submit, may depend on 10:04
26 the interpretation of Section 19. We made the point
27 effectively that restrictions have to be minimised in
28 terms of Section 19. To the extent that submission is
29 accepted, our position would be that denial of a

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

3
4 If that's not correct, in any event what we submit is
5 that the key issue based on the cases I have
6 highlighted is fairness, and is an appointment needed
7 essentially to ensure fairness?

10:04

8
9 That's then where I come to the second issue I wanted
10 to sort of return to from yesterday.

10:05

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

13 MR. SOUTHEY: Yes. Yes.

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

10:05

16 MR. SOUTHEY: Yes.

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

10:05

10:05

1 to be consulted or informed of every step.

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

16
17 "The requisite access of the public or the victim's
18 relatives may therefore be provided for in other stages
19 of the procedure."

20 10:07
21 MR. SOUTHEY: Sir, that in one sense goes back to the
22 submission and it's linked back to the submission, and
23 it's why I took you through, in one sense, the detail
24 of Amir because if you remember in Amir, when Lord
25 Bingham looked at the various stages, he started with 10:07
26 the police investigation. In the context of the police
27 investigation, he said absolutely no criticism of the
28 fact there was no public or family involvement in that,
29 for understandable reasons, because police

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

15
16 The question is, and it comes back to, in one sense,
17 what is it that's distinct - and this is why I was
18 trying to draw, why I went back to the test and went
19 back to Amin - what is it that means the families don't
20 have any right, for example, to participate in the 10:09
21 police investigation but do have a right to participate
22 in the processes like the CRE. The reason, we would
23 submit, is the only way in which that can be assessed,
24 because it's the only test certainly we have been able
25 to identify, is the legitimate interest test. Why is 10:09
26 there a legitimate interest in the CRE process in a way
27 that there wasn't in the police investigation in Amin?
28 The reason, we submit that, is that in the Amin -- in
29 the police process rather, what is the purpose of the

1 police process? It is to bring a prosecution if there
2 is sufficient evidence. That would be potentially
3 undermined by family involvement.
4

5 In the lessons learnt process, which is more analogous 10:10
6 to this, there is a legitimate family interest because,
7 going back to the purposes of the Article 2
8 investigation set out by Lord Bingham in Amin, the
9 families have an interest in ensuring that lessons are
10 properly learned so that they can have that reassurance 10:10
11 going forward that things won't repeat themselves. So,
12 that's the distinction we draw. We recognise it's not
13 necessarily every stage that there needs to be
14 involvement, and there is, in particular, a difference
15 between police investigations and what I have described 10:10
16 as the lessons learnt stage. But that equally the fact
17 that families don't necessarily have a right to be
18 involved in police processes doesn't mean they don't
19 have a right to be involved at other stages. The
20 question that arises is what the test is. As I say, 10:10
21 certainly we have not been able to identify in the case
22 law any test other than are they involved to an extent
23 necessary to safeguard the legitimate interests.

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

25 MR. SOUTHEY: That is the test that seems to apply at 10:11
26 this stage, yes.

27 CHAIRMAN: And that's how you measure fairness?

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

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

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

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

13
14 One thing, though, just on that that I would also
15 emphasise from my submissions yesterday is although 10:12
16 case law makes clear it is not a freestanding
17 requirement, one touchstone by which one measures
18 potentially that issue of protection of legitimate
19 interests is public confidence. I drew attention to
20 the case law yesterday that makes it clear that one of 10:12
21 the purposes of the Article 2 investigative obligation
22 is to ensure that there is public confidence in the
23 rule of law. So, looking at and going back to the
24 distinction I just drew between police investigations
25 and lessons learnt investigations, is it going to 10:12
26 undermine public confidence that family aren't involved
27 in a police investigation? We would submit we would
28 accept it won't undermine it because it's normal
29 practice for the police to conduct their investigations

1 in private, for good reason.

2
3 Does it undermine public confidence if the family
4 aren't able to raise issues they want to raise in a
5 process like the CRE investigation? It does have the 10:13
6 potential to undermine that because it looks as though,
7 effectively, the analysis essentially of what lessons
8 need to be learned is being conducted in secret.

9 That's where -- so public confidence is important.

10 It's not a freestanding test, I am not suggesting it is 10:13
11 a freestanding test, but it is part of the context in
12 which one should look at that issue.

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

1 Mr. Underwood, just to put this in context, first
2 became involved in this case about 12 years ago. He
3 was first instructed -- in fact, he was first
4 instructed as the Open Advocate in the case in about
5 2013. He was instructed as the Open Advocate, and then 10:15
6 became the Special Advocate when the initial Special
7 Advocate was appointed to the High Court bench in
8 Belfast. That means that certainly as far as the
9 families are concerned, they both believe he has a
10 depth of knowledge of the case and they have confidence 10:15
11 in him. They believe he is an effective advocate on
12 their behalf. That is important obviously, we submit,
13 particularly in the context of a case where the reality
14 is obviously a lot of material is going to be -- a lot
15 of the issues are going to be considered in private. 10:15

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

28
29 That's in part why confidence - and I've made the point

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

3
4 I think when the Inquiry broke yesterday, I was making
5 submissions about one particular important role being 10:17
6 effectively confirmation of whether or not there were
7 grounds of challenge. One of the things that I think I
8 should have made clearer perhaps, or certainly should
9 have addressed, was that, of course, when one talks
10 about potential grounds of challenge in this context, 10:17
11 one is not necessarily just talking about a challenge
12 at the end of the process. Grounds of challenge can
13 arise in relation to decisions made regarding
14 disclosure. One of the problems, for example, we
15 discussed -- or there were submissions yesterday on 10:17
16 disclosure, and you fairly put to me, sir, I think,
17 that counsel to the Inquiry will, of course, be arguing
18 for disclosure. But suppose there is a situation which
19 is, we would submit, not unrealistic where counsel to
20 the Inquiry argues for disclosure, the Inquiry rejects 10:18
21 those arguments having heard argument from State Core
22 Participants; it may be there are arguments that the
23 decision in those circumstances are flawed but the
24 family Core Participants will have, without a Special
25 Advocate, no way of knowing whether that's the case. 10:18
26 Having a Special Advocate, particularly an experienced
27 Special Advocate who has their confidence like
28 Mr. Underwood who doesn't at any stage say there is a
29 problem in relation to disclosure, as he would normally

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

9
10 If there were to be a judicial review in those 10:19
11 circumstances, they would probably have to defend your
12 ruling, sir. Perfectly properly. That's one of the
13 reasons why confidence -- if you look at that using the
14 test, if one considers the test I have just outlined,
15 which is safeguard their legitimate interests, they 10:19
16 have a legitimate interest in ensuring that everything
17 that should be in open is in open.

18
19 Public confidence depends effectively on that. If
20 there is an independent mechanism - effectively someone 10:20
21 representing their interests who is able to assess
22 essentially whether there is legal error in the
23 approach that's being adopted to that - it gives
24 confidence. Remember, as I say, the point there is
25 also an inequality, which is that State Core 10:20
26 Participants will be seeking to withhold that material
27 should. Should you order disclosure, it would be open
28 to them to potentially bring judicial review
29 proceedings; it would potentially be open to Sir Ronnie

1 Flanagan to bring proceedings, if he is a party. I am
2 going to come onto the issue of Sir Ronnie Flanagan
3 because it is particularly important, in a moment.
4

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

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

13 MR. SOUTHEY: Yes.

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

19 MR. SOUTHEY: Yes.

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

24 MR. SOUTHEY: Yes.

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

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

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

10:22

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

10:22

12 MR. SOUTHEY: Yes.

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

15 MR. SOUTHEY: Yes.

10:22

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

10:23

22 MR. SOUTHEY: Yes.

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

10:23

28 MR. SOUTHEY: Yes.

29 CHAIRMAN: But intercept-related conduct could only

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

4 MR. SOUTHEY: Yes.

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

15 MR. SOUTHEY: well, two things firstly. This isn't 10:24
16 answering your question but it might minimise the risk
17 of that. We would certainly submit that obviously the
18 2016 Act needs to be potentially read compatibly with
19 Article 2, and if the appointment of Mr. Underwood and
20 Mr. Kennedy was necessary for public confidence, the 10:24
21 interpretation we gave - or we've argued for, rather -
22 in relation to the sort of catch-all provision -- I
23 can't remember the provision but you will remember what
24 I described as the catch-all provision should
25 potentially incorporate them. But let's assume for the 10:25
26 moment that that argument is rejected, the tainting
27 process ultimately is normally concerned, as I
28 understand it, with the idea that because a Special
29 Advocate will normally spend time in open, it's

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

10:25

8
9 It's difficult, we would submit, to see why they should
10 be disqualified on the basis of knowledge that they've
11 got that is sensitive but which they couldn't
12 effectively deploy in closed proceedings. I mean, they
13 have that knowledge. They are expected and understood
14 to be able to do other work despite having that
15 knowledge, because the concern normally underlying
16 these processes is they will disclose something
17 inadvertently to the people who can only remain in
18 open. Because they won't have contact, it's difficult
19 to see how that's the issue.

10:26

10:26

20
21 One of the problems anyway with the tainting process is
22 ultimately there is a veto effectively for the Security
23 Services in relation to this, and I don't know how that
24 would play out. In one sense it would be speculative,
25 we would submit, to essentially refuse to appoint them
26 in these circumstances where we don't know whether
27 there is an objection, we don't know whether it's a
28 legit objection from the Security Services.

10:27

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

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

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

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

1 security clearance and he has the knowledge of closed
2 material, it's difficult to see what justification
3 there is for excluding him from a closed process.
4

5 Now, if that is correct, it does create, we would 10:30
6 submit, an inequality in circumstances where obviously
7 there is -- there have been criticisms made by family
8 Core Participants in the past of Sir Ronnie. As I say,
9 it's not simply that he is in a position to, for
10 example, question through his lawyers witnesses when 10:30
11 the family Core Participants aren't. He is in a
12 position to assess whether there is any challenge he
13 would wish to make to rulings of the Inquiry,
14 particularly including in relation to disclosing things
15 into open, and also on the substantive merits. He has 10:31
16 that advantage which, without a Special Advocate, we
17 submit, the family Core Participants will not have.
18

19 Of course, there is a second alternative, which is that
20 although we've said it would appear difficult to see 10:31
21 what justification there is for excluding him, if he
22 were to be excluded, that potentially makes it
23 difficult for counsel to the Inquiry because they would
24 then potentially have to question on behalf of parties
25 who have conflicting interests. That may be an issue 10:32
26 anyway because, as is clear, family Core Participants,
27 although largely aligned on many issues, are not
28 completely aligned.
29

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

11
12 That last point about conflicting interests does mean,
13 in our submission, it is difficult to draw any
14 assistance from the comparison that is drawn in some of
15 the pleadings to the role of counsel to the 10:33
16 Investigatory Powers Tribunal. The statutory framework
17 and the context is very different. In a complaint to
18 the Investigatory Powers Tribunal, what will happen
19 effectively - certainly seems to be envisaged by the
20 rules and seems in practice to happen - is that an 10:34
21 individual will submit a complaint against the Security
22 Services, the Security Services will be able to present
23 their material confidentially, and the individual will
24 quite often be excluded from that process because of
25 the need to protect security. So, it's not 10:34
26 multifaceted in the way that an inquiry such as this
27 is; there is one person excluded and one party that is
28 able to attend and present their case. In light of
29 that, it is not surprising that effectively, although

1 the position is named counsel to the IPT, counsel quite
2 clearly have specific duties to protect the interests
3 of the person who has made the complaint.
4

5 It may be worth just looking at the framework because 10:35
6 it is very different to the framework in this case. If
7 you go to the authorities bundle tab 4 page 39, this is
8 Section 69, which is the rule-making power in relation
9 to the tribunal, you will see in (3) that the
10 rule-making power, particularly (b) and (c) of 10:35
11 subsection (3), the rule-making power is specifically
12 established to enable the protection of the
13 complainant.
14

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

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

5
6 That contrasts, in our submission, with the role of
7 counsel under The Inquiry Rules. The Inquiry Rules
8 obviously contain less detail about what the role of
9 counsel is. The Rules themselves essentially provide,
10 as you'll be aware, the relevant Rules - I think they 10:38
11 start at page 55, I probably don't need to go to them -
12 under Rule 2, it is you who appoint the Chair; they ask
13 questions effectively on your behalf. That's Rule 10.

14
15 There isn't any further guidance on it but as you'll be 10:39
16 aware - we put it in our application, we haven't
17 produced it because it is only in draft - the Cabinet
18 Office have suggested that effectively questions are
19 being asked on your behalf and legal advice is being
20 provided to you by counsel to the Inquiry. All of that 10:39
21 indicates that, unlike the Investigatory Powers
22 Tribunal --

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

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

1 that the whole point of it is it is not just whether
2 you have made an error, whether the tribunal has made
3 an error, it is about whether there is an arguable
4 error. There is then a process essentially, and I
5 didn't perhaps file it like that; perhaps I should have 10:40
6 done.

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

9 MR. SOUTHEY: Yes, exactly. Exactly. As effectively
10 your legal adviser, it would be a very odd position for 10:40
11 counsel to the Inquiry to be in a position -- and this
12 is what effectively would be required, it would for
13 counsel to the Inquiry to say to you, well, I think the
14 law is X but there is an argument the law is Y; if you
15 adopt X, I've then got to tell the Core Participants 10:40
16 that although you've ruled X and I will argue in the
17 High Court it is X, I believe there is an argument of
18 Y. That is a very odd position to be in and it's a
19 very uncomfortable position we would be in, and it
20 would certainly need some sort of authority, which is 10:41
21 what you see in relation to the IPT.

22
23 It goes back to the point I made earlier, which is if
24 counsel to the Inquiry was some sort of panacea, why is
25 this room full of all the lawyers that are present? In 10:41
26 part, we would submit, that is for two reasons.
27 Firstly, and one shouldn't lose sight of that, even if
28 it's a situation where -- and in relation to a case
29 like this, or an inquiry like this in open - this may

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

5
6 But secondly, and probably equally importantly if not
7 more importantly, they provide a safeguard from the
8 Core Participants' point of view. They are able to
9 advise as to whether or not there are flaws in the way
10 in which the matter is proceeding. As I say, that 10:42
11 second point becomes even more important when matters
12 go into closed, because there is then a very important
13 issue from the families' point of view, which is
14 actually is there proper legal justification for
15 withholding material. 10:42

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

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

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

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

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

1 That reassurance, the reason I'm focusing on that, is
2 if you think about the realities of this case or this
3 Inquiry, everyone recognises that large, key parts of
4 this process are likely to be in closed. That is
5 likely to be frustrating. Despite all the points you 10:45
6 have just made, it is frustrating for the individuals
7 because they want to know the truth, they want to know
8 that whatever findings are made are reliable. They
9 would normally be able to do that in one sense by
10 attending, by viewing, by making sure that they see 10:46
11 what questions are asked, they understand what is being
12 said, they can follow the process and then have
13 confidence in the outcome. When things go into closed,
14 they can't do that. But if they have someone who they
15 have confidence in who is present, who is effectively 10:46
16 saying there is no problem here, that adds to
17 confidence in the process, particularly in
18 circumstances where, as I say, the State parties are
19 present, the State parties will have that advantage.

20
21 As I say, it's not about doubting anyone's confidence,
22 anyone's commitment, anyone's integrity or anything
23 along those lines. It's about a process which is
24 inherently frustrating, inherently limiting the
25 participation, the legitimate participation, of the 10:47
26 family members, and the need for confidence in that
27 process.

28
29 It is striking, as I say, that there has been a special

1 Advocate involved in the judicial review. There is
2 likely to be a Special Advocate involved should it
3 proceed to trial in civil claim, and I think you're
4 aware of the civil claim that challenges the adequacy
5 of the investigation. Certainly that has been raised 10:48
6 as being a possibility during hearings this year.

7 CHAIRMAN: But that's only striking if you don't take
8 account of the difference between the adversarial and
9 the inquisitorial nature of the proceedings. I mean,
10 it's not really fair just to merge them altogether like 10:48
11 that. These proceedings are not in any sense the same
12 as a judicial review proceedings, where all that was
13 happening was that a contested claim was being argued
14 to a point of arguability, not even to a point of
15 determining. And once the bar of arguability had been 10:48
16 reached, it was handed over to an entirely different
17 process to carry out an actual independent
18 investigation into those matters. So, it's a
19 completely different process.

20
21 Now, I readily understand why you say you would like to
22 have a Special Advocate in these proceedings but I
23 don't accept that it's striking that there might not be
24 because of the difference in the two sets of
25 procedures. 10:49

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

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

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

22
23 In the judicial review they had the advantage of
24 being -- the Special Advocate had a potential role, had
25 the judicial review been rejected, of advising on an 10:51
26 appeal or indicating whether there were closed grounds
27 of appeal. That role, as I have already indicated, is
28 not obviously an appeal but it is a judicial review,
29 but that role potentially is also of importance in this

1 context.

2
3 The analogy I draw is although the process is
4 different, the functions that a Special Advocate
5 potentially would need to perform are similar. 10:51

6
7 One thing that has been touched upon by counsel to the
8 Inquiry is why is this Inquiry different to other
9 inquiries where there hasn't been a Special Advocate.
10 One firstly needs to be a little cautious about looking 10:52
11 at other inquiries, partly because the rulings don't
12 necessarily set out all the arguments so it is unclear
13 what arguments were presented. It is unclear, for
14 example, if the concerns I have just raised, and raised
15 on a number of occasion about legal advice, were raised 10:53
16 in those other inquiries.

17
18 But what are the differences? Firstly, we would submit
19 that one shouldn't lose sight of the context of
20 Northern Ireland, the particular concerns or suspicions 10:53
21 of the position of the State, which are enhanced in
22 this context, we would submit, by the fact that it has
23 taken so long to get to where we are now.

24
25 Secondly, there is the history of the use of the 10:53
26 Special Advocates. Of course, Horner J did seem to
27 suggest that they might be appointed in the Inquiry. I
28 recognise that there is a very real limit to what
29 weight can be placed on those remarks of Horner J.

1 They were formally obiter. I obviously have the
2 advantage of what was being argued; I don't remember
3 anything being said in argument about the use of
4 Special Advocates. I don't know whether there was any.
5 Certainly there was reference to the need for a closed 10:54
6 procedure but I can't remember whether anything was
7 said about Special Advocates.

8
9 But those remarks do suggest that Horner J, who had
10 obviously seen the Special Advocate's function, and 10:54
11 you, sir, obviously have an advantage over me in the
12 sense that you have seen the closed judgment, but I do
13 suggest that he regarded the role of the Special
14 Advocate as being of an advantage.

15 10:54
16 Another significant difference is the potential central
17 role of closed material. To use the Manchester
18 example, obviously in Manchester there was an important
19 closed issue, I can't deny that, but equally there were
20 plenty of fully open issues. Here, the Terms of 10:55
21 Reference, we would submit, on a fair reading make it
22 clear that closed is likely to be at the heart of
23 almost all, if not all, of the key issues of
24 preventability.

25 10:55
26 There is then the issue of the potential conflicts that
27 arise because of the position of Sir Ronnie Flanagan.

28
29 Finally, we do submit, because of the need potentially

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

10:56

7
8 The issue of delay has been raised. How significant
9 delay is, in our submission, is perhaps difficult to
10 assess at this stage. It may depend, for example, on
11 who has been appointed. If Special Advocates from the
12 judicial review are appointed, potentially in
13 conjunction with somebody else, they clearly bring a
14 significant amount of knowledge of the closed material
15 into play; that's likely to speed matters up. They've
16 also been sought at a relatively early stage. As far
17 as my understanding of what the Inquiry has said about
18 listing, at this stage we are still at a stage where
19 there are no closed hearing dates.

10:56

10:57

20
21 In any event in our submission, if I'm right that the
22 tests are as I have described, which is whether the
23 appointment is necessary for fairness, whether it's
24 important to ensure that legitimate interests of the
25 Core Participants are protected, in our submission
26 delay can't be a justification for refusing to appoint
27 Special Advocates.

10:57

28
29 Now, one aspect that has been touched upon in relation

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

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

23
24 However, what is clearly happening at the moment is
25 that Special Advocates are effectively using the 10:59
26 premises of PSNI and the MoD, as I understand it, to
27 view materials. Presumably the Inquiry - because
28 otherwise it's difficult to see how it could function -
29 has facilities available to it that enable security

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

4
5 Clearly the issues that arise, although they have 11:00
6 caused delay, are not preventing progress being made in
7 closed procedures. In this context, where it is
8 victims and survivors who seek the appointment of a
9 Special Advocate, it is a bit, we would submit -- well,
10 it doesn't sit well for effectively State parties to 11:00
11 say, well, there will be delay because of the failure
12 of the State to provide resources to enable Special
13 Advocates to fulfil their role. But, as I say, in any
14 event we would assume, and this is something as open
15 advocates it may be difficult for us to understand, we 11:01
16 would assume that whatever facilities are available to
17 the Inquiry could be used by Special Advocates to view
18 papers.

19
20 I have made reference obviously to the appointment of 11:01
21 Mr. Underwood and Mr. Kennedy. I've argued why they
22 would be of an advantage. We recognise that, of
23 course, one of the problems with them being involved is
24 that whilst some Core Participants have been able to
25 instruct them and have had in the past meetings with 11:01
26 them, et cetera, giving them instructions, that isn't
27 true of all Core Participants. The solution to that
28 that we've proposed, based on experience of other cases
29 where there has been a development, a very significant

1 development which means further instructions need to be
2 given, is that an additional Special Advocate can be
3 instructed to effectively join the team. That means
4 that there is an opportunity for that additional
5 Special Advocate to be given instructions in open; they 11:02
6 then join closed, and you have a combination of updated
7 and fresh instructions with the prior knowledge of the
8 existing Special Advocates.

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

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

25
26 The final issue that's been raised in terms of
27 practicality is the issue of cost. Now, I should say
28 in terms of cost, as with other issues, our basic point
29 is that practicalities shouldn't drive the outcome of 11:03

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

10
11 Correctly, we submit, PSNI in its submissions
12 recognises that, in general, it is the public agency
13 that is seeking to rely on closed material that ends up
14 paying for the Special Advocates, but says there is a
15 distinction because these are inquisitorial material. 11:04
16 In our submission, the problem with the PSNI
17 submission -- in one sense it perhaps isn't very much
18 different from an applicant's point of view because
19 ultimately the State has to fund this in one way or
20 another if it is needed for fairness. The problem with 11:05
21 the PSNI submission is that actually the test, and one
22 sees this from I -- it may be just worth looking at
23 this because it makes it good.

24
25 If you go to page 897 of the bundle, which is tab 33, I 11:05
26 was a case where there was a question about who pays
27 for the use of sensitive material in family
28 proceedings -- the use, rather, of a Special Advocate
29 in family proceedings. The ruling ultimately of Cobb

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

13
14 Ultimately, in our submission, that must be the correct
15 approach because if one thinks about what will happen 11:06
16 in this case, the reason why material will be
17 confidential is because the Inquiry has concluded - for
18 legitimate reasons, one assumes - the Inquiry has
19 concluded that an application made by a State party for
20 a Restriction Order is a valid one. It's the State 11:06
21 that is seeking to benefit from the Restriction Order
22 by protecting its, and it seeks to benefit from it
23 because it seeks protection of its legitimate
24 interests. If that requires additional cost, then it
25 should be the State, because it's the State that is 11:07
26 seeking to withhold the material that it's paying for
27 the Special Advocate. But as I say, we submit in one
28 sense that can't drive matters. The key issue is what
29 does fairness require, or what is required to ensure

1 that legitimate interests of family members are
2 protected.

3
4 The final thing, I should say, is you'll notice that I
5 haven't gone into any great detail about the judgments, 11:07
6 or the decisions rather, that were reached in the three
7 inquiries where consideration has been given to the use
8 of Special Advocates. The reason for that is that
9 although obviously, in one sense, two of them might be
10 said to be supportive of my arguments because two of 11:08
11 them have been found there probably was a power, we
12 recognise that ultimately they are not binding. It's
13 unclear, certainly from our reading of the decisions,
14 what arguments were advanced. Looking at where we are
15 now, you will have, by the time this hearing finishes, 11:08
16 have had extensive arguments about a number of issues,
17 some of which don't seem to have been considered in the
18 earlier Inquiry decisions, and so you hopefully, if
19 counsel have fulfilled their task, will be in a better
20 position to consider these issues than perhaps previous 11:08
21 Inquiry Chairs where.

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

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

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

1 to gain much insight about what the reasoning was.

2 MR. SOUTHEY: No.

3 CHAIRMAN: There is a small matter, though, that I did
4 want to bring to your attention just in case it is of
5 any significance. I don't think it is. In paragraph 11:09
6 35 of your own submissions, you draw attention to what
7 was said in the Afghan ruling about Sir John Saunders'
8 reliance on AHK.

9 MR. SOUTHEY: Yes. Sorry, yes.

10 CHAIRMAN: Now, you then deal with the impact that 11:09
11 Al-Rawi has on that, which is not the point I want to
12 draw to your attention. There is a quote in paragraph
13 5 of the Manchester Arena Inquiry decision which is
14 said to be from AHK. It is that quote that's then
15 referred to by the Chair in the Afghan Inquiry. All I 11:10
16 want to bring to your attention is that as far as I can
17 see, the quote doesn't in fact come from AHK at all, it
18 comes from the second first instance case in the
19 Competitions and Market Authority series of litigation.

20 MR. SOUTHEY: Okay. I don't think I spotted that. As 11:10
21 I say I can't see why that would make any difference.

22 CHAIRMAN: It doesn't make any difference. I just
23 wanted to make sure that we didn't go through this
24 whole procedure without that not being identified.

25 MR. SOUTHEY: Yes. I don't think I spotted that but I 11:10
26 don't think anything matters in relation to it.

27 CHAIRMAN: It doesn't add anything, but the judge in
28 the first instance Concordia case was His Honour Judge
29 Matthews. He gave an ex tempore judgment and there was

1 no authority cited.

2 MR. SOUTHEY: Yes. Thank you. That covers everything.

3 CHAIRMAN: Could I just ask you about one final thing

4 then, please?

5 MR. SOUTHEY: Yes. 11:11

6 CHAIRPERSON: You mentioned during the course of this

7 morning's discussion that a significant part of the

8 consideration which I should bear in mind concerns the

9 issue of public confidence, and I understand why you

10 make that point. 11:11

11 MR. SOUTHEY: Yes.

12 CHAIRMAN: You say, and I think rightly, that it is not

13 something which is a standalone consideration.

14 MR. SOUTHEY: Yes.

15 CHAIRMAN: Does the same apply then to the interests of 11:11

16 the next of kin, in other words that they are not a

17 standalone consideration? The reason I ask that is, as

18 we discussed yesterday, the requirement under Article 2

19 is to provide, in the language of the European Court,

20 some form of effective investigation. 11:12

21 MR. SOUTHEY: Yes.

22 CHAIRMAN: A component of an effective investigation is

23 obviously the involvement of the next of kin.

24 MR. SOUTHEY: Yes.

25 CHAIRMAN: They require to be involved to the extent 11:12

26 necessary to safeguard their legitimate interests;

27 that's the test we have been canvassing.

28 MR. SOUTHEY: Yes.

29 CHAIRMAN: So that's a component of an effective

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

11
12 "The Court considers it appropriate to specify that
13 compliance with the procedural requirements of Article
14 2 of the Convention is assessed on the basis of several
15 essential parameters: The adequacy of the 11:13
16 investigative measures; the promptness of the
17 investigation; the involvement of the deceased person's
18 family, and the independence of the investigation.
19 These elements are interrelated and each of them taken
20 separately does not amount to an end in itself, as is 11:13
21 the case in respect of the independence requirement of
22 Article 6 of the Convention. They are criteria which,
23 taken jointly, enable the degree of effectiveness of
24 the investigation to be assessed."

25 11:14
26 Now, there is nothing to quarrel with there, is there?
27 MR. SOUTHEY: well, I'm not going to disagree with
28 the -- well, I am not going to disagree with the
29 European Court of Human Rights, certainly at this

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

5
6 The case law does -- and I took you to Amin but there
7 is Strasbourg case law, Strasbourg judgments one after
8 another. The case law does go, we would say in
9 relation to the family, a little more specific in the
10 sense it does repeatedly use this language of 11:15
11 "involvement to the extent necessary to protect
12 legitimate interests."

13 CHAIRMAN: Yes.

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

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

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

20 CHAIRMAN: It is: 11:15

21
22 "... compliance with the procedural requirements of the
23 Convention is assessed on the basis of several
24 essential parameters: the adequacy of the
25 investigative measures, the promptness of the 11:15
26 investigation, the involvement of the deceased person's
27 family, and the independence of the investigation."

28
29 I mean, it just seemed to me the question then comes to

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

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

22
23 Yes, there is a degree of overlap; yes, there is a
24 degree of balance because we've accepted, for example,
25 that the requirement for legitimate involvement doesn't 11:17
26 mean you can't have a closed procedure, but the balance
27 comes in because once you depart from, if you like, the
28 normal model, and the normal model being attendance;
29 that's the way as a matter of domestic law we comply

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

11:18

6
7 Yes, it's not one-model-fits-all, there is plenty of
8 case law that makes that clear, but if the State is
9 departing from normal standards, safeguards need to be
10 put in place that ensure that basic principle of
11 legitimate interests is safeguarded.

11:18

12
13 I hope that answers the question.

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

11:18

17 MR. SOUTHEY: Thank you, my Lord.

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

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

11:19

25
26 AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

11:19

27
28 CHAIRMAN: Good morning, Mr. Skelt.

29

1 SUBMISSION BY MR. SKELT

2
3 MR. SKELT: Thank you very much, and thank you to my
4 colleagues for accommodating me out of order. I very
5 much appreciate it. Thank you. 11:34

6
7 Thank you. On behalf of Sir Ronnie Flanagan, sir, we
8 have considered in detail the submissions made by the
9 other Core Participants, both from the victims and also
10 from the State agencies, together with the very helpful 11:34
11 documents from the Inquiry's legal team.

12
13 Sir Ronnie has read with particular care the
14 submissions by the victims groups, particularly where
15 they seek the appointment of Special Advocates. I 11:34
16 should make this clear, that he is entirely sympathetic
17 to their requests, and acknowledges why they seek and
18 why they feel that there is a need for the appointment
19 of Special Advocates. Mr. Southey has already covered
20 that in some detail. It includes, of course, ensuring 11:34
21 that everything is done to put information into the
22 open. And if there has to be a closed process, then it
23 should be, as seems likely, as limited as possible.
24 And secondly, to ensure the interests both of the
25 victims and wider public are protected within those 11:35
26 closed proceedings.

27
28 Nothing I say on Sir Ronnie's behalf should be taken to
29 undermine any of the submissions made by the victims

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

5
6 Sir, as you will have seen from our short submissions,
7 Sir Ronnie does not himself seek the appointment of a
8 Special Advocate, subject to one caveat that I'll
9 mention in a moment. It's very important, lest it be
10 misunderstood that Sir Ronnie's submissions on the 11:35
11 appointment of Special Advocates for him reflect his
12 position as having been the Chief Constable at the
13 material time of the bombing, thus having had the
14 authority at that time to view much of the closed
15 material. That puts him, it may be thought, into a 11:36
16 slightly different category. We submit, sir, that it
17 is not unusual, in fact at all, for somebody in his
18 position in a later inquiry to have some role in closed
19 proceedings necessarily dependent on the individual
20 circumstances of an inquiry and the issues that a 11:36
21 witness or a Core Participant has to address.

22
23 With respect to the questions that we were asked to
24 comment upon, we do not intend to add to the extensive
25 submissions you have in writing and orally on whether 11:36
26 Special Advocates can lawfully be appointed, and indeed
27 by what process. We mean no disrespect by not adding
28 to that weight of learning.

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

9
10 The basis for that submission is, as I have alluded to 11:37
11 already, Sir Ronnie is in a somewhat different position
12 to the other Non-State Core Participants at this
13 Inquiry on principally the issue of the protection of
14 sensitive information. As the Chief Constable at the
15 time of the bombing, Sir Ronnie is likely to have had 11:37
16 authority to view the majority of the closed material
17 back then. Further, he may well have seen some of the
18 actual material to be considered in closed at this
19 Inquiry. He may be required to give evidence in closed
20 proceedings. We respectfully submit that as a 11:38
21 requirement of basic fairness, if he is expected to
22 give evidence in closed, he cannot simultaneously be
23 excluded from those same closed proceedings.

24
25 Moreover, and this has been touched on already, I 11:38
26 think, through Mr. Southey's submissions, if there is
27 material on which findings may be made which touch upon
28 directly or inferentially Sir Ronnie, he is required to
29 be given some notice of it and the ability to comment

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

10
11 We acknowledge, of course, that there may be classes of 11:39
12 material in the closed proceedings that he did not have
13 authority to see, even when he was Chief Constable, and
14 cannot properly be shown now, although of course that
15 cannot be known as yet. 11:39

16
17 We acknowledge, of course, that the State Core
18 Participants will have legitimate concerns about the
19 control of sensitive information but in Sir Ronnie's
20 case, we respectfully submit that is capable of 11:39
21 relatively straightforward conventional case
22 management, and orders around such matters as document
23 handling are entirely commonplace in inquiries that
24 have a closed element to them. As we have alluded to
25 in our short submissions, written submissions, members 11:40
26 of the legal team representing Sir Ronnie would, we
27 anticipate, have the necessary clearance level to see
28 the closed material or the majority of the closed
29 material in this case.

1
2 Sir, should you agree with our analysis - again to make
3 it entirely clear - Sir Ronnie is content that the
4 Inquiry legal team deal with the issues in closed but
5 that any closed material which is relevant to Sir 11:40
6 Ronnie is brought to his attention. We refer to Sir
7 Ronnie here meaning both him and his suitably cleared
8 legal representatives. That would, we submit, mean
9 Sir Ronnie has some involvement in closed proceedings,
10 should there, in fact, be the material that requires 11:40
11 his input, but only on a limited basis.

12
13 Similarly, if he is asked to give evidence in closed,
14 then he should be cited on the material relevant to
15 that process, and be legally represented. None of 11:41
16 those submissions, we hope, suggest or are intended to
17 suggest that an adversarial approach is taken to this
18 Inquiry, nor that Sir Ronnie himself is taking an
19 adversarial approach to this Inquiry.

20 11:41
21 We respectfully envisage that Sir Ronnie's role as
22 described can be readily managed on an ongoing basis.
23 Again, if that is right, we submit there will be no
24 necessity for a Special Advocate to be appointed for
25 him. 11:41

26
27 For the avoidance of doubt, we do not hold the view or
28 make the submission that Sir Ronnie and his legal team
29 should be given access to all the closed material, it

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

5
6 We are particularly mindful, sir, that the appointment
7 of Special Advocates necessarily carry advantages but
8 they also come with difficulties and restrictions, many
9 of which are very helpfully summarised and identified
10 in the Inquiry legal team's notes on the issue of 11:42
11 appointments on Special Advocates; I needn't repeat
12 those. But certainly in Sir Ronnie's case - and again
13 I focus entirely on him - for a Special Advocate to be
14 appointed for him, we envisage that those restrictions
15 are likely to cause more problems than the appointment 11:42
16 of a Special Advocate would cure, and that, properly
17 managed, he can have a level of involvement in closed
18 proceedings that are free from the restrictions that
19 arise from having a Special Advocate appointed on his
20 behalf. 11:42

21
22 Sir, for those reasons we do not respectfully see the
23 necessity for a Special Advocate to be appointed to
24 represent Sir Ronnie's interests. In the absence of
25 that identified necessity, we respectfully submit it 11:43
26 would be wrong to appoint one for him. However, the
27 caveat that I mentioned earlier is this: In the event,
28 sir, that the Inquiry decides to exclude Sir Ronnie
29 from all closed process and from all closed

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

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

24
25 Sir, that is essentially all we would wish to say, 11:44
26 brief though it is. We submit that there is no
27 necessity to appoint a Special Advocate for Sir Ronnie,
28 certainly not at this time. He can and should properly
29 be granted a role in closed proceedings, although it is

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

5
6 Short though that is, sir, I hope that is of assistance

7 CHAIRMAN: Thank you very much.

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

10 CHAIRMAN: I am grateful to you. Thank you.

11:45

11 MR. GREANEY: Sir, it would be good idea to have a
12 short break so that advocates can exchange positions.

13 May we suggest just a couple of minutes, following

14 which we will hear from Mr. Kane, who will make

15 submissions on behalf of the bereaved families and

11:45

16 survivors represented by John McBurney Solicitors.

17 CHAIRMAN: Right.

18
19 AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

20
21 CHAIRMAN: Good morning, Mr. Kane.

11:47

22 MR. KANE: Good morning, sir.

23
24 SUBMISSION BY MR. KANE

25
26 CHAIRMAN: When you're ready.

11:49

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

1
2 Further, our position is that Mr. Southey has very ably
3 and comprehensively covered the majority of the legal
4 points which we made, together with many others which
5 were contained in his submission, and we gratefully 11:50
6 adopt his arguments in those respects which support our
7 position. There will be one or two matters which I
8 will touch upon in our brief submission orally.

9
10 Can I first of all, just by way of preliminary, say 11:50
11 that you raised, or rather counsel to the Inquiry
12 indicated that if the Attorney refused to appoint a
13 Special Advocate, that things would get messy.
14 Yesterday, you, sir, used the procedure whereby
15 appointments were made. While we made an application 11:50
16 for a Special Advocate, we do agree with your
17 interpretation that essentially you make a request and
18 not an appointment, and we are at ease with that.

19
20 But we also say, however, that whether or not things 11:51
21 might get messy, whether there might be legal arguments
22 to be made, would not be a reason for the refusal of
23 the application for a Special Advocate.

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

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

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

1 MR. KANE: Right.

2 CHAIRMAN: -- who would actually do the appointing,
3 whether it would be me or whether it be the relevant
4 law officer. Now, I think we are at one, it should be
5 the relevant law officer.

11:51

6 MR. KANE: Yes.

7 CHAIRPERSON: If it's messy for him, that's his
8 problem.

9 MR. KANE: That's succinctly put, sir. I agree with
10 that. My apologies if I'm wrong about it being
11 Mr. Greaney but there you are.

11:51

12
13 There was much discussion about the conflating of
14 adversarial description and the inquisitorial role of
15 the Inquiry. Can I say, sir, that obviously that
16 formed part of the debate yesterday. This Inquiry has
17 a huge task involving what will probably be a large
18 amount of material which will probably again fall into
19 the closed section. We're content to say that as the
20 Act suggests, you have to look at fairness. Much was
21 said yesterday, many cases were cited, and the issue of
22 fairness in various contexts arose, but we say it's for
23 you as chairman to look at fairness; to have a feel for
24 fairness; to consider the essence of fairness in the
25 context of this Inquiry, glean assistance from all
26 the help which you obtained yesterday from the various
27 authorities which were opened, and which you may or may
28 not obtain from what the various representatives may
29 say to you.

11:52

11:52

11:53

1
2 we do say that we've no doubt as to the role which we
3 have in representing our clients, bereaved families and
4 injured survivors. In the course of this Inquiry,
5 there will be disappointment, there will be 11:53
6 disagreement, and that can cause an adversarial mindset
7 to wrongly develop but we fully accept it does not
8 change the nature of the process.

9
10 we make these submissions to you today from an invited 11:54
11 position to do so, to make an application for a Special
12 Advocate, and thereafter we hope to assist you to reach
13 a decision on that matter. But we would, however, also
14 invite you to take the view that it is best to go
15 forward clothed with the support, confidence and trust 11:54
16 of the families, feeling that fairness has been
17 involved and is paramount in reaching the decision on
18 the question of Special Advocates.

19
20 we also say there are certain core values at play in 11:55
21 this application which could potentially be at risk
22 because of the prominence of the many legal arguments.
23 Our application is not for some sort of trumping one
24 argument over another, but I want to say to you this,
25 sir: what I say is based on firm instructions taken 11:55
26 after lengthy and detailed consultation with our
27 clients, and they may appear as if they are, for want
28 of a better word, lay submissions almost, but they are
29 core values which they feel are at stake. Essentially

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

3
4 However, if there must be closed material as is
5 provided for by Section 19, then we say it should, 11:55
6 where possible, be kept to a minimum. As I said to
7 you, sir, in the course of my opening statement, if
8 judgments are to be made, then close calls must fall on
9 the side of disclosure rather than being hidden from
10 our families' view. 11:56

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

23
24 Regrettably, the indications already given by State
25 Core Participants, as referred to also in my opening 11:57
26 statement, do little to inspire confidence in the
27 approach of those Core Participants to dealing with
28 material which is 26 plus years old.

1 Sir, my clients' instructions on Special Advocates were
2 very simple, uncomplicated, and easy to follow.
3 Essentially if it's help additional to the Inquiry
4 legal team, then they want that help as additional,
5 supplementary and complementary, and it should not be 11:57
6 seen as a challenge to anyone in this room or to any
7 authority.

8
9 We recognise, sir, that you have a very wide
10 discretion. Discretion has been defined as to do as I 11:58
11 please. Now, obviously within this context, it's just
12 not as wide and there has be an exercise of discretion
13 within lawful parameters, but the Inquiries Act did not
14 legislate either way on the issue of Special Advocates.

15 11:58
16 You, sir, under the Act, control not only the procedure
17 but also the conduct of this Inquiry. The families
18 look to you on this issue and say that the decision on
19 the application of Special Advocates is a critical
20 decision, it's for you to take, and it's within the 11:58
21 ambit of the conduct of your Inquiry.

22 CHAIRMAN: well, that's what they say; I understand
23 that very easily. The more difficult question might be
24 for me to determine whether or not that's the right
25 question. 11:59

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

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

12:00

5
6 The point has been made that Special Advocates aren't
7 necessary because of the task which the Inquiry legal
8 team can do, but we've already reached the situation
9 where the families are legally represented. If that
10 argument was taken to an illogical end, then we'd only
11 have you, sir, and counsel to the Inquiry and
12 solicitors. What we're saying is that, by its logical
13 extension, should mean that Special Advocates are
14 granted.

12:00

15
16 The families posed a simple question to us and we feel
17 under a duty to replicate that to you. That is, what's
18 the rationale in allowing us their legal representation
19 to assess material which is open and has been open to
20 the world for years, but then seek to deny us, as their
21 representatives, the Special Advocates as their
22 representatives, access to the closed material, albeit
23 accepting that there are necessary limitations to the
24 role of a Special Advocate?

12:01

25
26 Again, put simply from their point of view, they will
27 look around at everyone else in this room and they'll
28 see they are all going to get into the room with the
29 closed material and they are being excluded.

12:01

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

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

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

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

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

6
7 Now, we'll see how this all unfolds. But if that's
8 right, if it's right that there is no power, then there
9 is nothing I can do about that. That is a legal
10 conclusion that requires to be arrived at, regardless 12:04
11 of whether one likes it or not and regardless of
12 whether it's the outcome which the families would wish.
13 Regardless of whether it is the outcome I would wish
14 for them, it is a legal issue. All I'm saying is that
15 yes, of course I understand you tell me what the 12:04
16 families want, but what the families can get is
17 governed by the legal rules.

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

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

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

26
27
28 Dealing with the practicalities perhaps of special
29 Advocates, can I just say that our submission is that

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

9
10 So, they have a very critical role to serve on behalf 12:06
11 of the Core Participants who are the bereaved families
12 and injured survivors. I'm not saying this as a
13 criticism but I'm saying this as not knowing, and that
14 is we do not know the scale and depth of the Special
15 Advocate experience of the members of the Inquiry legal 12:06
16 team. All I would say is that being vetted and being
17 approved for such work does not equate with years of
18 experience, or expertise.

19
20 Going on from that point, sir, I want to make a point 12:06
21 again which I do hope is not taken by anyone in the
22 wrong way, as we would say in this part of the world,
23 and that is that much has been made of the expressions
24 of confidence in the Inquiry legal team. Can I say
25 this, and it's not to introduce a discordant note, 12:07
26 confidence in any situation is never unconditional.
27 Confidence is an ongoing matter and it may ebb and flow
28 as to the level of the confidence which exists.

1 we have to say, and I want to be quite frank with you,
2 sir, that we put in our written submission on
3 14th April; on 15th April, the Memorandum of
4 Understanding was published. I do have to say on
5 behalf of the people whom I represent that that did
6 dent the confidence of our clients in the Inquiry, and
7 the decision to sign up to the Memorandum of
8 Understanding, and that's something which may ebb and
9 may flow.

12:08

10
11 we also say that our trust in how the Inquiry will
12 progress may ebb and flow depending upon what is
13 essentially seen over the course of the next number of
14 months and years. Again this is not to be taken as a
15 criticism, we do also have concerns about the enormity
16 of the work of the Inquiry, and we do see our role not
17 as challenging in a negative sense but in assisting the
18 Inquiry. We have already been doing that. We have
19 sent various queries which we have identified, for
20 instance, in the tranches of documents where we have
21 identified documents which were incomplete or missing.
22 We don't view that or do that out of criticism or lack
23 of confidence but we do that to assist. The point that
24 I am making is that it's not unconditional confidence.

12:09

12:09

12:09

25
26 Can I say that at this point there is, as it were, a
27 situation where it's a chance, it's the best possible
28 chance, to ensure that in the exercise of your
29 discretion, ultimately Core Participants should not be

1 left with doubts about the work of the Inquiry, or, at
2 the end of it all with, "if only" misgivings about why
3 they had not any representation separately at the
4 closed hearings. That's against the background where
5 previous reviews and reports have left a bad taste in 12:10
6 the mouth of the victims of Omagh, where corners have
7 been cut and hard questions were ducked by other
8 bodies.

9
10 Finally, sir, can I deal with the practicalities of 12:11
11 separate representation for differing Core
12 Participants. I accept totally that if you are of a
13 mind that Special Advocates should be appointed, or
14 recommended for appointment, that the question as to
15 how many or in what shape they should take will have to 12:11
16 be considered. But again I want to say this with
17 sensitivity: The Core Participants of bereaved
18 families and survivors have been and will always remain
19 united in grief, but we all have to acknowledge that
20 there are differences that have emerged over the past 12:12
21 number of years, and those differences have evolved as
22 to emphasis, priorities and concerns regarding certain
23 matters.

24
25 You will know from the various hearings which have 12:12
26 already taken place that the Core Participants we
27 represent have a very distinctive view in the issue
28 concerning the involvement of State authorities in the
29 Republic of Ireland, and you will have heard in my

1 opening statement that we encourage the Inquiry to have
2 particular emphasis on the Terms of Reference at
3 paragraph 2I.
4

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

25
26 Those, sir, are the concerns which we wish to place
27 with you. We wish you well in drawing together all the
28 various strands which will go to your decision as to
29 where fairness leads you on the question of Special

1 Advocates.

2
3 Thank you very much.

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

12:15

8 MR. KANE: I do, yes.

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

12:15

13
14 In paragraph 11 of your submissions, you explain that
15 you would see the authority for requesting appointment
16 to lie in Section 17 of the Act. You give some
17 examples of where Special Advocates have been appointed
18 in other circumstances. One of which is the case of
19 Tariq. Now, as I would understand Tariq, there was
20 power within the Employment Tribunal rules of procedure
21 to order that there should be a closed hearing, and
22 then the Employment Tribunal's national security rules
23 of procedure, which were then in force, specifically
24 gave power to the Attorney General to appoint a Special
25 Advocate when a closed hearing had been fixed. So,
26 specific power to order closed hearings and specific
27 power to appoint a Special Advocate, all in the context
28 of adversarial proceedings.

12:16

12:16

1 So, in the case of Tariq, we have an example of
2 proceedings in adversarial context which provide for
3 both closed hearings and the express appointment of a
4 Special Advocate. By way of comparison, in the Inquiry
5 Act proceedings, we have an example of inquisitorial 12:17
6 process providing for closed hearings but making no
7 express provision for the appointment of Special
8 Advocate.

9
10 I rather suspect the Secretary of State might say that 12:17
11 that's an example of a comparison between one set of
12 provisions governing closed procedures and another set
13 which demonstrates the absence of a power to appoint in
14 the second set. So, why do you say that Tariq, in
15 fact, does the opposite and vouches the presence of a 12:17
16 power?

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

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

12:19

6 CHAIRPERSON: All right. Thank you.

7
8 Should we adjourn briefly again?

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

12:19

14 CHAIRPERSON: Thank you.

15
16 AFTER A SHORT BREAK THE INQUIRY RESUMED AS FOLLOWS:

12:21

17
18 CHAIRMAN: Mr. McAleer, good afternoon.

19
20 SUBMISSION BY MR. McALEER:

21
22 MR. McALEER: My name is McAleer, I appear along with
23 Mr. McGuckin, led by Mr. Toal. As you are aware, sir,
24 we are instructed on behalf of Core Participants
25 represented by Logan & Corry Solicitors, Roche McBride
26 Solicitors, and Campbell & Haughey solicitors.

12:24

27
28 Can I say, sir, we are grateful and indebted to
29 Mr. Southey and the Fox Law team for their detailed and

1 comprehensive submissions, and we wish to adopt those
2 on behalf of the Core Participants for whom we appear.
3 Given the change in the running order this morning, we
4 have also had the benefit of submissions by Mr. Kane,
5 and I endorse those fully in respect of our Core
6 Participants in respect of what he has said, for
7 fairness, your worship. I beg your pardon, Chairman.

12:24

8
9 unless you, sir, have any questions for me, those are
10 the limit of the submissions I intend to make.

12:24

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

14 MR. MCALEER: Yes.

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

12:25

20
21 "The deep mistrust and suspicion of the State that
22 exists in this country will never be fully allayed
23 unless it is confirmed that every single document and
24 piece of information is placed into the open."

25
26 In paragraph 7, you say:

27
28 "Whilst others may concede and accept that closed
29 procedures are necessary", that's not the view of your

1 Core Participants.

2
3 Now, I really just need to understand what you want me
4 to take from that. Why do you tell me that every
5 single document or piece of information needs to be
6 placed into the open? 12:26

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

14
15 Now, we fully accept that the obligations under Article 12:26
16 2 do not require all Core Participants public access to
17 all parts of the Inquiry proceedings. We are simply
18 trying to convey, as Mr. Kane did a few moments ago,
19 the primary view, or perhaps aspiration, of the Core
20 Participants we represent, is that this Inquiry should 12:27
21 be in public in everything that it does. We accept, as
22 I say, there is a limitation on that. That paragraph
23 is an attempt to address that so that you, sir, are
24 aware of what our instructions are from the Core
25 Participants we represent. 12:27

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

29 MR. MCALEER: Absolutely, sir.

1 CHAIRMAN: Just to take an example, if there was, for
2 example, intercept material to be led, is it not clear
3 that the law doesn't permit that type of evidence to be
4 led in open sessions in an inquiry?

5 MR. MCALEER: I agree. The IPT is clear on that. 12:27

6 CHAIRMAN: It must be part of your function to explain
7 the legal rules that apply to the Core Participants,
8 mustn't it?

9 MR. MCALEER: I agree, my Lord.

10 CHAIRMAN: So what am I to make then of the proposition 12:27
11 that every single document and piece of information has
12 to be placed into the open?

13 MR. MCALEER: Again, I don't want the perhaps clumsy
14 expression to take away of either our faith in the team
15 appointed or in the processes which this Inquiry must 12:28
16 adopt. The intention behind those paragraphs, as I
17 say, my Lord, is to try and address the concerns
18 expressed by our Core Participants that things will
19 never be made known to them which should be made known
20 to them. 12:28

21
22 The corollary of that or the potential assistance that
23 a Special Advocate would provide is that there will be
24 reassurance given to the Core Participants that there
25 is someone present at those hearings specifically 12:28
26 tasked with protecting their interests.

27 CHAIRMAN: All right. You tell me two other things
28 which I'd like to ask you about. You tell me that the
29 power to appoint Special Advocates is obvious from the

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

12:29

6
7 Now, I canvassed the case of Roberts with Mr. Southey
8 yesterday, and maybe it's clear that what you say is
9 obvious about Roberts may not be quite so obvious to
10 others. Is there anything further that you want to say 12:29
11 about Roberts to help me to understand why it's obvious
12 that the power to appoint Special Advocates is evident
13 there?

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

24
25 The issue we are trying to address is that if there is 12:30
26 a principle - I am very ably assisted by Mr. Southey in
27 his submissions - that where there is a procedure where
28 it will be restricted access in restricted hearings in
29 respect of certain material and there is a right or a

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

12:31

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

8 MR. MCALEER: Thank you, sir.

9 CHAIRMAN: Mr. Greaney.

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

12:31

14 CHAIRMAN: Thank you.

15
16 AFTER A SHORT BREAK, THE INQUIRY RESUMED AS FOLLOWS:

17
18 SUBMISSION BY MR. MANSFIELD KC

19
20 CHAIRMAN: Good afternoon, Mr. Mansfield.

12:35

21 MR. MANSFIELD: Good afternoon.

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

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

25 CHAIRMAN: Would you be more comfortable sitting down?

12:35

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

28 CHAIRMAN: Please, whatever feels more comfortable.

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

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

3 CHAIRMAN: Yes.

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

17
18 Implicitly, obviously, there are various matters that
19 can be inferred from our not asking. But there is one
20 caveat to that, if I may just develop it, because 12:36
21 listening carefully to arguments that have already been
22 put before you, I think the Rush family are concerned
23 in relation to if you have or consider you do have the
24 power and you do exercise the discretion to appoint
25 Special Advocates, the problem that the Rush family 12:37
26 would like you to consider alongside - I'm sure you
27 will - is the question of delay. Because you have
28 heard a situation described, in fact this morning but
29 also before today, and Mr. Greaney has already

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

11
12 That in itself, that is the number of advocates that
13 may be involved in the process, but then there is the
14 premises. We've heard about predictions of when things
15 will become available in the past. Again, there is a 12:38
16 commitment but again it's not entirely clear whether it
17 will be available. You have not only the number and
18 identity, but also the premises.

19
20 Of course, the actual operation is also subject to 12:38
21 delay because I want to posit the situation, which I
22 hope is a practical one, whereby let us suppose there
23 is bound to be more than one Special Advocate, they are
24 going to have to read the material. Now, in this case
25 the Terms of Reference are important because they are 12:38
26 very focused, they are very clear what they concern,
27 and that is the central issue of preventability. The
28 Terms of Reference - I'm not going to read them out
29 because you are very clear about what they are - but in

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

7
8 So the process, even once they are appointed, even when
9 they've found premises, there is going to be the risk
10 of more delay while these matters are read up, as it 12:39
11 were. There is in some of the authorities the
12 suggestion that Special Advocate turns up to the open
13 hearings and listens to -- well, in adversarial how the
14 case is put, but in this one it would be the context in
15 which materials are being not disclosed or disclosed, 12:39
16 because the very first Term of Reference deals with a
17 risk assessment. So, if there is closed material in
18 relation to that, you have to know what the risk
19 assessments were saying.

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

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

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

9
10 This leads into - and I assure you now I am going to 12:41
11 finish before lunch, well before lunch - it leads into
12 a co-related issue. It is, I think, part of Mr. Kane's
13 written submissions, that his primary contention - and
14 we would agree with this - is as much material as
15 possible should be held in open, for obvious reasons. 12:41
16 I don't need to elaborate, you have already mentioned
17 them yourself.

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

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

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

13
14 whereas in this case as you will go through the Terms
15 of Reference, one hopes that the mantra that is often 12:43
16 put up, namely it is not in the interests of national
17 security, you will apply a framework, a template of
18 rigorous scrutiny as to whether that really is the case
19 after all these years, that assessments that were made
20 nearly 30 years ago have a risk to national security 12:43
21 now. I don't need to go further because I think the
22 point makes itself.

23
24 If I may just deal with this as an add-on to that. The
25 questions that would arise in relation to any documents 12:44
26 can be dealt with in this case, we say, not only by
27 Mr. Greaney himself - I have made that clear already -
28 but there is a procedure which perhaps I'm sure you
29 will have read but you might like to bear in mind.

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

12:44

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

21
22 But paragraph 158 onwards, Mr. Hermer suggested:

23
24 "A solution to the admitted problem of the need to
25 protect national security material was the proposal of 12:46
26 holding hybrid hearings with military witnesses" - most
27 of them were concerned with that in the Afghanistan
28 one - "with military witnesses giving evidence partly
29 in open and partly in closed."

1
2 Then the arguments are set out on that page 1293, an
3 analysis.

4
5 Again, to save time I don't read them all out but you 12:46
6 will see the arguments in favour of a hybrid hearing do
7 apply to this particular inquiry, the one that you are
8 handling yourself, because we say not all the witnesses
9 are going to be in the same category.

10
11 what happened in Novichok was this: That Hughes LJ,
12 who was chairing, where the issue was exactly the same
13 as this one, preventability, developed. I think it
14 wasn't the subject of discussion, it just happened
15 rather like Topsy, that once I started asking 12:47
16 questions, for example, police officers in charge of
17 the scene in Salisbury - one of the two scenes, the
18 other one was Amesbury - what was allowed in our case
19 was since I was dealing with preventability, it was
20 agreed that I could ask the questions in public myself 12:47
21 on behalf of the family as to what questions had to be
22 answered. Obviously I wouldn't necessarily get an
23 answer each time. The Chair would say 'I think
24 Mr. Mansfield, no, or yes or whatever'. It was done
25 very much on an informal basis but it worked in the 12:48
26 sense that occasionally a witness would stop, the Chair
27 would say, well, I think you can answer that one, or
28 there would be a gist, I would be given a gist of what
29 was, you know, the material that I couldn't see. But

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

7
8 Now, it's akin to a hybrid hearing of the kind that is
9 set out here, although it was rejected for reasons that
10 it would be really impossible to operate in the 12:48
11 Afghanistan case. But we say in this case, that system
12 could be operated, as it were, as a kind of back-up to
13 the argument. I don't predispose what your decision
14 would be as to whether you can appoint as a matter of
15 power and whether you are going to as a matter of 12:49
16 discretion in particular cases. I am not going to
17 preempt that, I am just suggesting in terms of the
18 cases I am putting, namely I am not asking for a
19 Special Advocate and I am not saying provided I can ask
20 these questions either, but this is a potential further 12:49
21 down the line that we would want to be arguing, as I
22 did in Novichok, because you might get a category of
23 document that I'm told about - I am not told what they
24 are, just a category - and then I could make
25 submissions on the category. Even if it was going to 12:49
26 save time, I would tell Mr. Greaney, for example here,
27 what the concerns would be that I can't air them
28 publicly but he could deal with it in a closed session.
29

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

5
6 That is all I would want to say at this stage
7 CHAIRMAN: Thank you, Mr. Mansfield, that is helpful.
8 I will give you close consideration to your explanation
9 about the hybrid system, and I'll read what was said in
10 the Afghan case about that. Thank you.

11 MR. MANSFIELD: Yes, certainly.

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

15 CHAIRMAN: Yes. Thank you.

16
17 THE LUNCHEON ADJOURNMENT

18
19 THE INQUIRY CONTINUED AT 1:45 P.M.

20
21 CHAIRMAN: Mr. Greaney.

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

25 CHAIRPERSON: Good afternoon Mr. McKay.

26
27 SUBMISSION BY MR. MCKAY

28
29 MR. MCKAY: Good afternoon, sir. You have the

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

5
6 The Police Ombudsman, as you know, is neutral on the
7 question of whether a Special Advocate or Advocates
8 should be appointed, although it is submitted it is
9 open to you to appoint if you consider it necessary to
10 do so. The written submissions and these additional 13:46
11 short oral submissions are designed to assist the
12 Inquiry in identifying the relevant legal principles
13 and contribute to your resolution of the issues as set
14 out in the series of questions posed by the Inquiry
15 legal team. 13:46

16
17 Can I emphasise if you do not think they assist you,
18 please, of course, disregard them.

19
20 The Inquiry has invited submissions on three broad 13:46
21 areas. First, the existence or not of a power by an
22 inquiry established under the 2005 Act to appoint a
23 Special Advocate. Second, if there is a power to do so
24 the factors relevant to the exercise of that power.
25 Third, the practicalities of doing so. 13:47

26
27 The following submissions augment and clarify where
28 necessary the Police Ombudsman written submissions.
29

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

13:47

7
8 Of the many examples provided, none serve a like
9 purpose to the 2005 Act, which, as the explanatory note
10 to the legislation makes clear, is "provide a
11 comprehensive framework for inquiries set up by
12 ministers to look into matters of public concern."

13:48

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

13:48

13:48

22
23 "Lord Salmon's observation on public versus private
24 evidence gathering was succinct. Secrecy increases the
25 quantity of the evidence but it debases its quality.
26 The counsel on tribunals considered that in principle,
27 it seems right that an inquiry into a matter of public
28 concern should itself be conducted in public unless
29 there is a strong public interest in the Inquiry or

13:49

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

13:49

7
8 CHAIRMAN: I'm just a little behind you, I think,
9 Mr. McKay. Are we looking at the Effect of Inquiries
10 consultation paper?

13:49

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

13 CHAIRMAN: The final report.

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

13:50

21 CHAIRMAN: Yes. Yes, that's fine.

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

13:50

13:50

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

5
6 The avowed aim, of course, of this Inquiry has been as
7 much of the evidence will be heard in public as
8 possible.

9
10 Making express provision for the appointment of a
11 Special Advocate in the 2005 Act would be, in my
12 submission, to acknowledge that the use of restriction
13 orders or notices would be sufficiently prevalent such
14 that provision was a necessary prerequisite. This
15 would be inconsistent with its legislative purpose and
16 could undermine public confidence.

17
18 There is a distinction between the legislation referred
19 to in counsel to the Inquiry's note dated 17th June
20 2025 and a statute that has the investigation of
21 matters of public concern at its heart. Lord Bingham
22 at paragraph 21 of R-v-H - I don't need you to look it
23 up, sir, unless you want to but it's a case I know you
24 are very familiar with after the submissions you have
25 heard - the page reference is 215 of the bundle of
26 authorities. In that case, Lord Bingham recognised
27 this distinction between proceedings brought under
28 several of the statutes referred to by counsel to the
29 Inquiry that at least existed at the time H was

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

3
4 If there is commonality, this is to be found to a
5 limited extent not in the raft of statutes that 13:52
6 expressly provide for the appointment of Special
7 Advocates, but in the criminal trial and inquiry under
8 the 2005 Act. Both proceed, in my submission, on a
9 presumption of open justice and to get to the truth,
10 even if they do so in different ways through 13:52
11 adversarial and inquisitorial modalities.

12
13 For these reasons, it is submitted that no significance
14 should be given to the fact that the 2005 Act is silent
15 on the use of special Advocates on a basis to infer 13:53
16 that one or more could not be appointed. Indeed, the
17 omission of express permission to do so is in harmony
18 with the expectation that a restriction or notice will
19 be used as the exception and not the rule.

20 13:53
21 The Police Ombudsman, in her written submission,
22 submitted that your power to appoint, and it is
23 submitted you do have such a power if it becomes
24 necessary to use it, derives from section 17(1) and (3)
25 of the 2005 Act. It is very familiar to us all but 13:53
26 it's worth repeating:

27
28 "The procedure and conduct of any inquiry are such that
29 the Chairman of the Inquiry may direct. And,

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

5
6 The appointment of a Special Advocate is procedural in
7 nature. Chahal v UK at 131, which has not, in fact,
8 made its way into the authority bundle but is cited by
9 a number of the other cases including Roberts at page
10 278 of the bundle makes this plain. This is the Court
11 in Chahal :
12

13 "The Court recognises that the use of confidential
14 material may be unavoidable when national security is
15 at stake. This does not mean however that the national
16 authorities can be free from effective control by the
17 domestic courts whenever they choose to assert that
18 national security and terrorism are involved, but there
19 are techniques which can be employed which both
20 accommodate legitimate security concerns about the
21 nature and sources of intelligence information, and yet
22 accord the individual a substantial measure of
23 procedural justice. "
24

25 You are, therefore, sir, the master of your own
26 procedure subject only to a requirement to act
27 compatibly with the Human Rights Act 1998, and the
28 usual well-established public law standards.
29

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

13:55

8
9 The appointment of a Special Advocate for --

10 CHAIRMAN: what's the authority for that, Mr. McKay?

13:55

11 MR. MCKAY: I beg your pardon, sir?

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

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

13:56

13:56

23 CHAIRPERSON: But I am not a court.

24 MR. MCKAY: No, you are not but you are a public
25 authority for the purposes of the Human Rights Act,
26 sir.

13:56

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

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

13:56

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

9 MR. McKAY: well, those affected by the derogation,
10 sir.

13:57

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

13:57

18 MR. McKAY: Sir, yes.

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

13:57

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

13:58

28 CHAIRMAN: Yes.

29 MR. McKAY: The appointment of a Special Advocate or

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

13:58

7
8 Sir, the Police Ombudsman also explored as an
9 alternative position whether Section 18 of the 2005 Act
10 could, if necessary, be read down in accordance with 13:59
11 Section 3 of the Human Rights Act to permit the
12 appointment of the Special Advocate. This was in
13 response to the question posed by the Inquiry legal
14 team exploring possible legal bases for appointment,
15 and was designed to assist. Counsel to the Inquiry has 13:59
16 questioned whether this submission is correct. In
17 light of the role the Police Ombudsman is attempting to
18 play in these proceedings, and in particular on this
19 issue and her position on the scope of Section 17, it
20 is not a submission I propose to pursue as it strikes 13:59
21 me that it is now, if it ever was, unlikely to assist
22 you.

23 CHAIRMAN: All right. Thank you.

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

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

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

14:00

6 MR. MCKAY: Of course, sir.

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

14:00

14:00

19 MR. MCKAY: Is this paragraph 12 of the written
20 submissions, sir?

14:01

21 CHAIRMAN: In paragraph 12 you tell us that Section 17
22 gives a power, in your submissions. Then at paragraph
23 16, you say it's not relevant to the question of
24 whether a power exists that the Inquiry operates on an
25 inquisitorial basis. What I was -- am I misreading
26 you?

14:01

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

1 CHAIRMAN: You say the power could arise from Section
2 17.

3 MR. McKAY: Yes. That's in response to the third
4 question proposed by the Inquiry team given the absence
5 of an expressed power. 14:01

6 CHAIRMAN: Yes. Is there a power; is that what it
7 comes to?

8 MR. McKAY: Yes.

9 CHAIRMAN: Then following that through, you say that
10 it's not relevant to the question of whether a power
11 exists that the process is inquisitorial. 14:02

12 MR. McKAY: I don't think it's relevant to whether the
13 existence of a power exists. I do think it's relevant
14 to how you exercise the power.

15 CHAIRMAN: I follow what you say but what I am
16 wondering about is why it's not relevant to the
17 question of power because unless I'm wrong, it seems to
18 me that every other statutory scheme which provides for
19 the appointment of a Special Advocate is a scheme which
20 operates within adversarial proceedings. Now, is that
21 right, do you think? 14:02

22 MR. McKAY: I think that happens to be the pattern of
23 the way that the law has evolved. I think it's a
24 feature of public inquiries or inquiries under the Act
25 that they are not adversarial and, therefore, this
26 issue arises when it has in the various inquiries that
27 have been referred to. I also think it's why some of
28 those inquiries have reached the conclusion that the
29 power exists, but I don't think one could identify as a 14:03

1 principle that the power only can arise in adversarial
2 proceedings.

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

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

23 CHAIRMAN: You also seem to suggest something which I
24 think is additional to the route suggested by the
25 families as to how a Special Advocate might be 14:04
26 available. What I think you suggest is that under Rule
27 6, a Special Advocate could be appointed as the
28 recognised legal representative for the purposes of
29 closed hearings only. Or, alternatively, that a

1 Special Advocate could be appointed as part of the
2 legal team in terms of Rule 8?

3 MR. McKAY: Yes.

4 CHAIRMAN: That's a route to appointment of Special
5 Advocate, you would say?

14:05

6 MR. McKAY: well, sir, can I say this: The approach
7 that's been taken by the legal team in the exploration
8 of these issues is a Q&A approach and it's very helpful
9 and very constructive. One of the things that

10 certainly the Police Ombudsman took from that is there
11 should be an effort to consider all of the options.

14:05

12 what she isn't doing in a partisan way is making
13 representations or submissions to you that this is
14 definitely a route or it's one that commends itself to
15 you, but in a sense they are considerations that need
16 to be given.

14:05

17 CHAIRMAN: well, I understand that. That's why I'm
18 asking you about it because if this is a route, then
19 I'll need to give consideration to it. I realise you
20 are not saying to me this is the route you should
21 necessarily follow, but if it's a route that's
22 conceivably available, then I should think about it.

14:06

23 MR. McKAY: Yes.

24 CHAIRMAN: So Rule 6, you say, could allow a Special
25 Advocate to be appointed as the recognised legal
26 representative for the purpose of the closed hearing.

14:06

27 I struggle with that because it seems to me to be
28 inconsistent with the fact that Special Advocates can
29 only be appointed by the relevant law officer, and that

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

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

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

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

14 CHAIRMAN: You are not pressing that?

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

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

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

29 CHAIRMAN: You want to look at the 2016 Act?

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

3 CHAIRMAN: Good.

4 MR. MCKAY: -- more constructively than I have a sense
5 I have so far.

14:08

6
7 The position of the Police Ombudsman is this: If a
8 Special Advocate is in principle capable of being
9 appointed, we agree with the analysis provided by
10 counsel to the Inquiry that paragraph 22 of Schedule 3
11 of the Investigatory Powers Act 2016 does not empower
12 you as chairman to make a disclosure to a Special
13 Advocate. That would contravene Section 56 of the Act.
14 Section 56 makes provision, of course, for the
15 exclusion of material derived from interception related
16 conduct subject to Schedule 3. However, sir, as I have
17 identified in the submissions, I think there is a
18 potential route to enable such a disclosure to be made,
19 albeit not by you but by your legal adviser.

14:08

14:09

20
21 Assuming hypothetically the existence of intercept
22 arises in this Inquiry and you order disclosure of it
23 to your legal advisers in accordance with paragraph
24 22(1) of schedule 3, consideration could be given as to
25 whether a disclosure by the solicitor to the Inquiry to
26 a Special Advocate would be permissible. Can I invite
27 you, sir, to turn to page 74 of the bundle of
28 authorities? This is section 57 of the 2016 Act.

14:09

14:09

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

1 convenient.

2 MR. MCKAY: Absolutely.

3 CHAIRMAN: So section 57?

4 MR. MCKAY: Section 57. I'll read in for the record
5 the relevant parts of that provision. 14:10

6
7 "Section 57, duty not to make unauthorised disclosures.
8 57(1). A person to whom this section applies must not
9 make an unauthorised disclosure to another person. (2)
10 a person makes an unauthorised disclosure for the 14:10
11 purpose of this section if (A), the person discloses
12 any of the matters within (4) in relation to (i), a
13 warrant under chapter 1 of this part." That's part one
14 of the IPA -- sorry, part 2 of the IPA.

15 14:10
16 "Or, a warrant under chapter 1 of part 1 of the
17 regulation of Investigatory Powers Act 2000. And (2)
18 the disclosure is not an accepted disclosure. (3) this
19 section applies to the following persons: (f) any
20 person to whom any of the matters within (4) have been 14:11
21 disclosed in relation to a warrant mentioned in
22 subsection 2(a)."

23
24 Just pausing there, sir, the warrants mentioned in 2(a)
25 do not include a warrant under the 1985 Interception of 14:11
26 Communications Act. But can I point this out in the
27 hope that it assists: There is a deeming provision in
28 the Regulation of Investigatory Powers Act at 82(4),
29 which deems in certain circumstances a warrant under

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

4 CHAIRMAN: Where is the deeming provision?

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

14:12

6 CHAIRMAN: I wonder if that then ties in with something
7 I was uncertain about. You tell us that Section
8 56(4)(d)(ii) applies to the incompetent inquiry?

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

14:13

11 CHAIRMAN: Yes.

12 MR. McKAY: Yes.

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

14:13

18 MR. McKAY: Yes, sir.

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

14:13

23 MR. McKAY: Or potentially both, yes.

24 CHAIRPERSON: Yes.

25 MR. McKAY: Depending on the investigative elements
26 that you will no doubt examine, it is theoretically
27 possible that we might be dealing with the period after
28 2nd October 2000 when the Regulation of Investigatory
29 Powers Act repealed the 1985 Act and comments to have

14:13

1 effect.

2 CHAIRPERSON: why does section 57(4)(b) not apply?

3 MR. McKAY: 57?

4 CHAIRMAN: 56(4)(b).

5 MR. McKAY: It could apply, sir. I hope I haven't 14:14

6 suggested that it -- I hope my submission doesn't just

7 suggest that the --

8 CHAIRMAN: well, you said it doesn't in paragraph 25,

9 you've said the conduct set out in 56(4)(b) does not

10 arise. 14:14

11 MR. McKAY: Sorry, yes, that's because the offence in

12 the 1985 Act was different to the offence in the

13 subsequent legislation. I think the offence in the

14 1985 Act was to intercept; the interception, unlawful

15 interception, without a warrant. There would be no 14:15

16 question here of interception taking place without a

17 warrant.

18 CHAIRMAN: It was conduct that would be unlawful in the

19 absence of a warrant?

20 MR. McKAY: Yes. 14:15

21 CHAIRMAN: Is that not the same as what we have in

22 Section 56(2)(a)?

23 MR. McKAY: well, Section 56(2)(a) deals with the

24 concept of lawful authority, which didn't exist in the

25 1985 Act, and which makes provision for a number of 14:15

26 forms of lawful authority, one of which does include a

27 warrant that has been properly issued under the Act.

28 CHAIRMAN: It tells us what interception-related

29 conduct is. It is conduct that is, or in the absence

1 of lawful authority, would be an offence.

2 MR. McKAY: Yes.

3 CHAIRMAN: And that's what Section 1 of the 1985 Act

4 said as well, is it not?

5 MR. McKAY: Could you give me a moment, sir, to look at 14:16

6 the '85 Act? One of the disadvantages of working from

7 electronic copies is that you don't always have it

8 readily to hand. I apologise.

9

10 Yes. The offence under Section 1 of the 1985 Act was 14:16

11 that a person who intentionally intercepts a

12 communication in the course of its transmission by post

13 or by means of a public telecommunication system shall

14 be guilty of an offence. And a person shall not be

15 guilty of an offence under that section if it was 14:17

16 interception in accordance with a warrant.

17 CHAIRPERSON: So that means that intercept would be

18 unlawful unless it was covered by a warrant?

19 MR. McKAY: Correct.

20 CHAIRMAN: Is that not the same as 56(2)(a)? 14:17

21 MR. McKAY: Yes, but it doesn't arise in this case is

22 the point I think I am trying to make. There is no

23 question that -- any interception which hypothetically

24 occurred, there is no question that it happened

25 unlawfully. 14:17

26 CHAIRMAN: Sorry?

27 MR. McKAY: There is no question that it would have

28 happened unlawfully.

29 CHAIRPERSON: what difference does that make?

1 disclosure, if we're talking about --

2 MR. MCKAY: The prohibition on disclosure, we're not
3 concerned about any issue that arises where you can
4 disclose because the offence has been committed. The
5 way that the offence was structured was -- 14:18

6 CHAIRMAN: No, the Act prohibits disclosure of
7 intercept-related conduct --

8 MR. MCKAY: Yes.

9 CHAIRMAN: -- regardless of whether it was done
10 lawfully or unlawfully, unless we are talking about 14:18
11 prosecution.

12 MR. MCKAY: Yes. Yes. Quite, yes.

13 CHAIRPERSON: So you are going to explain to me why it
14 is, I think, that the solicitor to the Inquiry can make
15 an accepted disclosure? 14:18

16 MR. MCKAY: I am certainly going to do that if it
17 assists, sir, yes. May I just try and find my place on
18 the original document?

19

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

28 CHAIRMAN: Yes.

29 MR. MCKAY: Section 58 is entitled "Section 57:

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

2
3 "For the purposes of Section 57, a disclosure made in
4 relation to a warrant is an accepted disclosure if it
5 falls within any of the heads set out in (c)(5) legal
6 advisers."

14:20

7
8 Then, sir, if you drop down to (5), head 3 is:

9
10 "A disclosure made by a legal adviser (1) in
11 contemplation of or in connection with any legal
12 proceedings."

14:20

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

14:20

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

18 CHAIRPERSON: well, the difficulty with that is that
19 section 56 in (1) appears to distinguish between legal
20 proceedings and Inquiry Act proceedings. It says:

14:21

21
22 "No evidence may be adduced, questions asked et cetera
23 in connection with any legal proceedings or Inquiry Act
24 proceedings."

25 MR. McKAY: Yes.

14:21

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

28
29 "Nothing in this section affects the operation of

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

4 MR. MCKAY: Yes.

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

14:22

8 MR. MCKAY: well, sir, if your view is that legal
9 proceedings, any legal proceedings, is qualifying legal
10 proceedings with Inquiry Act proceedings, then that's a
11 point that I would concede. But the terminology is --

14:22

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

14:22

19 MR. MCKAY: Yes.

20 CHAIRMAN: That would seem to be a disjunctive
21 description.

14:23

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

14:23

27 CHAIRPERSON: All right.

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

1 CHAIRPERSON: The deeming provision I am just trying to
2 find that you mentioned, did you say it was in the 2000
3 RIPA Act?
4 MR. MCKAY: Yes sir.
5 CHAIRMAN: I have Section 82 but (4) seems to be 14:23
6 amended or deleted.
7 MR. GREANEY: It seems to us to have been repealed by
8 the Act of 2016.
9 MR. MCKAY: The IPA, yes.
10 CHAIRPERSON: So there is no deeming provision then? 14:24
11 MR. MCKAY: Not any more, but I was attempting to
12 explain why a warrant under the 1985 Act did not appear
13 in that part of the IPA. Of course, if it has been
14 repealed - I'm looking at the original act, I apologise
15 for that, sir - if it has been repealed, then of course 14:24
16 that point falls away as well and I am singularly
17 failing in my duty to be of assistance to you.
18 CHAIRMAN: All right. Never mind. That probably takes
19 us to the end of that discussion about the --
20 MR. MCKAY: It takes us to the end of that discussion, 14:24
21 sir, yes.
22 CHAIRMAN: All right. Thank you. Was there anything
23 else you wanted to mention, Mr. McKay?
24 MR. MCKAY: Not in relation to route to disclosure to
25 Special Advocate in those circumstances, sir. I have 14:24
26 some remaining short submissions to make on the
27 exercise of your discretion.
28
29 Any derogation from open justice should always be the

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

14:25

8
9 The appointment of a Special Advocate is only one
10 measure at your disposal. There are others, some
11 contemplated by the European Court of Human Rights in
12 Carter v Russia, and referred to you by you yesterday.
13 Concessions, admissions made by Core Participants,
14 summaries, gists or other forms of words; indeed, even
15 as Mr. Mansfield has canvassed, a confidentiality ring,
16 although that has not always found favour with courts
17 and tribunals; or a hybrid version of the
18 confidentiality. Or, indeed, even your team agreeing
19 with Core Participants the questions, concerns or areas
20 that they want to see raised in closed session.

14:25

14:25

14:26

21
22 I should deal with, and do so with some caution, the
23 issue of content of intercept. It is the submission of
24 the Police Ombudsman that the content of intercept
25 communications is, and always has been, capable of
26 being disclosed, providing - emphasis on that word -
27 providing that it does not offend against the
28 prohibition. That's the position that's existed since
29 the 2085 Act.

14:26

1
2 Reference is made to Preston. There is some
3 disagreement between the Secretary of State and the
4 Police Ombudsman on that point but I don't think it's a
5 disagreement of significance. He relies on the speech 14:27
6 of Jauncey LJ in Preston which says effectively, yes,
7 it can be but the difficulties are almost
8 insurmountable, and we would agree with that.

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

11 MR. McKAY: 21?

12 CHAIRMAN: of Schedule 3.

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

20 14:28
21 Incidentally, the discussion between Mr. Southey and
22 you yesterday about whether a Special Advocate could
23 have a role in the Section 18 type situation, it seems
24 to us doesn't arise because of the way that section is
25 drafted. The very purpose of Section 18 is to make 14:28
26 sure that the prosecutor, as I think you provisioned
27 yesterday, can discharge his or her responsibilities to
28 disclose relevant material in a way that doesn't offend
29 the prohibition. There could conceivably be no role

1 for a Special Advocate in those circumstances.

2 CHAIRMAN: That's a paragraph 21 point, is it?

3 MR. MCKAY: Yes.

4
5 when exercising your discretion, consideration may be 14:28
6 given to whether any lesser measures can afford the
7 necessary procedural justice or fairness to the Core
8 Participants before considering an appointment. It may
9 well be that your own counsel can provide the necessary
10 safeguards in respect of all, many, or some of the 14:29
11 issues that need to be aired in closed proceedings but
12 not necessarily all. That is a decision that you make
13 at an appropriate stage of the Inquiry.

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

19
20 Sir, we refer to the case of Chief Constable and AA v 14:29
21 YK & Ors 2010 AER D59 at page 583 of the bundle of
22 authorities, although it's not the full report in the
23 bundle. In that case, Mr. Swift KC, as he then was,
24 identified four matters which he thought the Court
25 should consider before the appointment of Special 14:29
26 Advocate in a non-statutory case was necessary, those
27 four being the purpose for which the Special Advocate
28 has been requested, parenthetically for example for the
29 purposes of assisting the court on a determination on a

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

13
14 Adopting those factors or some variation of them would
15 enable the principle approach to be taken to the range 14:30
16 of different circumstances where the question of
17 appointment of a Special Advocate might arise in the
18 present case. They could also assist you to determine
19 whether the particular circumstances require an
20 appointment or multiple appointments of Special 14:31
21 Advocates, or none.

22
23 If you reach the conclusion that a Restriction Order is
24 necessary and that fairness demands that you put in
25 place measures to accord the necessary procedural 14:31
26 justice or fairness to the Core Participants - and it
27 is a fluid concept sir, not, as you referred to
28 yesterday as an inanimate object sitting on a shelf -
29 then the practicalities in whatever form need to be

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

4
5 The final submission that the Police Ombudsman would 14:31
6 make is really just one of emphasis, that any
7 derogation or the derogation from open justice does not
8 demand of one single solution. There are a range of
9 measures available to you to attempt to redress the
10 balance. 14:32

11
12 I end the submission as a former Special Advocate
13 myself with the observation that appointment of a
14 Special Advocate is not a panacea. For many of the
15 reasons set out by Mr. Greaney KC yesterday morning, 14:32
16 and it may be and indeed is likely to be while Bingham
17 LJ in R-V-H described their use in that case as a
18 course of last and never first resort.

19
20 Sir, those are the submissions I have made on behalf of 14:32
21 the Ombudsman. I don't know if there is anything else
22 arising. I apologise if at times I have been less
23 helpful than I would have liked to have been.

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

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

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

3 CHAIRPERSON: Yes. Thank you.

4
5 AFTER A SHORT ADJOURNMENT, THE INQUIRY RESUMED AS
6 FOLLOWS:

14:33

7
8 SUBMISSION BY MS. GRANGE

9
10 CHAIRMAN: Ms. Grange, good afternoon.

14:43

11 MS. GRANGE: Good afternoon, Mr Chairman.

12 CHAIRPERSON: So when you're ready.

13 MS. GRANGE: Yes, thank you.

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

14:44

23
24 Our position on these two key questions is that the
25 language of the statutory scheme, the purpose and the
26 context of the legislation, and Parliament's intention
27 as demonstrated in subsequent legislation, all strongly
28 suggest that no such power exists.

14:44

14:44

1 Alternatively, we submit that even if such a power
2 existed, it would not be necessary or appropriate for
3 the Chair to make any such appointment in this Inquiry.
4

5 No Inquiry has taken that step to date, even inquiries 14:45
6 with a very substantial closed national security
7 element to them. There is no justification from
8 departing from that approach, we say, in this
9 particular case
10

11 we have detailed submissions in writing. I don't
12 propose to repeat all of those. I will try to focus on
13 the key points.
14

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

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

3
4 On the discretion question, I'm going to be making
5 eight key points as to you shouldn't exercise your
6 discretion.

14:46

7
8 Turning now to the expressed statutory language, it is
9 our submission that when you are exercising your powers
10 under the Act and the Rules, you are exercising
11 statutory functions, and your powers are limited to
12 those conferred on you expressly or, by necessary
13 implication, by the statutory scheme. Indeed, the test
14 of necessary implication is a demanding one. You get
15 that from Carswell LJ in the Roberts case at paragraph
16 131. I think you have your own version of Roberts, but
17 if you will recall, Carswell LJ at that point said
18 "implication, it's a demanding test."

14:46

14:46

19
20 I don't understand Mr. Southey or anyone else to be
21 contending that there is some kind of independent
22 source of common law power which you should use in
23 which to say you have the power to appoint Special
24 Advocates. It is either got to be in the express
25 language of the Act or by necessary implication.

14:47

14:47

26
27 Importantly we say that the statutory scheme provides a
28 comprehensive code for the conduct of a public inquiry
29 including, where necessary, restricted or closed

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

14:47

14:48

11
12 We submit that neither the Act nor the Rules make any
13 provision, either expressly or by necessary
14 implication, for the appointment of Special Advocates.
15 On the contrary, what the Act and the Rules do is
16 provide you for a comprehensive regime for the
17 withholding of closed material as necessary; for the
18 holding of hearings in the absence of the public or in
19 the absence of particular Core Participants where there
20 may be harm or damage which necessitates the
21 withholding of that material. That regime is
22 principally to be found in Sections 19 and 20 of the
23 Act.

14:48

14:48

24
25 It's also important, we say, to recognise Rule 12 of
26 the Inquiry Rules, which I don't think we have looked
27 at in these two days so far. Rule 12 of the Rules, and
28 I'll let you bring it up.

14:49

29 CHAIRMAN: Yes.

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

13
14 we say that's a complete code. It provides you with
15 the procedural tools necessary to determine whether to 14:50
16 and, if so, how to conduct closed hearings. That's
17 also, we say, important to link back to Section 17(1)
18 of the Act which begins with the words "subject to any
19 provisions of this Act or of rules under Section 41."
20 what that's telling you is that you've got to conduct 14:50
21 this Inquiry subject to the very specific provisions
22 that Parliament has designed for you and then you've
23 got these broader powers in Section 17. But that's a
24 clear marker in Section 17(1), that where it has given
25 you specific powers, that's where Parliament has chosen 14:50
26 to strike the balance. That's where Parliament has
27 decided, if necessary, fairness in certain contexts
28 needs to be determined.

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

14:51

6
7 we draw upon some other key aspects of the statutory
8 regime in making those submissions.

9
10 The first point to make is the role of counsel to the 14:51
11 Inquiry. That role of counsel to the Inquiry is
12 defined in the Act. That includes the ability to pay
13 counsel to the Inquiry, to provide remuneration; that's
14 in Section 39 of the Act. Also, immunity from suit is
15 addressed in Section 37 of the Act. So where there are 14:51
16 particular legal officers who are to have a role in an
17 inquiry, the Inquiries Act descends to telling you that
18 you can pay them, and it descends to telling you that
19 they have immunity from suit.

20
21 If you look at those sections - we don't need to pull
22 them up now, Sections 37 and 39 - they are very
23 specific about the roles of different individuals,
24 different legal officers within an inquiry, including
25 counsel to the Inquiry. We say that the power to 14:52
26 appoint Special Advocates has to be looked at in the
27 absence of any corresponding provisions which address
28 immunity from suit, address remuneration in the same
29 way; there is just nothing.

1
2 we say that's particularly odd in circumstances where,
3 as you have already observed today, the Special
4 Advocate role is a very unique and special one. They
5 typically owe no duties to those that they represent in 14:52
6 the closed session, and they have no lawyer-client
7 relationship in the way typically understood between
8 legal professionals and their clients. That
9 peculiarity calls out for being addressed and
10 explained. As you've seen in other regimes where the 14:53
11 Special Advocate role is identified, those matters are
12 addressed.

13
14 There is also no provision for Special Advocates to
15 suggest Rule 10 questions, or apply themselves to 14:53
16 question witnesses under Rule 10 of the Inquiry Rules.
17 We say this is another key indicator that Special
18 Advocates are simply not part of Parliament's intention
19 in this comprehensive regime. It is only recognised
20 legal representatives who are able to apply to ask 14:53
21 questions of witnesses. A Special Advocate cannot be
22 appointed to act as a recognised legal representative
23 in the manner anticipated in Rule 6 of the Rules.

24
25 Accordingly, there is no provision in Rule 10 or any 14:53
26 other provision that would permit a Special Advocate to
27 ask questions, or to apply to ask questions. That
28 would have to be somehow worked out by the Inquiry
29 Chair. We are not saying you couldn't ever work that

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

14:54

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

14:54

16 MS. GRANGE: Yep.

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

20 MS. GRANGE: Yep.

14:55

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

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

14:55

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

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

14:55

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

14:56

15
16 That brings me on to my second point, which is about
17 the purpose and the context of the Act. It's obviously
18 well established that the purpose and context provide
19 the basic frame of orientation for the use of the
20 language enjoyed within it. We have cited a number of
21 cases. There are many that can be cited to support
22 that proposition. They are cited at paragraph 9 of our
23 written argument. We have to consider the language
24 that Parliament has chosen within the particular
25 context which arises.

14:56

14:57

26
27 we focus on two particular features of the statutory
28 context which we say are particularly relevant to
29 whether the Chair has a power. First, we say it's

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

11
12 One only needs to remember the background to this
13 Inquiry. There was Bloody Sunday, with the costs that
14 arose there. It's in the consultation reports that
15 costs at times had varied but sometimes were spiralling 14:58
16 out of control. We say it's no accident that there is
17 a significant focus in the 2006 Rules on controlling
18 the costs and expenditure. Some 16 of the 34 Rules in
19 those 2006 Rules are devoted to the question of costs.
20 Therefore, it's quite clear that that was an important 14:58
21 consideration in the desire to update inquiries'
22 legislation.

23
24 One asks again would Parliament have granted the Chair
25 an implied power to appoint Special Advocates without 14:58
26 making any provision whatsoever to address the costs
27 consequences of doing so, such cost consequences
28 potentially being extremely significant in an inquiry
29 with any measure of restricted hearings.

1
2 Then secondly, and perhaps more fundamentally, we say
3 that statutory context is an inquisitorial regime. Far
4 from being irrelevant, as some have submitted today, we
5 say that is perhaps the most relevant factor in terms 14:59
6 of interpreting the Act. It's a different approach
7 completely to that taken in the context of inter partes
8 litigation, where the need for Special Advocates has
9 usually been identified. A public inquiry does not
10 involve parties pursuing competing pleaded cases or 14:59
11 agendas, seeking to pull the investigation in different
12 directions.

13
14 Really important is Section 2(1) of the 2005 Act which
15 expressly prohibits the determination of civil or 14:59
16 criminal liability by a public inquiry. That's really
17 important in terms of the context here. It's important
18 in terms of what fairness requires, because you are
19 never going to be in a position of actually determining
20 what someone's civil liabilities are, or indeed 15:00
21 criminal ones.

22
23 Public inquiries are set up to look at matters of
24 public importance, to look to the past but then look to
25 the future and make recommendations. That is a 15:00
26 completely different beast from adversarial litigation.
27 It involves an independent and objective investigation
28 by yourself, assisted by your counsel to the Inquiry,
29 if appointed. The role of yourself in the Inquiry, the

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

8
9 All of those that are in this room, all of us, are here
10 to assist you in your investigation. We say that 15:01
11 having Special Advocates to represent particular
12 interests in the closed proceedings within that process
13 is antithetical to that inquisitorial process, and
14 antithetical to you having control over the
15 investigation with those that you have appointed to 15:01
16 lead that investigation. That's baked into the whole
17 scheme of the Act and the Rules.

18
19 So, we say that context also adds force to the points
20 that we make on the language of the Act. 15:01

21
22 Then, thirdly, we say that Parliamentary intention as
23 evident from later statutes reinforces those points. I
24 don't say I need this third strand to my argument but
25 it certainly does confirm the points that I am making. 15:02
26 Parliament has made a number of changes to national
27 security legislation to address what material can be
28 seen by inquiry panels and counsel to the Inquiry, and
29 by other inquiry personnel. The first change came

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

8
9 That position was changed in February 2009 by Section
10 74(1) of the Counterterrorism Act 2008, where such 15:03
11 disclosure was also permitted to be made to counsel to
12 the Inquiry as well as the panel. Then we've looked at
13 Section 56 in detail, and Schedule 3 of the 2016 Act.
14 There we have the prohibition on disclosure emanating
15 from interception but subject to certain very clear 15:03
16 defined exceptions, which included a panel of an
17 inquiry, or a person appointed as a legal adviser to
18 such an inquiry. That was expressly stated to include
19 the inquiry solicitor as well as counsel to the Inquiry
20 at that point. 15:03

21
22 So, Parliament is looking very carefully at personnel
23 involved in an inquiry and deciding whether this
24 species of closed material can be disclosed to them.

25 15:03
26 We can be, we would say, very confident that there was
27 no exception for Special Advocates in the 2005 Act
28 inquiry context, because, as your counsel to the
29 Inquiry has already helpfully pointed out, Schedule 3

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

12
13 We say that that confirms that it is Parliament's
14 intention not to have Special Advocates in this very
15 different type of legal process. 15:05

16
17 We also say it's obvious that the phrase that
18 Mr. Southey alighted upon, paragraph 23(2)(e) in
19 Schedule 3, talks about "a person performing functions
20 necessary for the proper functionings of proceedings." 15:05
21 We say again it's clear that's not Special Advocates.
22 Parliament would have used the terms "Special
23 Advocates", as it has done elsewhere in Schedule 3. We
24 say that's obviously meant to refer to ancillary
25 personnel that might be necessary when restrictive 15:05
26 proceedings are taking place.

27
28 We say that Parliament has had four opportunities now
29 to indicate that Special Advocates could have such

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

1 MS. GRANGE: Yep.

2 CHAIRMAN: What Hodge LJ set out was things like
3 explanatory notes; they have been touched on already.

4 MS. GRANGE: Yep.

5 CHAIRMAN: And they talk of a comprehensive scheme. 15:07

6 MS. GRANGE: Yep.

7 CHAIRMAN: Other sources as identified by Hodge LJ were
8 Law Commission reports, reports with Royal Commissions,
9 advisory committees, government white papers; all of
10 these may disclose the background to a statute and 15:08
11 assist the Court to identify not only the mischief
12 which it addresses but also the purpose of the
13 legislation.

14 MS. GRANGE: Yes.

15 CHAIRMAN: The context disclosed by such materials, 15:08
16 Hodge LJ said, is relevant to assist the Court to
17 ascertain the meaning of the statute whether or not
18 there is ambiguity or uncertainty.

19

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

23

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

1 MS. GRANGE: Yes, in accordance with the Rules in
2 Pepper V Hart.
3 CHAIRMAN: So you wouldn't be looking to what the
4 general paramilitary discussion was?
5 MS. GRANGE: No. 15:09
6 CHAIRMAN: But it might well be possible to gain
7 something from what was said by the minister who
8 introduced the bill.
9
10 when the Inquiries bill came before the Commons for its 15:09
11 second reading - it started out in the Lords, of
12 course, but it came to the Commons for its second
13 reading - it was introduced by the Undersecretary of
14 State for Constitutional Affairs. As far as I can see,
15 he explained the purpose of the bill as having three 15:09
16 strands to it. He said the bill was designed to inform
17 the arrangements for conducting inquiries into events
18 of serious public concern. Secondly, he said the bill
19 created a comprehensive framework for inquiries set up
20 by ministers. Thirdly, he said the bill would put on a 15:10
21 proper, more comprehensive, footing our ability to
22 conduct an effective public inquiry in circumstances
23 where national security issues may well arise.
24 MS. GRANGE: Yep.
25 CHAIRMAN: So, those are the three strands of the bill. 15:10
26 MS. GRANGE: Yep.
27 CHAIRMAN: Of course, Section 19, although it wasn't
28 numbered in that way, was repeated eventually in the
29 Act as passed. Sorry, Section 19 in the Act was

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

15:12

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

15:12

13 MS. GRANGE: Yep.

14 CHAIRMAN: All of these different areas. One curiosity
15 struck me, which was that, first of all, there were
16 closed proceedings available in some planning act
17 proceedings, which came as something of a surprise to
18 me. There are closed proceedings available in the Town
19 and County Planning Act of 1990, the Planning (Listed
20 Buildings and Conservation Areas) Act of 1990, and the
21 Planning (Hazardous Substances) Act of 1990. So, from
22 1990 onwards, in each of these different spheres to do
23 with planning, there were proceedings anticipated in
24 which there could be closed hearings.

15:13

15:13

25 MS. GRANGE: Yeah.

15:13

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

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

5
6 For all of the years that passed between 1990 and 2004,
7 closed hearings could be held under those proceedings
8 but for some reason when the 2004 Act was going
9 through, it was realised, well, we need to make sure we
10 can have Special Advocates there. That, in terms of 15:14
11 timing, just raises the question of could Parliament
12 possibly have been ignorant of the need for Special
13 Advocates in relation to Inquiries Act when it was
14 doing the bill a few months later?

15 MS. GRANGE: Yeah, and Parliament would be taken, as a 15:14
16 matter of statutory interpretation, to be aware of
17 that, either from the planning context or the
18 immigration context. By that point, you had had the
19 SIAC Act for sometime from 1997.

20 CHAIRPERSON: It's the timing that struck me as -- 15:15

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

22 CHAIRMAN: Just all around the same sort of time, they
23 are aware of need for Special Advocates in some
24 circumstances and yet, if aware of them, of the need
25 for them in Inquiries Act proceedings, they leave it 15:15
26 unsaid.

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

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

15:15

7
8 The high point of Mr. Southey's case, I would submit,
9 is the Roberts v Parole Board decision. It's already
10 been discussed at length. I would just make a number
11 of key points about that. Obviously, I have to accept
12 that that's an example, in a different context, of the
13 Court deciding that it was appropriate in that case to
14 imply a power to appoint a Special Advocate where you
15 had a statutory tribunal rather than a court. Because
16 a lot of the cases that involved courts, it is easy to
17 see, for example, a High Court exercise its inherent
18 jurisdiction --

15:16

19 CHAIRMAN: Yes, it's very different.

20 MS. GRANGE: -- it is very different.

15:16

21
22 Roberts is obviously a case to look at. As you pointed
23 out, it is a case that others chairs in other public
24 inquiries thought potentially relevant to this case.

25
26 I would make a number of discrete points. First, the
27 context. The context in Roberts could not be more
28 anxious from both sides of the equation. From a public
29 safety point of view, it was obviously important that

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

7
8 From the other side of the equation, it involved
9 liberty of the subject; one of the most anxious
10 contexts: Should this man be released from prison 15:17
11 after a long spell in incarceration. So, on both sides
12 the stakes were high. As we know, context is
13 everything when it comes to fairness. If you need any
14 more support for that, in Roberts at paragraph 40 Woolf
15 LJ makes those very points about fairness not being a 15:17
16 single unwavering standard, it varies according to the
17 nature of the decision, for example, to be made.

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

1 Special Advocate.

2
3 So, the express powers of the tribunal were different
4 and were germane to the decision of the majority. It
5 is also worth bearing in mind the two dissenters, 15:19
6 Bingham LJ and Steyn LJ dissenting. Not insignificant
7 voices but that's another point. I would submit that
8 that was a case where there was an obvious gap in that
9 they could have a closed process, but what was at stake
10 for the individual was so significant that they needed 15:19
11 to mitigate that, and the obvious mitigation was a
12 Special Advocate.

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

18 MS. GRANGE: No.

19 CHAIRMAN: So it fails.

20 MS. GRANGE: Yes. 15:19

21 CHAIRMAN: By that stage, the board's procedures had
22 been amended so as to make them compatible with Article
23 5.

24 MS. GRANGE: Yes.

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

28 MS. GRANGE: Yes.

29 CHAIRMAN: So, fairness in terms of its domestic

1 procedures required an adversarial hearing --
2 MS. GRANGE: Absolutely.
3 CHAIRMAN: -- just as Article 5 did. So, it just
4 couldn't work at all --
5 MS. GRANGE: No. 15:20
6 CHAIRMAN: -- as a matter of law --
7 MS. GRANGE: No.
8 CHAIRMAN: -- without a Special Advocate.
9 MS. GRANGE: Yes, absolutely. One can see why the
10 Supreme Court was compelled to do what it did. Sorry, 15:20
11 the House of Lords, I think.
12
13 So, when one appreciates all that by way of context,
14 you can see that the force of any read across to this
15 context is very, very limited. 15:20
16 CHAIRPERSON: well, I have to look at fairness, of
17 course, but it would be difficult - and I don't think
18 anyone has said this - it would be difficult to suggest
19 that in inquiry procedure, fairness requires a Special
20 Advocate as a matter of law. 15:20
21 MS. GRANGE: Yes.
22 CHAIRMAN: we see from other inquiries that it doesn't.
23 MS. GRANGE: No, no.
24 CHAIRMAN: So that's the distinct difference between
25 Roberts and inquiry procedure. 15:21
26 MS. GRANGE: Yes, I agree. That's what we say about
27 Roberts and about whether or not there is this implicit
28 power to imply here the appointment of a Special
29 Advocate.

1
2 I am going to deal very briefly with the question of
3 whether Articles 2 or 3 of the ECHR have any bearing on
4 the issues that you're considering. In our submission,
5 the case law is clear that whether it's Article 2 or 3, 15:21
6 the investigative obligation does not require the
7 public or Core Participants to have full access to all
8 parts of the inquiry proceedings and evidence; and that
9 Strasbourg has on a number of occasions approved the
10 use of closed proceedings where necessary; cases such 15:21
11 as Amin, Ramashai, JL v Secretary of State for Justice
12 all make that clear. We are left back on the test of
13 next of kin must be involved to the extent necessary to
14 safeguard their legitimate interests.

15
16 what we say is there is certainly no case that anyone
17 can point to that says in our inquisitorial context, a
18 Special Advocate must be appointed in order to comply
19 with Article 2. There is nothing approaching that at
20 all. They have to be involved to the extent necessary 15:22
21 to safeguard their interests. When one looks at it
22 from that prism, they are heavily involved in any
23 public inquiry, the victims, the families. They have a
24 right to legal representation; they will be able to
25 make applications for Core Participants status; they 15:22
26 will have the ability to work with counsel to the
27 Inquiry, to suggest questions or even to apply to the
28 Chair to ask questions themselves. The way the Section
29 19 process works is that it's only that material that

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

15:23

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

15:23

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

15:23

15:24

15:24

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

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

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

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

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

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

5
6 We say that yes, you don't have someone sitting on your
7 shoulder in closed checking all your homework.

8 Frankly, when one looks at what was intended in the
9 Inquiries Act to create a comprehensive regime but also
10 one that was proportionate in terms of cost, that is 15:27
11 simply not necessary.

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

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

21
22 That's clearly where Parliament decided the burden
23 should lie in terms of making decisions about the scope
24 of these investigations, what lines of inquiry to
25 pursue, what was relevant, what was not relevant. 15:27
26 Inquiries have to make those decisions every day, and
27 someone might second guess them.

28
29 The other point I would make is if we look at the case

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

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

21
22 We say in terms of previous rulings by inquiry chairs,
23 and with no disrespect to those chairs and those that
24 were making legal submissions, the arguments that you
25 have heard in writing and over the last two days go way 15:29
26 beyond anything that we see in those decisions. I am
27 afraid they do look quite superficial now given the
28 depth of argument that you have had, and the number of
29 points, including the points about the 2016 Act and the

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

15:30

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

15:30

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

15:30

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

15:30

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

15:30

1 CHAIRMAN: Amongst many others.

2 MS. GRANGE: Pardon?

3 CHAIRMAN: Amongst many others.

4 MS. GRANGE: Amongst many others, I'm sure that's
5 right.

15:31

6
7 Your solicitor to the Inquiry also has experience of
8 the Litvinenko Inquiry and various inquests, including
9 the 7/7 London bombings. That's relevant to whether or
10 not you need to exercise your discretion to have
11 another legal officer inputting into the closed
12 sessions.

15:31

13
14 Thirdly, all of the Special Advocate regimes, and it is
15 not in contention here, contain express provision to
16 the effect that Special Advocates cannot communicate to
17 the specially represented persons after they have had
18 sight of the sensitive material. That being so, the
19 instructions given by Core Participants could not go
20 beyond a general instruction to test the evidence
21 carefully in order to establish whether there may have
22 been missed opportunities to prevent the bombing, and
23 to pursue certain lines of questioning emerging from
24 the open evidence.

15:31

15:31

25
26 That's precisely the task that can be undertaken by
27 Counsel to the Inquiry informed by the Rule 10
28 applications that may be made in the open hearings.
29 The open advocates can prepare a detailed list of

15:32

1 questions that they want put in open and in closed;
2 that can be provided to Counsel to the Inquiry.
3 Obviously Counsel to the Inquiry will take those into
4 account when they approach their preparation for the
5 closed hearings.

15:32

6
7 Indeed, Counsel to the Inquiry is going to be in an
8 arguably better position than any Special Advocates
9 here because they can continue to communicate with the
10 Core Participants for the families despite having seen
11 the closed material.

15:32

12
13 Fourthly, there will be a duplication of function
14 between counsel to the Inquiry and any team of Special
15 Advocates. We say that's inevitable. Given your duty
16 under Section 17(3) to avoid unnecessary cost, we say
17 that you would have to identify something very
18 particular, very special, that meant that Special
19 Advocates could do something which your team of Inquiry
20 counsel could not.

15:33

21
22 Special Advocates are a scarce and precious resource.
23 They are needed across lots of different jurisdictions
24 in very anxious contexts. We would say there is no
25 justification for the Inquiry, or anyone else,
26 incurring that expense in circumstances with the
27 duplication with the role of counsel to the Inquiry is
28 so obvious.

15:33

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

10
11 Sixthly, delay. We say delay is really important, and
12 obviously you have heard Mr. Mansfield's submissions on
13 delay. Promptness is a key consideration in an Article
14 2 investigation. 15:34

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

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

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

4
5 Seventhly, any such appointment, we say, is likely to 15:35
6 make the hearings very complicated. I make this very
7 special point, particularly where you've got some
8 closed material that Special Advocates couldn't see and
9 some that they could see, that raises the spectre of
10 having two types of closed process. What we say about 15:35
11 that is that actually makes things very complicated,
12 not just for the legal teams but actually for the
13 witnesses who are giving their evidence, to be told,
14 well, when you're answering these questions, you can
15 only refer to this corpus of material; when you are 15:35
16 answering these questions, you can now refer to this
17 wider corpus of material. Actually what we say you
18 should focus on is what is going to give you the best
19 evidence and what is going to put those witnesses in a
20 position to give you the best evidence. Having that 15:36
21 kind of confusion, on top of the length of time that
22 has passed since these events, we say could really
23 cause a lot of complexity, hypothetically assuming that
24 we have that type of material. For the avoidance of
25 doubt, we neither confirm nor deny, as was put in our 15:36
26 written submissions, whether there is such material in
27 our submissions. I think as you said earlier, you were
28 testing this out on a hypothetical basis that if there
29 was such material, how would things work.

1
2 Finally, while it is accepted that each case is
3 different and requires individual consideration, we say
4 it's significant that a proportion of those public
5 inquiries which have included closed hearings have been 15:37
6 concerned with fatalities and have had bereaved
7 families as Core Participants. What we say is there is
8 no difference, we would, say between, for example, the
9 families in the Manchester Arena bombing situation and
10 the families here. And no previous inquiry has 15:37
11 identified the need to appoint a Special Advocate.
12

13 As to the test that should be applied, we submit that
14 nothing less than the high bar identified by Bingham LJ
15 in R-v-H should apply. Such an appointment will always 15:37
16 be exceptional, never automatic; a course of last and
17 never first resort. We note that that test was
18 reiterated by the Court of Appeal in the Concordia case
19 as recently as 2018. Even if the test is better
20 expressed as one of necessity, which some Core 15:38
21 Participants have submitted, we submit that it also
22 fails to meet that similarly high bar. We would say
23 that nothing that has been submitted to you would
24 satisfy that necessity test.
25

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

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

5
6 As to practicalities of the appointment, those
7 practicalities would need to be worked out depending on
8 what the identified need for such an appointment was,
9 as articulated in the Chairman's request. It is our
10 position that it would have to be a request to the 15:38
11 Advocate General of Northern Ireland who is responsible
12 for making those appointments. You will have to
13 identify whether you say there's a power and, if so,
14 what you are doing in terms of your discretion. If you
15 do request the appointment, you will give reasons for 15:39
16 that, but then the Advocate General will have to take a
17 separate decision as to whether or not to appoint them.
18 He will obviously have to take into account the reasons
19 that you give. It will be a separate decision by him
20 as to whether or not he is prepared to make that 15:39
21 appointment.

22
23 On cost, we also say it's premature at this stage to
24 tie yourself down in terms of cost. That will have to
25 be worked out, again depending on the identified need, 15:39
26 how many special Advocates. There are various options
27 that have been posited in the submissions. We
28 submitted in our main submissions that this certainly
29 wasn't an obvious case where simply the provider of the

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

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

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

10 CHAIRMAN: Thank you. 15:40

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

15 15:41

16 AFTER A SHORT ADJOURNMENT, THE INQUIRY RESUMED AS
17 FOLLOWS:

18

19 SUBMISSION BY MR. HENRY

20 15:51

21 CHAIRMAN: Mr. Henry, good afternoon.

22 MR HENRY: Good afternoon, sir.

23 CHAIRPERSON: Yes.

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

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

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

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

21 CHAIRMAN: Thank you. Yes, Mr. Greaney?

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

24
25 It remains for us finally to thank all Core 15:53
26 Participants for the care that they have taken over
27 their written submissions and oral submissions, and for
28 the clarity of them. We, for our part, consider that
29 you are now well equipped to determine the important

1 issues that this hearing has presented for you.

2
3 we do anticipate that there will be a further
4 procedural hearing at some stage between now and the
5 commencement of the Chapter 3 oral evidence hearings. 15:53
6 Sir, we will communicate the date of that hearing and
7 its length to all Core Participants at some point in
8 the future.

9 CHAIRMAN: Yes. Thank you, Mr. Greaney.

10
11 In terms of the hearings yesterday and today, I am very
12 grateful to all of the counsel for the submissions
13 which they have presented. The issue which has been
14 raised is both important and interesting. It's
15 necessary that I take care to reflect on all of those 15:54
16 submissions, and I will produce a written decision in
17 due course.

18 MR. GREANEY: Thank you, sir.

19
20 THE HEARING ADJOURNED TO A DATE TO BE FIXED 15:54

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