

The Ruling on the Participation of a Special Advocate in Statutory Inquiries

The Summary

This summary of the ruling has been prepared to assist in understanding the Chair's decision. It does not form part of the reasons for the decision. The full ruling is the only authoritative document. The ruling is published on the Omagh Bombing Inquiry website. In providing this summary, the Inquiry Chair wishes to record his gratitude to the legal representatives of all of the Core Participants for the helpful submissions presented to him.

The Issue

The ruling considers the question of whether a Special Advocate can be permitted to participate in proceedings conducted under the Inquiries Act 2005, and, if so, whether one or more ought to be appointed to assist the family and survivor Core Participants in this Inquiry. The ruling explores the statutory context within which Inquiries are conducted, the role of a Special Advocate, the arguments advanced by the applicants, and the rationale underpinning the conclusions reached.

Definition and Role of a Special Advocate

In certain civil proceedings before the High Court and other senior courts, statutory provisions allow one party in the case to withhold sensitive material from the other party and that party's legal representatives. In such circumstances, the judge may consider this material in a closed hearing, from which the public, the opposing party and their lawyers are all excluded. These provisions are typically reserved for cases involving material whose disclosure could harm national security. Comparable rules apply in some statutory tribunals, such as the Special Immigration Appeals Commission and the Proscribed Organisations Appeal Commission.

Where these provisions are engaged, a Special Advocate can be appointed by the relevant Law Officer, such as the Attorney General for England and Wales or the Advocate General for Northern Ireland, to represent the interests of the party excluded from the closed hearing. Importantly, a Special Advocate does not replace the excluded party's own lawyer, nor does he or she share the same professional relationship with that party. While the Special Advocate is permitted to view the sensitive material, he or she is

prohibited from discussing it or seeking instructions about it from the excluded party. The Special Advocate's role is to represent the interests of the excluded party during the closed hearing, but their communication with the party or their legal team is generally restricted once they have seen the sensitive evidence.

The Inquiries Act 2005 allows Inquiry Chairs to conduct closed hearings from which members of the public and Core Participants, including affected families and survivors, are excluded along with their legal representatives. However, neither the 2005 Act, nor the Inquiry Rules 2006, contain provisions that specifically address the appointment or participation of a Special Advocate in Inquiry proceedings.

Applications for the Appointment of Special Advocates

Most of the survivor and family Core Participants in the Inquiry requested the appointment of Special Advocates. They argued that section 17 of the Inquiries Act 2005 grants the Inquiry Chair broad discretion in determining the Inquiry's procedures. By invoking principles of natural justice and procedural fairness, the applicants asserted that this discretion was sufficiently broad to allow for the appointment of Special Advocates to represent family and survivor Core Participants at any closed hearings held in the Inquiry. Additionally, they contended that the European Convention on Human Rights (ECHR) necessitated the appointment of Special Advocates to ensure that the Inquiry complied with the requirements of Article 2 of the Convention.

The Ruling

The Inquisitorial Nature of Statutory Inquiries

The ruling begins by distinguishing the inquisitorial process of statutory inquiries from the adversarial nature of court litigation or proceedings before other statutory bodies. In seeking to identify what effect should be given to fairness considerations in an inquisitorial process, the ruling highlights the investigative function of the Inquiry Chair, who is responsible for determining what evidence will be considered at hearings. The ruling explains that, unlike adversarial proceedings, in the inquisitorial process governing the Inquiry there are no competing parties with divergent objectives. The Inquiry is led by the Chair's investigation and the role of each Core Participant is to assist the Inquiry in establishing the facts.

Parliament's Intention and the Legislative Framework

The ruling reviews the legislative background of the Inquiries Act 2005 and the associated 2006 Rules. It analyses how Parliament has addressed the appointment of Special Advocates in other statutory contexts, both before and after the passage of the 2005 Act, including the provisions of the Investigatory Powers Act 2016 regarding the ability to lead intercept evidence in statutory inquiry proceedings. The ruling concludes that the

framework laid out in the 2005 Act and the 2006 Rules was intended to be comprehensive, encompassing all necessary procedures for statutory inquiries, including closed hearings. Therefore, the omission of any reference to the ability to appoint a Special Advocate was deliberate and reflected Parliament's intention that there was no necessity for, or proper role for, a Special Advocate in the inquisitorial Inquiries Act proceedings.

The Role of Counsel to the Inquiry

The ruling addresses the unique role of Counsel to the Inquiry, whose duties include presenting all evidence to be considered by the Inquiry. Rule 10 of the 2006 Rules specifies that Counsel to the Inquiry is the sole legal representative with a right to question witnesses, whether in public or closed hearings. The ruling explains that one of the functions of Counsel to the Inquiry is to liaise with the legal representatives for the Core Participants in order to understand whether there are matters that they would wish to have explored in particular chapters of evidence.

Procedural Fairness

It is explained within the ruling that Counsel to the Inquiry is well-placed to raise any relevant matters that the family and survivor Core Participants wish to have addressed during closed hearings, just as effectively as a Special Advocate could. The ruling rejects arguments that procedural fairness requires the appointment of a Special Advocate in order to make legal submissions in closed hearings and to facilitate legal challenges to any of the decisions made in closed hearings, or findings made on the basis of evidence heard in such hearings. It further dismisses the claim that, without a Special Advocate, family and survivor Core Participants are at an unfair disadvantage in comparison to State Core Participants. It points out that the family and survivor Core Participants are not in a contest with the State Core Participants.

Article 2 of the European Convention on Human Rights

The ruling examines the procedural obligations under Article 2 of the ECHR, which mandates an effective investigation into deaths resulting from violence. It reviews relevant case law from the European Court of Human Rights, noting the decisions which acknowledge that portions of an investigation may lawfully be conducted in private.

In considering the extent to which family and survivor Core Participants can be involved in the work of the Inquiry, the ruling notes the various functions which the legal representatives of the family and survivor groups can perform. It explains the operation of the protocol which will help to inform all Core Participants of the evidence to be heard at particular hearings. It identifies the level of communication between the Inquiry Legal Team and the Core Participants, and it notes the provision of full disclosure of the

voluminous amounts of material which will not fall to be dealt with in closed hearings. Having concluded that the essential elements of an Article 2 compliant investigation are that it is both effective and independent, the ruling concludes that the procedures and protocols of the Inquiry will be sufficient to satisfy the Article 2 requirement that the family and survivor next of kin are involved to the extent necessary to safeguard their legitimate interests.

Discretion

The ruling then canvasses whether a discretionary power, even if available, should be exercised by requesting the appointment of one or more Special Advocates. The contention had been that Special Advocates were necessary to satisfy the requirements of natural justice and procedural fairness, and that therefore there must be a power available to allow for their participation. The reasons given for rejecting these propositions went to demonstrate that they were not required to ensure fairness as part of a discretionary appointment.

The ruling draws attention to the wide range of experience available to support the Inquiry Chair within the Inquiry Legal Team, pointing out that they will be able to deploy a level of expertise the equal of that available to Special Advocates. The Ruling explains that the level of experience and expertise present within the Inquiry Legal Team, whose function is to support the Chair, will be sufficient to meet the need for public reassurance in the independence and effectiveness of the Inquiry.

Attention is also drawn to the duty imposed on an Inquiry Chair to have regard to cost in making any decisions as to the procedure to be followed. The ruling concludes that the appointment of Special Advocates would duplicate the work of Counsel to the Inquiry and, to some extent, that of the other lawyers acting for the family and survivor Core Participants. This would not be proportionate. Since no role or distinct function for Special Advocates had been identified in the inquisitorial process, their appointment by the relevant Law Officer would not be requested.