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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	<i>ICOS No:</i>	25/100358/1
	<i>Delivered:</i>	26/06/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING’S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY MICHAEL GALLAGHER  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A RULING BY LORD TURNBULL CHAIR OF THE  
OMAGH BOMBING INQUIRY MADE ON 17 NOVEMBER 2025 RE THE  
APPOINTMENT OF SPECIAL ADVOCATES TO THE OMAGH BOMBING  
INQUIRY

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Mr Hugh Southey KC and Mr Aidan McGowan (instructed by Fox Law Solicitors) on  
behalf of the Applicant

Mr Paul Greaney KC, Mr Nicholas De La Poer KC, Mr Edward Pleeth and Mr John  
Rafferty (instructed by the Crown Solicitor’s Office) on behalf of the Respondent  
Ms Kate Grange KC and Mr David Reid (instructed by the Crown Solicitor’s Office) on  
behalf of the Secretary of State for Northern Ireland

Mr Ian Skelt KC and Mr Andrew McGuinness (instructed by MTB Law) on behalf of  
Sir Ronnie Flanagan

Ms Leona Askin (instructed by Campbell and Haughey Solicitors) on behalf of  
Nicola Hamilton

Mr Michael Mansfield KC and Ms Nicola Rowntree (instructed by Desmond J Doherty,  
Elev8Law Solicitors) on behalf of Anthony Rush

Mr Alan Kane KC, Ms Beth McMullen and Mr Michael Smyth (instructed by Anderson  
Gillan Barr Solicitors) on behalf of the John McBurney Core Participants

Mr Joseph Aiken KC (instructed by Claire McManus Solicitor) on behalf of the Police  
Ombudsman for Northern Ireland

Michael Roche (instructed by Roche McBride Solicitors) on behalf of Emmett Tunney,  
Notice Party

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**McALINDEN J**

*Introduction*

[1] The applicant brings this legal challenge against a ruling of the Rt Hon Lord Turnbull, the chair of the Omagh Bombing Inquiry (“the Inquiry”), regarding the appointment of special advocates to the Inquiry, which was handed down on 17 November 2025. In a lengthy ruling, Lord Turnbull determined that the Inquiries

Act 2005 (“the 2005 Act”) which governs independent statutory inquiries did not contemplate or permit the appointment of special advocates and, even if it did, the appointment of special advocates was neither necessary nor desirable in the context of the present Inquiry. The applicant’s case is that the 2005 Act does allow for the appointment of special advocates, even when intercept material is being dealt with in “closed.” The applicant further argues that in order for the Inquiry into the Omagh bombing to be article 2 ECHR compliant and to operate in accordance with the common law principles of fairness, it is necessary, when the Inquiry is sitting in “closed”, for special advocates to be appointed to represent the interests of the applicant and the other core participants who support the applicant in this challenge.

[2] Lord Turnbull received very detailed written submissions reflecting all shades of opinion on these issues from the core participants and he then conducted a two-day hearing on 21 and 22 July 2025 during which he heard from the representatives of many of the core participants. The transcript of that two-day hearing runs to 303 pages. He then delivered a reserved ruling on 17 November 2025 which runs to 76 pages and which painstakingly sets out the arguments made on behalf of the applicant and those other core participants who support the applicant’s arguments. I hope not to have to repeat much of the narrative material, which is set out in Lord Turnbull’s ruling, although some repetition may be unavoidable. I intend to address the two core issues identified by the applicant in the hope that the Inquiry will be able to continue without further significant interruption at least insofar as the issue of special advocates is concerned.

[3] Section 3(1) of the Human Rights Act 1998 (“the 1998 Act”), in so far as it is possible to do so, requires that legislation, including primary legislation, must be read and given effect in a way which is compatible with applicable Convention rights. This provision obviously applies to the Inquiries Act 2005 (see section 3(2)(a) of the 1998 Act). Therefore, in addressing the issue of whether the Inquiries Act 2005 allows for the appointment of special advocates, it is necessary to probe into the issue of whether the appointment of special advocates is necessary to make an independent statutory inquiry in general, and this Inquiry in particular, article 2 ECHR (procedural obligations) compliant. If the appointment of special advocates is necessary to make an independent statutory inquiry article 2 ECHR (procedural obligations) compliant, then, in so far as it is possible to do so, the Inquiries Act 2005 would have to be read, interpreted and given effect in a manner that facilitates the appointment of special advocates.

[4] In order to explore the issue of whether the appointment of special advocates is necessary to make an independent statutory inquiry in general, and this Inquiry in particular, article 2 ECHR (procedural obligations) compliant, I intend to look firstly at what this Inquiry is going to inquire into and how this Inquiry intends to perform its functions. I will then address the issue of whether the procedures of this Inquiry are article 2 ECHR (procedural obligations) compliant and fair or whether the absence of special advocates per se renders or is likely to render the procedures of this Inquiry article 2 ECHR (procedural obligations) non-compliant and/or unfair, and, if I come

to that conclusion, I will then address the issue of whether the 2005 Act can be read, interpreted and given effect in a way which is compatible with applicable Convention rights, in particular the article 2 ECHR (procedural obligations) by the facilitation of the appointment of special advocates.

[5] The first thing to note is that this is an independent statutory inquiry set up by the Secretary of State for Northern Ireland under the 2005 Act. An independent statutory inquiry is an inquisitorial, investigative process where the inquiry chair is the investigator. An independent statutory inquiry is not an adversarial process and obiter judicial comments made in the context of legacy or other contentious inquests have no place or relevance in the context of independent statutory Inquiry procedures. Inquests including legacy inquests are supposed to be inquisitorial procedures where the coroner is the investigator trying to establish certain facts (see para [39] of *Re Margaret Drake* [2026] NICA 17). I fear that there is an unwarranted push to somehow convert what is an inquisitorial process into an adversarial one in the context of coroners' investigations and, to the extent that there is a similar push in the context of independent statutory inquiries, that should be strongly resisted. An independent statutory inquiry is not about establishing any particular case. It is about establishing the truth and, in some instances, making recommendations as to how matters can be improved going forward.

[6] The primary function of the core participants in an independent statutory inquiry is to assist the chair of the inquiry in ascertaining the truth. That may mean that some core participants may have some very difficult questions to answer re their conduct or inaction and it is clearly appropriate in the interests of fairness that they have the benefit of legal advice and representation when they are facing such questioning. But core participants are not there to mount a case or to push for a certain outcome. Legal representation at an independent statutory inquiry is not provided to core participants, with the cost of such representation being covered by the inquiry, for those purposes. Meaningful participation in such an inquiry does not equate to being able to mount a case for determination by the chair of the inquiry or to push for a certain outcome at the end of the inquiry process.

[7] It is clear that this Inquiry was set up in response to the judgment of Horner J as he then was in the case of *Re Gallagher* [2021] NIQB 85 (July 2021), in which the judge concluded that the state had failed in its obligation to conduct an article 2 ECHR compliant investigation into the Omagh bomb atrocity on the basis that there was plausible evidence that the bombing could have been thwarted, that this matter needed to be properly investigated and that to date such an investigation had not occurred. The judicial review application before Horner J was a classic adversarial procedure with "closed" and "open" elements, with special advocates representing the applicant in the judicial review in the "closed" hearings and with a "closed" and an "open" judgment.

[8] Following the announcement by the Secretary of State for Northern Ireland concerning his intention to set up an independent statutory inquiry and the

appointment of Lord Turnbull to chair that Inquiry, there were discussions between the chair of the Inquiry and the representatives of some of the families of the deceased and injured about the scope of the Inquiry and the terms of reference of the Inquiry and it was out of these discussions that the finalised Terms of Reference actually emerged. It is worthy of note that, at Lord Turnbull's insistence, the Terms of Reference are wider than the specific issues that Horner J identified as being matters of concern. In addition to discussing the Terms of Reference at these meetings, it would appear that the issue of the instruction of special advocates was also discussed and that it was agreed that the utilisation of special advocates in the Inquiry would be an issue which would be parked for determination when the Inquiry was up and running and the procedures which the chair intended to adopt and follow were published. This demonstrates an open-minded approach by the chair both in relation to the Terms of Reference and in relation to the issue of the use of special advocates.

[9] The final Terms of Reference are as follows:

"Purpose

1. To investigate whether the car bomb detonated in Omagh, County Tyrone on 15<sup>th</sup> August 1998 in which 29 people and two unborn children were killed could have been prevented by UK state authorities, with particular attention to the matters considered by Horner J. in the application for judicial review, *Re Gallagher* [2021] NIQB 85.

Scope

2. To the extent necessary to investigate issues relating to whether the Omagh bombing could have been prevented by UK state authorities, the inquiry's investigations will include consideration, individually and collectively, of the following matters:

(a) As background and context to the Omagh bombing, the assessment by UK state authorities of the threat posed in Northern Ireland by dissident republican terrorists from 1st December 1997 to the date of the Omagh bombing. This shall include consideration of any change in the assessment following the Belfast Agreement on 10th April 1998.

(b) The adequacy of the measures taken by UK state authorities, including the police, security forces and intelligence and security agencies, to disrupt those dissident republican terrorists who had been involved in terrorist attacks or attempted terrorist

attacks in the period from 1st December 1997 to the Omagh bombing. This shall include consideration of any change in the measures used or approach taken by UK state authorities following the Belfast Agreement on 10 April 1998.

- (c) The adequacy of the policies and practices of UK state authorities, including the police, security forces and intelligence and security agencies, in sharing intelligence between themselves and with the authorities in the Republic of Ireland on the activities of those dissident republican terrorists who had been involved in terrorist attacks or attempted terrorist attacks in the period from 1st December 1997 to the Omagh bombing.
- (d) The allegation made by Norman Baxter (former Senior Investigating Officer in the investigation into the Omagh bombing) in the course of his evidence to the Northern Ireland Affairs Select Committee on 11 November 2009, that police investigators into previous attacks in Moira (20 February 1998), Portadown (9 May 1998), Banbridge (1 August 1998) and Lisburn (30 April 1998) did not have access to intelligence materials which may reasonably have enabled them to disrupt the activities of dissident republican terrorists prior to the Omagh bombing.
- (e) Information relating to dissident republican terrorist activity said to have been passed to police between June and August 1998 by an alleged British security forces agent known by the name of Kevin Fulton and whether that might reasonably have enabled UK state authorities, whether on its own or in conjunction with other information, to disrupt dissident republican terrorists engaged in the planning and preparation of the Omagh bombing.
- (f) The nature of the intelligence said to have been obtained by the UK Government's Communication Headquarters (GCHQ), including from alleged vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and conduct of the Omagh bombing and other earlier attacks.

- (g) The adequacy of the analysis and handling of and response by UK state authorities to any intelligence obtained by GCHQ, including from vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and/or conduct of the Omagh bombing and other earlier attacks.
- (h) The extent and adequacy of steps taken by UK state authorities to track and analyse the mobile telephone usage by those suspected to be involved in dissident republican terrorist attacks before the Omagh bombing and whether that might reasonably have enabled UK state authorities to disrupt dissident republican terrorists engaged in the planning, preparation and/or conduct of the Omagh bombing.
- (i) Any other matters which are relevant to whether the Omagh bombing on 15th August 1998 could have been prevented by UK state authorities. To the extent it is relevant to the issue of preventability by UK state authorities, this may include information sharing and investigations with and by state authorities in the Republic of Ireland.

### Method

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

### Report

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

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

- (a) receiving, in advance of hearings, disclosure of evidence which the chair considers relevant to that core participant;
- (b) making an opening and closing statement at certain hearings;
- (c) suggesting lines of questioning to be pursued by counsel to the Inquiry;
- (d) their recognised legal representatives applying to the chair to ask questions of a witness.

[11] The chair has granted core participant status to a considerable number of individuals and bodies. His decision in relation to the refusal of core participant status to one individual has survived a judicial review challenge (*Re Peter Keeley's application* [2024] NIKB 71 Humphreys J). Those that have been designated core participants include: the Secretary of State for Northern Ireland; the Police Service of Northern Ireland; The Police Ombudsman for Northern Ireland; Sir Ronnie Flanagan; and a large number of the injured and the next of kin of the deceased. The core participants are represented by teams of solicitors and counsel.

[12] In order to add detail to the Terms of Reference so as to provide greater focus to the work of the Inquiry and to map out the direction of travel of the inquisitorial process, the Inquiry legal team have painstakingly drafted a detailed provisional list of issues which they have described as a living document and which will be subject to regular review and amendment. Proof of this is the fact that the latest iteration (the third so far) was published on 31 October 2025. The list of issues has been described as providing a guide to the topics the Inquiry chair proposes to investigate when he examines each aspect of the Inquiry's Terms of Reference. The published list of issues specifically acknowledges that that some matters will require investigation in both "open" and "closed", or in certain cases, wholly in "closed." However, wherever possible, the evidence will be heard in public and the chair will only receive evidence in "closed" where he determines it is necessary for him to do so. "Closed" evidence will be kept under constant review to test whether it can, at least in some form, be disclosed into "open." Bringing such evidence into the public domain, as far as it is legally permissible to do so, is a key purpose of this Inquiry.

[13] When addressing the question of preventability, the list of issues indicates that the work of the Inquiry will include consideration of the lawful methods that the UK state authorities could reasonably have employed between 1 December 1997 and 15 August 1998 to gather information, evidence or intelligence about the activities of

dissident republicans. Such methods include the interception of communications, the use of undercover officers or CHIS, equipment interference, consideration of liaison material from other countries' investigation and monitoring of those suspected of involvement in earlier terrorist attacks and their associates, and the review of witness, documentary and scientific evidence from earlier police or other state investigations following previous attacks. The Inquiry will consider whether those methods were in fact employed by the UK state authorities, and, if they were, whether they were employed appropriately. This will involve consideration of the powers available:

- (a) at common law;
- (b) in statute (including under the Police and Criminal Evidence Act 1984, the Interception of Communications Act 1985, the Public Order (Northern Ireland) Order 1987, the Police and Criminal Evidence (Northern Ireland) Order 1989, the Security Service Act 1989 and the Intelligence Services Act 1994); and
- (c) under non-statutory guidelines, guidance or codes of practice.

[14] The Inquiry will also examine the methods available to the UK state authorities during the relevant period for the purpose of keeping under surveillance, disrupting or stopping the activities of dissident republicans engaged in the planning and preparation of a terrorist attack or attacks and whether those methods were in fact employed, and, if they were, whether they were employed appropriately, including the extent to which use could have been made of policing powers to detain, stop and search suspects and search vehicles and premises, with or without a warrant, under the Police Act 1997, the Northern Ireland (Emergency Provisions) Act 1996 and the Prevention of Terrorism (Temporary Provisions) Act 1989.

[15] The Inquiry also intends to look at any expanded powers created by legislative changes made in the aftermath of the Omagh bombing, such as the Criminal Justice (Terrorism and Conspiracy) Act 1998 in order to assess whether such changes could and, if so, should have been made prior to 15 August 1998 and if such changes had been made prior to the attack, what difference earlier change may have made.

[16] Crucially, the Inquiry will examine whether there was any failure by the UK state authorities to act on information, evidence or intelligence available to the UK state authorities prior to the Omagh bombing which may arguably have prevented the events of 15 August 1998. This will include examining whether there was any failure to obtain and/or explore the availability of information, evidence or intelligence which, if obtained and acted upon, may arguably have prevented the attack.

[17] The Inquiry intends to examine whether those identified as being responsible for the Omagh bombing carried out any terrorist attack or attacks prior to 15 August 1998 and, if so, whether their involvement in those earlier events was, or should have been, known to UK state authorities and, in either case, whether there were

opportunities to disrupt the activities of those terrorists before they mounted the attack on Omagh.

[18] The Inquiry intends to investigate and precisely map out the response of the police and other UK state agencies to any warning calls made in relation to the Omagh bombing. The Inquiry proposes to investigate the significance of warning calls and the use of codewords more generally, including the significance, if any, of the use of the term “Martha Pope” in the calls made prior to the detonation of the Omagh bomb. The Inquiry will also examine whether the UK state authorities implemented a process of “Security Normalisation” in Northern Ireland in the one-year period prior to the Omagh bombing, or during any part of that year and, if so:

- (a) whether that created an environment in which it was easier for terrorists to carry out any attack, including the Omagh bombing;
- (b) whether “Security Normalisation” impacted on the UK state authorities’ operational capabilities to detect and de-activate the bomb placed in Omagh on 15 August 1998, following receipt of the bomb warning calls;
- (c) whether “Security Normalisation” impacted on any decision-making related to detecting and de-activating the bomb placed in Omagh on 15 August 1998 following receipt of the bomb warning calls; and
- (d) whether information and intelligence which was gathered (or which ought to have been gathered) prior to the bomb warning calls, impacted (or should have impacted) on any decisions relating to the prospect of detecting and deactivating the bomb placed in Omagh following receipt of the bomb warning calls.

All of that will involve a comparison between the responses to warning calls made in respect of dissident republican attacks that occurred between July 1997 and August 1998.

[19] The list of issues makes it clear that although the Inquiry is specifically prevented by section 2(1) of the 2005 Act from ruling upon or determining issues of civil or criminal liability in respect of the attack or any crimes associated with the attack, that does not mean that during the work of the Inquiry it will not be necessary to identify those individuals believed to be responsible for the bomb attack or acts associated with it. For the avoidance of doubt, it is specifically stated in the list of issues that the Inquiry fully intends to identify those individuals, if the evidence permits that to be done. It is stated that the identification of such responsibility is quite different from ruling upon or determining civil or criminal liability. It is asserted that section 2(2) of the 2005 Act means that an Inquiry should not be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

[20] It is specifically stated that in analysing the preventability of the Omagh bombing, no sensible assessment of whether evidence or intelligence might have been better utilised can be undertaken without identifying whether the intelligence relates to someone involved in the bombing. Furthermore, no sensible assessment can be made of whether better intelligence or evidence could have been obtained without identifying those in respect of whom intelligence or evidence was needed. It is further asserted that no understanding of the value of cell site data or call patterns can be reached without knowing who was using telephone numbers of relevance at any particular time. It is stated that these matters illustrate why the work of the Inquiry requires the individuals believed to be responsible for the Omagh bombing and associated events to be identified. The Inquiry is determined to identify those persons to the extent that the evidence enables that to be done. It is argued that nothing in the Act prevents that but in making any identifications, the Inquiry will take care to avoid the language of criminal or civil liability.

[21] Expanding on what is encompassed within the scope of the Inquiry, the list of issues goes on to explain that the assessment of the threat posed by dissident republican terrorists from 1 December 1997 to 15 August 1998 will necessarily involve the Inquiry exploring the activities of those terrorists in the period leading up to 1 December 1997, on account of the fact that the preliminary work carried out by the Inquiry would indicate that the threat posed by those dissident republican terrorists pre-dated the relevant period. The Inquiry intends to explore the intelligence and information available to UK state authorities from 17 July 1997. That date has been chosen because it is 14 days prior to the planting of large explosive device in the carpark of the Carrybridge Hotel in Lisbellaw, County Fermanagh; an act which was attributed to dissident republican terrorists. However, in order to ensure that it carries out a full investigation in relation to the threat posed by dissident republican terrorists, this time period will continue to be kept under review as the work of the Inquiry progresses.

[22] A large number of general structural and systemic issues will be investigated and the following questions will be posed and answered:

- (a) Which UK state authorities had a role in the management of the terrorist threat in Northern Ireland during the relevant period and what was the legal basis for that role?
- (b) What was the nature and structure of the relationships between the various UK state authorities involved in the management of the terrorist threat in Northern Ireland over the relevant period, including the hierarchy between them?
- (c) What system or systems were used by those UK state authorities over the relevant period for assessing the level of threat to life and property posed by terrorists in Northern Ireland?

- (d) What threat assessments were made by those UK state authorities in relation to the threat to life and property posed by terrorism in Northern Ireland over the relevant period? If no such threat assessments were made, why was that the case? Did the Belfast/Good Friday Agreement and/or the negotiations leading to that Agreement result in any change in the process for the making and dissemination of threat assessments and, if so, what was the nature and extent of that change and why was that change made?
- (e) How often were those threat assessments the subject of review and were they reviewed by a person or persons of the appropriate experience and expertise?
- (f) To what extent were threat assessments shared within or outside the UK Government? If they were shared, to what extent was sharing deemed necessary and why? Who, ultimately, were the threat assessments shared with?
- (g) Which agencies or departments within the UK Government were responsible for making, reviewing and updating the threat assessments or, if not an agency or department, who did hold those responsibilities?
- (h) During the relevant period, in addition to any standard timeframes for review, was a further review always conducted following a terrorist attack? If not, why not and should it have been?
- (i) How did the process of assessing the threat posed by terrorism in Northern Ireland vary, if at all, from similar threat assessments carried out in relation to the rest of the United Kingdom?
- (j) Was the threat posed in Northern Ireland by dissident republican terrorists from 1 December 1997 to the date of the Omagh bombing underestimated and/or misunderstood?

[23] The Inquiry will look into the origins, make up and structure of dissident republican terrorist groupings and this work will involve posing the following questions:

- (a) Which political and paramilitary organisations were joined by or created by dissident republicans opposed to the peace process in Northern Ireland?
- (b) When were these organisations created and, to the extent it is relevant, how were they funded? To what extent did the activities of these organisations impact on the threat assessments made during the relevant period or necessitate additional threat assessments being made?

- (c) Did opposition to the peace process by dissident republicans necessitate any change to the threat assessment in the period before and/or after the Belfast/Good Friday Agreement coming into force? If not, why not?
- (d) Did any threat assessments carried out by the UK state authorities over the relevant period specifically consider the threat posed by any of the following groups:
  - (i) Continuity IRA?
  - (ii) Irish National Liberation Army?
  - (iii) Provisional IRA (“PIRA”)?
  - (iv) Real IRA?
  - (v) Óglaigh Na hÉireann?
- (e) If they did, what was the result of the relevant threat assessment(s)?
- (f) Was there a further threat assessment of any or all of those groups carried out following the Belfast/Good Friday Agreement? If so, what was the result of that assessment? Did it take into account the possibility of an increased threat posed by dissident republican terrorists? Was any such assessment adequate?

[24] The Inquiry also intends to examine what information or intelligence was shared by the Government of Ireland with the UK state authorities and to what extent was that factored into the threat assessments carried out by the latter.

[25] The Terms of Reference specifically refer to the requirement to investigate the adequacy of measures taken by state authorities and agencies to disrupt dissident republican terrorist activities and whether there was a change in approach following the signing of the Belfast/Good Friday Agreement on 10 April 1998. The list of issues makes it clear that in order to properly investigate these matters, the Inquiry will seek to identify the key organisations in the UK with responsibility for the policing and security of NI during the relevant period and what were the responsibilities of each. In particular, the Inquiry will seek to establish the roles and responsibilities of uniformed policing resources, CID, Special Branch, MI5, GCHQ, MI6, and the Army. The Inquiry will also investigate to what extent these organisations worked together to share information, evidence and intelligence in order to identify and apprehend dissident republicans or otherwise disrupt dissident republican activity and whether the identified cooperation and working arrangements were adequate.

[26] The Inquiry intends to look into the background to the attack and, in order to do so, the Inquiry legal team has indicated in the list of issues that they will examine the chronology of conflict known as “The Troubles” in Northern Ireland in order to identify the key events that led ultimately to the Belfast/Good Friday Agreement on 10 April 1998, with a particular focus on the period between 1993 and 1998. The list of issues indicates that the Inquiry may engage in a very broad review of the historical context, going back as far as the Sunningdale Agreement (December 1973) and

examining subsequent initiatives such as the Northern Ireland Constitutional Convention (1975-1976); the Northern Ireland Assembly (1982 to 1986); the Anglo-Irish Agreement (November 1985); the Brooke/Mayhew Talks (1991-1992); the Downing Street Declaration (December 1993); the ceasefires called by PIRA and some loyalist groupings (1994); the "Frameworks for the Future" published jointly by both governments (February 1995) which was followed up by the joint communique on all-party negotiations in Northern Ireland and decommissioning (November 1995); the publication of the "Mitchell Principles" by US Senator George Mitchell (January 1996); the end of the PIRA ceasefire (February 1996); the beginning of preliminary all-party talks in Belfast (June 1996); the reinstatement of the PIRA ceasefire (July 1997); the establishment of the Independent Commission on Decommissioning (August 1997); Sinn Fein signing up to the Mitchell Principles and entering all-party talks (September 1997); the meetings of the Liaison Subcommittee on Confidence Building Measures (commencing in October 1997); and the signing of the Belfast/Good Friday Agreement (10 April 1998).

[27] In respect of Belfast/Good Friday Agreement, the Inquiry intends to identify and examine what were the key strands of the Belfast/Good Friday Agreement and the institutions it created. It will examine strands 1, 2 and 3 of the Belfast/Good Friday Agreement including the recognition of the role of the Government of Ireland with particular emphasis on the facilitation of co-operation on security matters. It will look at the processes put in place for the decommissioning of weapons and how the Agreement envisaged that the security of Northern Ireland would be normalised over time. It will examine whether this involved a reduction in troop numbers, a reduction in military and/or police patrolling, removal of security installations, greater freedom of movement for traffic and the removal of emergency powers in Northern Ireland and it will examine to what extent were any of these changes made ahead of the Agreement being formally announced.

[28] The Inquiry intends to examine the mechanisms that were proposed for the review of policing and justice, in particular the role of the Royal Ulster Constabulary. It will look at the prisoner release scheme and how this scheme was put into effect and whether it was accelerated. It will examine the issue of which groups were included or excluded in the scheme and the rationale for doing so. The Inquiry will examine how the Belfast/Good Friday Agreement came into force in Northern Ireland, in the rest of the United Kingdom and in the Republic of Ireland between 10 April 1998 and 15 August 1998, including looking at the co-ordinated referendums that took place in Northern Ireland and the Republic of Ireland, and examining the legislative and constitutional changes made in the Republic of Ireland and the United Kingdom to facilitate the enactment of the Belfast/Good Friday Agreement.

[29] Importantly, the Inquiry will go on to examine whether the coming into force of the Belfast/Good Friday Agreement had an impact (and if so, the nature and extent of that impact) on the approach of the UK state authorities to the policing and management of the terrorist threat in Northern Ireland and the levels of army and/or police and/or other personnel that were deployed to manage that threat. It will

examine the rationale behind any changes in approach. As part of this exercise, it will examine whether there were changes in approach in Northern Ireland and/or the Republic of Ireland in the use of overt security tactics, such as roadblocks, vehicle check points and border checks, as a result of the Belfast/Good Friday Agreement (whether made in anticipation of the Agreement or after it was made) and whether one of the effects of any such changes was to create greater freedom of movement for traffic throughout Northern Ireland and/or from the Republic of Ireland into Northern Ireland. The Inquiry will also examine whether there were any changes in approach in Northern Ireland and/or the Republic of Ireland to the use of covert security tactics as a result of the Belfast/Good Friday Agreement and if so, in what way or ways did these changes manifest themselves.

[30] Following on from the matters referred to in para [20] above, the Inquiry intends to examine what was or should have been known by the UK state authorities about the activities of dissident republican organisations and individuals associated with those organisations prior to the signing of the Belfast/Good Friday Agreement. In order to meaningfully engage in this task, the Inquiry intends to examine a total of 32 completed or attempted attacks in NI and munitions finds both north and south of the border, commencing with the planting of the Carrybridge Hotel bomb in Lisbellaw at the end of July 1997 and concluding with the detonation of a car bomb in Newry Street, Banbridge on 1 August 1998, in which the code word “Martha Pope” was used.

[31] Focusing on these incidents, the Inquiry will investigate what steps were taken by the UK state authorities to identify, monitor, apprehend or otherwise disrupt, deter and/or stop the dissident republican organisations and individuals involved, or believed to be involved, in these attacks and/or stop their access to weapons and precursor materials. The Inquiry will address the issue of whether any such steps that were taken were sufficient or whether more could and should have been done. The Inquiry will investigate whether any such steps included any part of the UK state seeking to track the funding of dissident republican organisations and individuals. If such steps were taken, it will investigate how successful those steps were and, if no such steps were taken, it will investigate the reasoning behind such inaction. It will examine the whole issue of the proscription of dissident republican organisations and whether this tactic was appropriately and effectively utilised.

[32] Crucially, the Inquiry will investigate whether there were any operational decisions taken either before or after the Belfast/Good Friday Agreement, by the police, security forces or Intelligence and security agencies, not to identify, apprehend, disrupt and stop the dissident republican organisations and individuals involved in these attacks or to adopt any different approach to those organisations and individuals from that which had previously been adopted and, if so, what the rationale was for any identified change of tack. It will investigate whether there were any political or politically influenced decisions by the UK state authorities, before or after the Belfast/Good Friday Agreement, not to identify, apprehend, disrupt and stop the dissident republican organisations and individuals involved in these attacks and, if so, what the rationale was for any such decision-making.

[33] When looking into the adequacy of intelligence sharing arrangements between the UK and the Republic of Ireland in respect of dissident republican terrorists during the relevant period, the Inquiry intends to identify the key organisations in the Republic of Ireland with responsibility for engagement with those UK state authorities involved in the policing and security of Northern Ireland, and this will include identifying the scope of their roles and responsibilities. The Inquiry will examine the nature and extent of joint working and liaison between the Republic of Ireland and the UK in relation to the terrorist threat in Northern Ireland (whether that threat emanated from within Northern Ireland itself or the Republic of Ireland or both) before and after the Belfast/Good Friday Agreement, including arrangements for information, evidence and intelligence sharing, and the adequacy of those arrangements. The Inquiry will seek to ascertain what information, evidence and intelligence was shared between the key organisations in the UK and the Republic of Ireland prior to the detonation of the Omagh bomb which related to the dissident republican attacks that occurred on both sides of the border between 31 July 1997 and 15 August 1998. The Inquiry will seek to address the issue of whether more could and should have been shared.

[34] Turning to the Omagh bombing itself and, in particular, the anonymous phone call which was made to the RUC on 4 August 1998 stating that an unspecified attack would be made on police in Omagh on 15 August 1998; the Inquiry will investigate whether and, if so, to what extent, was the making of this call or its contents shared between key organisations in the UK and the Republic of Ireland and the nature and extent of any actions taken by the UK state authorities or An Garda Síochána in relation to that intelligence. The Inquiry will seek to address the issue of whether more could and should have been done.

[35] Having regard to the conclusions of the report by the late Mr Dermot Nally, the former Secretary of the Government of Ireland, into alleged intelligence failings by An Garda Síochána which may have had a bearing on whether the Omagh bombing could have been prevented, the Inquiry will seek to identify any failings to share intelligence between the Republic of Ireland and the UK state authorities or other issues of relevance to the Inquiry's Terms of Reference. It will explore whether An Garda Síochána had information, evidence or intelligence prior to the Omagh bombing that a terrorist attack of the nature of that which took place in Omagh was being planned, and whether, after the Omagh bomb, An Garda Síochána identified intelligence that, if identified prior to 15 August 1998, might have helped to prevent the bombing.

[36] The Inquiry intends to investigate whether UK state authorities received any information, evidence or intelligence from the Republic of Ireland prior to the Omagh bomb indicating that any such attack within Northern Ireland was planned. If such information was provided, the Inquiry will seek to address the issue of whether the UK state authorities acted appropriately, having regard to the information, evidence or intelligence received.

[37] The Inquiry will seek to address the issue of whether there were any missed opportunities before 15 August 1998 in the liaison between the UK and the Republic of Ireland which might have enabled the authorities to identify and apprehend or otherwise disrupt and stop the dissident republican organisations and individuals who carried out the Omagh bombing. If any such missed opportunities are identified, the Inquiry will seek to discover what went wrong and why. In particular, the Inquiry will seek to ascertain whether the vehicles now known to have been involved in transporting the bomb to Omagh and/or the individuals connected with those vehicles were the subject of any surveillance or reporting (including via any agent or agents) in the period leading up to the Omagh bombing and if there was such surveillance and/or reporting, what form did it take and what, if any, action was taken as a result. If there was surveillance and/or reporting and no action was taken, the Inquiry will seek to ascertain why this was the case.

[38] The Inquiry will also seek to discover whether the UK state authorities covertly obtained any information, evidence or intelligence from within the Republic of Ireland which suggested that such an attack (ie an attack in Northern Ireland on or around 15 August 1998) was planned and, if so, how was that information, evidence or intelligence obtained and whether the authorities within the Republic of Ireland were aware of that information, evidence, or intelligence being obtained by the UK state authorities. The Inquiry will look at whether any such information, evidence or intelligence was shared by the UK state with the ROI authorities or agencies at any stage and whether the UK state authorities made appropriate use of the said information, evidence or intelligence.

[39] In relation to the evidence of Mr Norman Baxter before the Northern Ireland Affairs Select Committee in 2009 and bearing in mind that the Inquiry will have to have due regard to the issue of parliamentary privilege, the Inquiry intends to investigate what was known by uniformed policing resources, CID, Special Branch, MI5, MI6, GCHQ and the British Army about the attacks/attempted attacks conducted by dissident republicans between 31 July 1997 and 15 August 1998 and the evidential or intelligence links between those attacks, including information, evidence and intelligence about the organisation(s) believed to be involved; the individuals believed to be involved; the source and type of precursor explosive material used; the source and type of timer power unit used; the design and build of the explosive devices, including the wiring; the source of the vehicles used to deliver the bombs; any other scientific links between the attacks; the location of the attacks; any links between the telephone warnings, including the code word used and the identity of the callers; and further attack planning. If the Inquiry finds evidence of a failure by any organisation to share information, evidence or intelligence, the Inquiry will attempt to explore whether the timely sharing of such information, evidence or intelligence would have allowed the police to disrupt the activities of dissident republicans involved in the Omagh bombing before 15 August 1998. The Inquiry will also explore whether any failure to share information, evidence or intelligence

resulted from or was influenced by a desire or perceived requirement to protect any agent or covert technique.

[40] In relation to the activities of alleged UK state agents (Kevin Fulton, David Rupert and others), the Inquiry intends to consider the roles played by these two named alleged UK state agents and, indeed, any other UK state agents in relation to the provision of information or intelligence about dissident republican activity either before or after the Omagh bombing. In relation to the individual known as Kevin Fulton, the Inquiry will seek to discover which UK state agencies, if any, he provided intelligence or information to and during what time period; in what capacity did he provide information or intelligence (ie formally as an agent or otherwise); whether he only provided information or intelligence pursuant to tasking, or whether he volunteered information or intelligence.

[41] The Inquiry will be particularly interested to ascertain whether Mr Fulton provided relevant information or intelligence to UK state agencies between June 1998 and August 1998. In investigating these matters, the Inquiry will seek to discover on what dates, if any, within that time range, was information or intelligence provided by Kevin Fulton; how precisely this information or intelligence was provided; to whom was it provided; what it related to; what was the precise content of same; how widely it was shared or disseminated by the initial recipient; what grade was attributed to it; what action, if any, was taken in response to it; and if the intelligence or information was not shared or acted upon, the rationale for such inaction. The Inquiry will seek to ascertain whether any of the intelligence or information which was provided included credible and actionable intelligence about the activities of dissident republicans who may have been engaged in the planning of and preparation for the Omagh bombing and whether, if acted upon, that information or intelligence could have been used to disrupt the planning, preparation and/or conduct of the Omagh bombing. A similar exercise will be carried out in respect of the individual known as David Rupert. In addition to the above, the Inquiry will specifically look at the issue of whether there were any attempts made after the Omagh bombing to "spin" the importance or knowledge by the UK state authorities of the information or intelligence shared by Kevin Fulton.

[42] The Inquiry intends to similarly explore whether UK state authorities or agencies made use of or had access to any other agents who provided information or intelligence in relation to dissident republican activity during the relevant period. It will seek to identify the UK state authorities or agencies involved and whether any identified agent or agents was or were specifically tasked in relation to those organisations listed in para [22](d) above, suspected members of those organisations or in relation to the series of attacks and munitions finds that preceded the Omagh bombing beginning with the Carrybridge Hotel bomb. The Inquiry will seek to explore whether any reporting was received from any other agents about any of those organisations or their members or about any of the attacks and munitions finds or about the planning of and/or preparation for the attack in Omagh. If any such reporting was received, the Inquiry will seek to ascertain from whom it was received,

how was it graded, what was done with it in terms of sharing or dissemination, how was it acted upon and if it was not shared or acted upon, what were the reasons for such inaction.

[43] The Inquiry intends to investigate whether prior to 15 August 1998, any agent to whom the UK state authorities had access held any information or intelligence on any of those organisations listed in para [22](d) above or any members of those organisations or about any of the attacks leading up to the attack on Omagh or about the planning of and/or preparation for the attack on Omagh itself which was not supplied to the UK state authorities. If this transpires to be the case, the Inquiry will attempt to discover why that information was not supplied to UK state authorities and, if it had been supplied, whether it may have prevented the Omagh bombing.

[44] In order to leave no stone unturned, the Inquiry will explore whether, prior to 15 August 1998, the authorities in the Republic of Ireland had access to any agent reporting of relevance to the Omagh bombing and, if they did, whether the product of that reporting was shared with any UK state authorities. If it was, the Inquiry will investigate whether the UK state authorities responded appropriately to any such reporting. Alternatively, if such reporting was not shared with any UK state authorities, the Inquiry will seek to ascertain why it was not shared and whether, if shared and acted upon, it could have been used to disrupt the planning, preparation and/or conduct of the Omagh bomb.

[45] The Inquiry intends to look at the general issues of agent recruitment, agent handling and the processing of the product of agent reporting. It will investigate whether the UK state authorities had developed processes for ensuring that agent reporting from a number of sources was considered together and in combination with other information or intelligence so as to ensure that a complete picture, or as complete a picture as possible, was gained. The adequacy and effectiveness of any such processes will also be assessed.

[46] Looking at the practices of MI5, MI6, the RUC (including, but not limited to, Special Branch and CID) and the British army, the Inquiry will attempt to ascertain what processes were used for purposes of recruitment of agents within or with access to the dissident republican movement, including the granting of participating informant status to those agents. Other issues which the Inquiry hopes to address include: the processes used for the handling of such agents; the training given to the handlers of any such agents; the standing instructions given to those handlers; the processes used for the tasking of such agents; the processes used for the recording and assessing the reliability, importance and value of any information or intelligence provided by such agents particularly with regard to the disruption of dissident republican terrorist activity; the criteria used for determining whether, how and in what form any such information or intelligence should be shared with others; and the nature and extent of any statutory underpinning to or other basis for the identified processes or criteria. In relation to the issue of sharing of such information or intelligence, the Inquiry intends to investigate whether there is any evidence to

indicate a reluctance on the part of any of the above agencies to share any such information or intelligence with any other relevant bodies in the UK or ROI.

[47] The Inquiry will specifically investigate the role played by GCHQ in relation to the gathering of information or intelligence on dissident republican terrorists during the relevant period, including any intelligence resulting from vehicle tracking and telephone intercepts or monitoring with a view to ascertaining what, if any, information or intelligence GCHQ actually acquired or obtained about the series of dissident republican attacks that occurred between 31 July 1997 and 15 August 1998 and the Omagh bombing and/or the planning or preparation for it. If it transpires that any such information or intelligence was obtained, the Inquiry will seek to ascertain how and by what means was it obtained; how and by whom was it reviewed; and whether such a review occurred in real-time or subsequently and, if subsequently, how quickly did any such review take place.

[48] In relation to the dissident republican attacks which took place in the year or so leading up to the attack on Omagh, the Inquiry will seek to ascertain whether any information or intelligence that was so obtained by GCHQ facilitated or assisted in the identification of individuals involved in any of these attacks and the roles these individuals played and whether the information or intelligence covered issues such as the preparation of and planning for further attacks. The issue of the sharing of any such information or intelligence by GCHQ with RUC Special Branch ("SB") and/or CID will be addressed, with the Inquiry looking into the means by which any such information or intelligence was shared, how quickly any such information or intelligence was shared and the identity of those in Special Branch and/or CID who received it.

[49] If the Inquiry is able to identify any restrictions placed on the sharing of any such information or intelligence by GCHQ with RUC SB or CID, it will proceed to investigate the rationale for the existence of any such restrictions and the statutory underpinning or other basis for the identified restrictions and the Inquiry will also go on to evaluate whether any such restrictions were appropriate and necessary or whether they indicated the adoption of an over-cautious approach by GCHQ and, thus, had the effect of limiting the ability of other UK state agencies including RUC SB and CID to disrupt dissident republican terrorist activity. The Inquiry will also specifically investigate whether any such information or intelligence garnered by GCHQ could have facilitated or assisted in the identification of those involved in the Omagh bombing. If GCHQ did garner any information or intelligence relevant to the Omagh bombing, the Inquiry will seek to ascertain whether any action was taken in response to this information or intelligence and, if so, when and by whom. It will examine how effective any such action was and if no action was taken, it will attempt to ascertain why this was the case.

[50] The Inquiry has signalled an intent to delve into the granular detail of GCHQ activities and the activities of other relevant UK state bodies and agencies during the relevant time which involved the surveillance of individuals, the tracking of vehicles,

the tracking or monitoring of mobile telecommunications devices or the interception of exchanges emanating from or received by such devices, in circumstances where those individuals, vehicles and devices were suspected either at the time or subsequently of being connected to the Omagh bombing. The Inquiry will seek to discover the exact circumstances in which any such tracking, monitoring or interception was initiated, the precise methods used to carry out such tracking, monitoring or interception, when such tracking monitoring or interception work commenced and for how long such work continued. The Inquiry will also examine the nature, extent and importance of the product obtained as a result of any such work, whether and with whom such intelligence product was shared and what actions, if any, were taken as a result. If such product was generated and shared, the Inquiry will specifically seek to identify what if any handling instructions were issued when the product was shared. If any such product was generated but has not been retained or preserved, the Inquiry will seek to discover, why, when and in what circumstances was such product disposed of.

[51] The Inquiry intends to examine the whole subject of mobile cell site data analysis in order to ascertain when mobile phone cell site data first became available to the relevant UK state authorities or agencies; when the techniques for the analysis of such data first became available to these bodies and agencies; and, when analysis of such data by each of these authorities or agencies first commenced, either for the purpose of intelligence gathering or for the purpose of investigating crime. Focusing in on the Omagh bombing, the Inquiry will attempt to ascertain whether mobile cell site data generated in the year leading up to the bombing was, either at that time, or at any subsequent time, garnered and analysed in respect of any mobile handset or SIM card believed (whether at the relevant time or at any subsequent time) to have been used by any person who was or is now suspected of being involved in the Omagh bombing. If any such analysis has ever taken place, the Inquiry will seek to identify the relevant telephone numbers and any individuals of interest associated with those numbers. The Inquiry will also seek to identify the mobile communications service providers from whom the data was garnered, the state agencies or bodies who obtained the data, including the identity of any individual who made the decision to seek access to the data, the dates on which any such data was requested and the dates on which any such data was provided. The Inquiry will also seek to establish when such data was analysed, by whom it was analysed and the identities of the persons who gave the go ahead for such analysis. If the raw data still exists, the Inquiry will seek to identify the present keepers of the said data. Having delved into these issues, the Inquiry will consider the question of whether the analysis of any such data established any links between the various attacks and munitions finds which occurred in the run up to the Omagh bombing and between any of those attacks and munitions finds and the Omagh bombing itself. The Inquiry will seek an answer to the question of whether any such data or the product of analysis of any such data was shared with the authorities in ROI and, if such sharing did take place, the Inquiry will seek to ascertain when such sharing took place and the form of the material shared.

[52] Separate from the issue of mobile telephone cell site analysis (which provides information relevant to the location of a mobile phone/SIM card in relation to the location of identified mobile phone masts), there is also the issue of the records relating to the calls made and received by identified mobile phones/SIM cards and the duration of such calls (call data records). The Inquiry will attempt to ascertain whether call data records in the year leading up to the Omagh bombing which relate to any mobile handset or SIM card believed (whether at the relevant time or at any subsequent time) to have been used by any person who was or is now suspected of being involved in the Omagh bombing, were, either at that time, or at any subsequent time, obtained by relevant state authorities or agencies and, if so, whether these records were analysed with a view to investigating whether there was any contact between mobiles/SIM cards of interest and/or whether the patterns of use of any of the mobile phones/SIM cards indicated involvement in any of the attacks or munitions finds leading up to the bombing, or the Omagh bombing itself. If the analysis revealed such contacts or patterns of use, the Inquiry will seek to establish the precise nature and extent of the contacts and/or patterns of use. The Inquiry will seek to identify who authorised the obtaining of these records, who analysed the records and their level of expertise and experience in such analysis. If such call data records still exist, the Inquiry will seek to identify the present holders of these records. The Inquiry also intends to address the issue of the sharing of such records or information contained in such records with authorities or agencies in ROI.

[53] It is clear that the Inquiry intends to leave no stone unturned when looking into the issue of whether the analysis of mobile cell site data and/or call data records points towards the existence of any links between the attacks and munitions finds that occurred in the year leading up to the Omagh bombing and the bombing itself and, if so, the Inquiry intends to identify those links, identify those responsible for the relevant analysis and identify and describe the reporting associated with any such analysis. If no cell site data and/or call data records were obtained by any of the relevant UK state authorities or agencies, the Inquiry will seek to ascertain why this was the case. If cell site data and/or call data records were sought by the relevant UK state authorities or agencies from telecommunications providers, the Inquiry will seek to ascertain whether any data, records or other information which was provided was provided voluntarily or was provided pursuant to a legal order and whether the practice differed between telecommunications operators or was dependent upon where the phones under investigation had been used.

[54] The Inquiry has specifically set out its intention to address the same issues involving mobile cell site data and call data records as described in paras [51] to [53] above in respect of ROI state authorities and agencies including whether such data and/or records obtained and analysed by the ROI authorities/agencies was/were shared with any UK state authorities/agencies.

[55] The Inquiry has signalled its intention to divide the oral hearings up into what it describes as eight chapters, two of which have already taken place. Chapter one which took place in January and February 2025, involved giving opportunities to those

injured in the Omagh bombing to give their accounts about the impact of the attack on their lives and to those bereaved relatives of those killed in the explosion to provide the Inquiry with pen portraits of the deceased and to describe the impact of the explosion on the lives of the bereaved. Evidence was also given by a number of first responders who attended the scene of the explosion in the immediate aftermath or treated the injured and dying. This chapter was given the title: “Commemorative and Personal Statement hearings.”

[56] Chapter two was entitled “Core Participant Opening Statements” and it took place in June 2025. In advance of this, the chairman of the Inquiry emphasised the need for state core participants to positively assist the Inquiry in its search for the truth, to engage with the Inquiry in an open, candid and transparent manner consistent with the Hillsborough Charter and to frankly recognise and accept any identified mistakes or failings relevant to the terms of reference at the earliest possible stage. The content of the opening statements was covered by a specific protocol drafted by the Inquiry legal team and this protocol made provision for the management of any “closed” concessions by state core participants. As it was, there was no meaningful acknowledgment of mistakes or failings by any of the state core participants. The protocol emphasised that the primary aim of the Inquiry was to uncover the truth. The protocol also reminded all core participants that this aim will be achieved most effectively and efficiently if state core participants engage meaningfully and fully, respecting the inquisitorial nature of the proceedings.

[57] Chapter three has been given the title “The Bombing of Omagh” and it was due to start on 9 March 2026 but was postponed because of issues with disclosure from ROI and the existence of this judicial review. It is intended that this phase of the Inquiry will seek to establish the methodology which was adopted in carrying out the Omagh bombing and the identities of the perpetrators, based on “open” material. The Inquiry will examine all open material relevant to the construction of the bomb, the movements of the car containing the bomb, any warning calls that were made, the use of telephones, scientific evidence and “any other relevant overt evidence.” The Inquiry will examine in detail any claims of responsibility, any arrests that took place and any subsequent court proceedings. Expert evidence in relation to the use of telephones based on overt material such as the analysis of call patterns and cell site data will be called during this open phase as will the results of scientific investigations which were carried out during the investigation into the Omagh bombing, including DNA analysis. It is the Inquiry’s intention to establish how the Omagh bombing was carried out and by whom. There will be no restricted or “closed” evidence during chapter 3. All core participants and their legal representatives will fully participate in this phase of the Inquiry.

[58] Chapter four has been given the title “To investigate previous Incidents: overt material.” It is intended that during this phase of the Inquiry the 32 attacks and munitions finds which occurred in the year leading up to the Omagh bombing will be investigated with a view to establishing any links between these attacks and finds and between any of them and the Omagh bombing. Such links may include commonality

of participation or similarities in methodology. The Inquiry's focus will be on overt policing investigative techniques and evidential material, including the use of telephones based on overt material such as call patterns and cell site data and forensic evidence. The Inquiry will not be looking at covert investigative techniques during this phase and will not be examining any covert material that may exist. This will be considered in chapter six.

[59] In chapter four, the Inquiry will investigate what was established by overt policing investigation prior to the Omagh bombing and what more could have been established by overt policing investigative techniques based on the material and techniques available at the time. Crucially, this open phase of the Inquiry will scrutinise the adequacy of the police investigations. The Inquiry will seek to establish the overt policing investigative structures and processes in place in the relevant period as they applied to dissident republican terrorism. Expert evidence in relation to policing powers will be heard at the beginning of chapter four. Further expert evidence relating to cell site analysis and other scientific investigations, focusing on the relevant previous incidents will also be given in chapter four. Crucially, the Inquiry will examine in this open chapter whether enough information was or could have been obtained by means of overt investigations which could have enabled police investigators to identify and disrupt those responsible for the Omagh bombing before 15 August 1998. The oral evidence hearings for chapter four will be in "open" and there will be no "closed" or restricted hearings. All core participants and their legal representatives will fully participate in this phase of the Inquiry.

[60] Chapter five has been given the title "The Peace Process and Security Normalisation." This chapter will investigate the historical and political context of the Omagh bombing. Expert evidence will be given in respect of such issues as the history of the Troubles, dissident republican terrorism (particularly in the year leading up to the bombing) and the Belfast/Good Friday Agreement. Crucially, the Inquiry will investigate whether the policy, development, implementation and operational effect of what is described as security normalisation had a bearing on whether the Omagh bombing could have been prevented. The oral evidence hearings for chapter five will be in "open" and there will be no "closed" or restricted hearings. All core participants and their legal representatives will fully participate in this phase of the Inquiry.

[61] Chapter six will be the first phase of oral evidence where it is anticipated that "closed" material will be considered. The title of this chapter is "The previous incidents: covert material." The Inquiry will investigate what covertly obtained information, if any, was obtained in respect of the previous incidents and what additional covert information could have been garnered based on the material and techniques available at the time. This will involve the consideration of the adequacy of the approaches adopted by the police, military and UK intelligence services towards the development and use of covert techniques and management of covert materials. The Inquiry will investigate what covert investigative structures and processes existed in 1997-1998 as they applied to the threat of dissident republican terrorism, including how intelligence was shared. Expert evidence will be received in

relation to the history and workings of the Joint Intelligence Committee. The Inquiry will seek to ascertain whether sufficient intelligence including covert intelligence relating to the previous incidents was or could have been available to the police, military and UK security services to identify and disrupt those responsible for the Omagh attack, prior to it taking place.

[62] Chapter seven will be another phase of oral evidence where it is anticipated that “closed” material will be considered. The title given to this chapter is “Intelligence relating to the Omagh Bombing.” The Inquiry will investigate what covert material existed or could have been generated in relation to the Omagh bombing itself. This will involve identifying what covertly obtained information was available prior to 15 August 1998 about an impending attack. The Inquiry will investigate what could have been established by covert investigation based on the material and techniques available at the relevant time. This will involve considering the adequacy of the approaches adopted by the police, military and UK security services towards the development and use of covert techniques and management of covert materials specific to the Omagh bombing. The Inquiry will also look at any intelligence gathered after the Omagh bombing about those responsible with a view to building on the work undertaken in chapter three. The Inquiry will address the issue of whether there was or could have been sufficient intelligence related to any impending attack available to the police, military or UK security services to identify and disrupt those responsible for the Omagh bombing prior to the attack being mounted. The Inquiry recognises that there may be considerable overlap between chapter six and seven which might impact on whether they can usefully be consolidated. In relation to chapters three to seven, counsel to the Inquiry will make an opening statement at the commencement of each. This will be focused on the anticipated scope of the evidence and investigations to be carried out in that chapter. Provisional witness lists will be provided well in advance of the commencement of each chapter. Core participants will be given the opportunity to make submissions on the proposed list of witnesses. It is anticipated that so far as is possible, evidence from ROI sources will be called in accordance with the chapter divisions on foot of a detailed Memorandum of Understanding which it is the process of being finalised with the ROI government.

[63] It is anticipated that chapter eight will comprise of the last phase of oral evidence and this will consist of the closing statements of the core participants. However, consideration may also be given to affording the core participants the opportunity to make oral submissions on the content of any recommendations which should emanate from the Inquiry.

[64] It is important to emphasise the three primary characteristics of this Inquiry at this stage and these are matters which have already been emphasised by Lord Turnbull. The first is that the Inquiry is entirely independent of the UK state and Lord Turnbull intends to vigorously assert, defend and demonstrate that independence at every opportunity in his quest to uncover the truth. Secondly, the Inquiry is inquisitorial in nature and that has a very important bearing on how the

Inquiry will be conducted. The legal and forensic expertise, skills and experience of Lord Turnbull and the Inquiry legal team cannot be doubted and the ability and determination of this Inquiry chair and this Inquiry legal team to do everything in their power to uncover the truth by inquisitorial means cannot be legitimately questioned. Thirdly, it can be seen from the Terms of Reference and the list of issues that this Inquiry is all about obtaining evidence through inquisitorial investigation, weighing the same, ascertaining facts, and, where possible, drawing conclusions from those facts and evidence. It is not the role of the Inquiry to attribute civil or criminal liability to any person or body and, therefore, the determination of or adjudication on matters of law will not form a large part of the work of the Inquiry. Where matters of procedure involve legal issues, it is clear that the Inquiry is very sensitive to the need to ensure core participant involvement and this is demonstrated by the Inquiry's approach to the issue of special advocates which was dealt with entirely in open with all core participants being entitled to make submissions and representations on this issue. It is intended that during the course of the Inquiry, hearings on legal and procedural issues will be listed as required and such hearings will either be held in open or if that is not possible, the "closed" hearings will, where possible, be mirrored by meaningful open hearings on the issue. In any event, during the hearing of this judicial review, counsel to the Inquiry gave a specific undertaking that any ruling on a point of law made in "closed" will, wherever possible, be the subject of a meaningful gist which will be provided to the core participants. This approach has been adopted in other recent public inquiries and it preserves the ability of core participants to meaningfully challenge such rulings by way of judicial review.

[65] The Inquiry has been at pains to set out its approach to the issues of open and "closed" material and open and "closed" hearings from the outset. The Inquiry is adamant that all relevant evidence that is not made the subject of a restriction order will be heard in public. Lord Turnbull has specifically indicated that as much evidence as possible will be adduced in open and any restrictions on the publication of material, the dissemination of material to all the core participants or the hearing of evidence in "closed" will have to be justified as being strictly necessary. It is recognised that applications for restriction orders may have to be heard in "closed", at least in part and in order to facilitate meaningful participation of all core participants in any application for a restriction order, any core participant applying for such an order will be required to provide details of any previous relevant open disclosure and to prepare an open version of the material which is the subject of the application which contains the greatest amount of information deemed possible.

[66] The Inquiry chairman has already made a detailed ruling (following submissions from all the core participants) on the approach that the Inquiry will adopt in relation to the redaction of documents and this ruling clearly signals his intent to ensure that as much as possible will be put in the public domain and that the redaction of names including the names of persons suspected to be involved in the attack will only be allowed when strictly justified. A similar approach will be adopted when dealing with any anonymity applications. In relation to the withholding of material which could legitimately be categorised as operationally sensitive in the sense of being

information of use to terrorists or other criminals either by revealing tactics or capabilities of UK state actors or revealing methods and strategies used by malign actors, the Inquiry has formulated and adopted an approach of making Operationally Sensitive Restriction Orders which mean that, although the material which is the subject of such an order will not be put in the public domain, it will be provided to the core participants, subject to them providing undertakings preventing wider dissemination. It is also anticipated that there may be oral hearings where core participants and their legal representatives will be present but the general public may be excluded. The Inquiry chair has also indicated that in the context of any “closed” hearings, he will keep under review the issue of whether any “closed” hearing is capable of being “broken out into public.”

[67] In addition, the Inquiry has published a “Closed Material Restriction Order” legal note which sets out how applications for restriction orders will be dealt with. This legal note commences with a re-assertion of the Inquiry’s commitment to openness and transparency. The legal note also makes it clear that the Inquiry is aware that there is “an enhanced need for robust scrutiny of assertions made in “closed”, so as to ensure that the maximum amount of information is provided” to all core participants. In respect of documents that contain sensitive information, it is proposed to conduct “open” and “closed” hearings in order to identify “a set of defined categories of sensitivity” which will be known as “CMRO Categories.” Once these CMRO categories have been defined following “open” and “closed” hearings, documentation containing sensitive information will be assessed and assigned to one of the categories and this will determine how the document or information will be dealt with during the course of the Inquiry. The holding of open hearings in relation to the development and adoption of the CMRO categories means that all core participants and the media have meaningful input in relation to the issue of what material is dealt with in “closed” and what material is dealt with in open, with the goal being that as much material as possible is dealt with in open. These hearings are scheduled to take place in September of this year.

[68] In relation to “closed” hearings where evidence is garnered and/or facts established from evidence given in “closed” or materials adduced in “closed”, it is the intention of the Inquiry to gist out as much as is possible, having regard to sensitivity, national security and legal constraints, and to provide such gists to all the core participants. Such gists will provide meaningful details of the witnesses being examined and the areas covered with each witness. The Inquiry legal team will maintain regular contact with the legal representatives of the core participants in respect of “closed” hearings, providing them with meaningful updates, insofar as it is possible to do so and providing them with opportunities to suggest lines of questioning and topics for exploration with witnesses. The anticipated level of communication between the Inquiry legal team and the legal teams for the core participants excluded from the “closed” hearings can be contrasted with the absence of any meaningful communication between special advocates and those whose interests they are assigned to look after once “closed” hearings commence.

[69] The purpose of this lengthy description of the nature and extent of the investigations that the Inquiry will engage in, the matters which will be investigated by the Inquiry, the manner in which the Inquiry will conduct those investigations and the procedures which the Inquiry has and will adopt in order to ensure that those investigations both uncover the truth and reveal that truth in the public domain to the maximum extent possible, is to establish a valid frame of reference in which to address the question of whether the appointment of special advocates is necessary to ensure that the Inquiry procedures are fair and are compliant with article 2 ECHR procedural obligations which in the context of this Inquiry boil down to the core participants being able to meaningfully participate in the Inquiry to the extent necessary to protect their legitimate interests.

[70] A starting point is to identify the legitimate interests of the core participants taking this challenge. This is an inquisitorial investigation conducted by an entirely independent chairman who is a senior judge who is assisted by a legal team replete with legal and forensic expertise and the purpose of the investigation is to uncover the truth and reveal that truth in the public domain to the maximum extent possible. The primary function of the core participants is to assist the Inquiry in its search for the truth. The core participants' key legitimate interest is to ensure that the truth is uncovered and revealed. It is not a legitimate interest of a core participant in an independent statutory inquiry to promote a specific case or push for a specific outcome and it is not the function or role of the chair of an independent statutory inquiry to adjudicate upon the merits of a case or stance argued for or promoted by a person or body with core participant status. In the context of the article 2 ECHR procedural obligations, one cannot and should not lose sight of the importance of correctly defining the legitimate interests of the core participants which coincide with the primary function of the independent statutory inquiry which is to ensure that the truth is uncovered and revealed in the public domain to the maximum extent possible.

[71] The question posed in para [69] above (whether the appointment of special advocates is necessary to ensure that the Inquiry procedures are fair and are compliant with article 2 ECHR procedural obligations) can be reframed in the following manner. Does the absence of input from special advocates in this Inquiry mean that core participants who are excluded from "closed" hearings and are prevented from seeing "closed" material are unable to meaningfully participate in the Inquiry to the extent necessary to protect their legitimate interests as identified in para [70] and/or does the absence of input from special advocates representing the interests of core participants who are excluded from "closed" hearings and are prevented from seeing "closed" material give rise to procedural unfairness?

[72] In Lord Turnbull's detailed written decision, he adopted the description of the general role and function of special advocates as set out in the Guide to the Role of Special Advocates Open Manual, second edition 2022, issued by the Special Advocates' Support Office. Lord Turnbull noted that the concept of a special advocate is a well-known feature in litigation of various different types, both in England and Wales and in Northern Ireland. He noted that two special advocates represented the

interests of the applicant in the “closed” hearings held in the *Re Gallagher* judicial review proceedings [2021] NIQB 85. He further noted that the essential aspects of the function of a special advocate are that he or she may represent the interests of an excluded person at “closed” hearings but he or she is not accountable to them. The special advocate does not have a professional relationship in the normal sense with the excluded person and, subject to some limited caveats, can only communicate with that person prior to being provided with the relevant “closed” materials. A special advocate cannot be instructed directly by or on behalf of a client, in this case, a core participant, and can only be appointed by the relevant Law Officer. Lord Turnbull, as the chair of an independent statutory Inquiry, has no power to appoint special advocates to represent the interests of any core participant in the Inquiry and it is a matter of speculation as to how such an appointment would be progressed in the context of an Inquiry, for instance, whether it would require a formal request from the Inquiry chairman to the relevant Law Officer.

[73] In making the case in favour of the appointment of special advocates, the applicant seeks to rely on the common law principles of natural justice and procedural fairness which have developed over time. Like Lord Turnbull, I regard such reliance as ill-founded in the context of an independent statutory Inquiry which is a paradigm example of an inquisitorial investigation. The equality of arms argument made out by the applicant does not withstand scrutiny. The bereaved and survivor core participants do not have a case to present for adjudication by the chair of the Inquiry either in “open” or “closed”. These core participants do not have a case to answer. Their actions or inaction are not the subject of any form of scrutiny or investigation. The argument that there is a need to make provision for these core participants so that they enjoy equality of arms with any state core participant involved in “closed” hearings whose actions or inaction may well be the focus of intense inquisitorial scrutiny by the Inquiry legal team simply cannot be sustained. No issue for determination is joined between these core participants and the state core participants. There is no case to be put by or put to these core participants. They do not face the prospect of scrutiny which entitles them to the protection of legal representation. Equality of arms is not a constituent element of fair procedure in this context.

[74] In the overall context of the right to a fair hearing, individuals and bodies who may be directly affected by a decision, for instance, by suffering some detriment or criticism or achieving some material benefit, are entitled to be given notice of any case against them. They are entitled to disclosure of evidence; they are entitled to a reasonable opportunity to respond to the case made against them; and they should be allowed to present their own case. In the context of adversarial proceedings which, for grounds of national security or some other pressing public interest, involve “closed” hearings, it is readily apparent that, in the case of non-state parties, the rights that make up the right to a fair hearing may in some circumstances have to be circumscribed, and, in order to ameliorate any perceived or actual unfairness, it may be necessary to facilitate the instruction of special advocates for those non-state parties. The circumstances described in the foregoing sentences of this paragraph are

far removed from the circumstances that prevail in an independent statutory inquiry such as the present one which is an inquisitorial process conducted by the Inquiry chair with the assistance of the inquiry legal team. Legal representation of those core participants who are the injured or the bereaved is not provided for as a mitigation against what would otherwise be an unfair hearing. Legal representation of those core participants is provided for in order to assist them through what may be a legalistic, difficult, document heavy, complex and prolonged process and to ensure that they are best equipped to provide material assistance to the chair of the inquiry in his quest to uncover the truth.

[75] Jumping ahead a little, the questions of whether the 2005 Act allows for the appointment of special advocates and, if so, whether it is necessary to take steps to facilitate their appointment in an inquiry setting have been the subject of some consideration in three relatively recent high-profile inquiries. As Lord Turnbull pointed out in his decision on the point, the issue of whether the 2005 Act allows for the appointment of special advocates was not subjected to the same degree of detailed scrutiny in those other inquiries as has occurred in this instance, with the chairs of those other inquiries either proceeding on the basis that such a power existed or that it was not necessary to conclusively determine that point, choosing instead to concentrate on the issue of whether it was necessary to take steps to facilitate the appointment of special advocates in the context of each of the inquiries they were chairing.

[76] In the Litvinenko Inquiry (2015), the widow and son of the deceased Mr Litvinenko, were both core participants. The Secretary of State (“SoS”) had issued restriction notices as allowed under the provisions of section 19(2)(a) of the 2005 Act. These two core participants sought the appointment of a special advocate. The applications were based on the argument that special advocates would be in a position to apply for judicial review of the restriction notices and that this would be the only means of ensuring some sort of independent judicial oversight of the SoS’s decision to issue restriction notices. It was also argued that the appointment of special advocates would be the means by which these core participants could make an informed contribution to the determination of whether there was any Russian state involvement in the death of Mr Litvinenko. Mrs Litvinenko, as was acknowledged, had intimate knowledge of her husband’s history and activities.

[77] Sir Robert Owen issued a ruling dated 9 October 2014, in which he explained that he had formed a provisional view that the power to appoint a special advocate was implicit in the broad power to determine the procedure to be adopted in an inquiry and the express duty to act fairly. He considered that the circumstances in which the appointment of a special advocate would be necessary to enable the chairman of an inquiry properly to discharge his functions would be wholly exceptional. Bearing in mind the inquisitorial nature of an inquiry constituted under the 2005 Act, and the role to be played by counsel to the inquiry, he did not consider the appointment of a special advocate to be necessary for the proper discharge of his function. This decision was not challenged before the courts. The Inquiry went on to

identify those involved in the poisoning of Mr Litvinenko and that there was a strong probability that the two named individuals were acting under the direction of the Federal Security Service (“FSB”) and that their actions were probably approved by both the then Director of the FSB and President Putin.

[78] In the Manchester Arena Inquiry (2020 to 2023), certain of the family core participants sought the appointment of special advocates to enable them to have a more meaningful participation in the “closed” hearings which were to take place as part of the Inquiry. In his ruling dated 7 October 2021, Sir John Saunders considered that he had power to appoint special advocates through necessary implication arising out of the terms of section 17 of the 2005 Act. He also considered that there was a general power to appoint special advocates, as supported by the authority of *R v AHK and Others* [2009] EWCA Civ 287. Further support was capable of being drawn from the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45.

[79] In determining whether he ought to grant the application, Sir John concluded that the interests of the families and that of counsel to the Inquiry would be aligned, as the families had no special information that they could feed into this specific part of the Inquiry. His view was that a special advocate would be doing no more than checking to make sure that counsel to the Inquiry were doing their job properly. That was something he could judge for himself. He also noted that counsel to the Inquiry would be able to speak to the core participants and that they could suggest questions to him. He was of the view that it was important that the families were not left with an inaccurate impression of what a special advocate could do. He observed that if they were looking for re-assurance that the investigation conducted in a “closed” hearing was undertaken rigorously, they would not be able to get it, as they would not be able to have contact with the special advocate after he or she had received the restricted information. In these circumstances Sir John concluded that it was not necessary or desirable to appoint special advocates and he refused the application. The first report published in June 2021 found that there were a number of missed opportunities to alter the course of what happened on the night in question and that more should have been done by police and private security guards to prevent the bombing. Shortcomings were also identified in the actions of the security services in the lead-up to the bombing including the lack of capacity to effectively and efficiently process raw intelligence data and the failure to provide relevant information to counter-terrorism police. It is to be noted that the Inquiry provided a substantial and meaningful gist of the “closed” findings.

[80] In the Afghanistan Inquiry (2023 to date) an application was made to Lord Justice Haddon-Cave to appoint special advocates to represent the interests of Afghan families who were core participants. The basis of the application was that there was a very real prospect that the families would be the subject of severe criticism during the “closed” hearings which they should be entitled to be informed of the nature of and be given an opportunity to challenge it. It was argued that the presence of special advocates would lend important legitimacy to the “closed” proceedings which might

constitute the bulk of the Inquiry's work, both for the families and for public reassurance.

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

“(1) The Inquiry involves an independent and impartial investigation by a specially appointed Chair; its process is inquisitorial and is aimed at getting to the truth and not adversarial.

(2) I have complete confidence that counsel to the Inquiry will test the evidence in CLOSED with the same diligence and independence as they will in the OPEN hearings. Further, my approach to the CLOSED hearings will be just as rigorous as in OPEN.

(3) The appointment of Special Advocates would duplicate the existing role and functions of counsel to the Inquiry and moreover would involve unnecessary complication and cost.

(4) The appointment and involvement of Special Advocates would also cause significant delay, in circumstances where it is important that the Inquiry proceeds at pace.

(5) The extent to which Special Advocates would be able to communicate with the Afghan Families' RLR having already had access to the sensitive material in the context of the judicial review proceedings, is limited. In any event, any proposed lines of focus or enquiry could still be communicated to counsel to the Inquiry to the same end.

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

[82] In essence, Lord Justice Haddon-Cave was prepared to assume that a power to appoint was available, although he thought it required further examination, but did not think that the special advocate procedure would be appropriate or practical for his Inquiry. In any event, it would appear that in relation to any rulings made in

“closed” in the Afghanistan Inquiry, counsel for the Inquiry wherever possible provide meaningful gists of the rulings to all core participants. This has enabled a witness to initiate judicial review proceedings challenging such rulings. These proceedings are clearly adversarial in nature and involve both “open” and “closed” hearings with special advocates being involved. At the hearing of the present challenge, Mr Greaney KC indicated that in the Omagh Inquiry, wherever possible, any ruling on a point of law made in “closed” will be the subject of a meaningful gist which will be provided to the core participants to ensure that their ability to challenge legal rulings, even those made in “closed”, is meaningfully preserved. This undertaking from counsel to the Inquiry substantially removes one of the central planks of the applicant’s arguments which I will address in greater detail below.

[83] In relation to the practice in other statutory independent inquiries, Lord Turnbull, in his decision, noted at para [23] that:

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

[84] This state of affairs still prevailed when the matter came on for hearing before me, although the applicant and the supporting notice parties sought to place some reliance on the stance adopted by Sir Declan Morgan as Chief Commissioner of the Independent Commission for Reconciliation and Information Recovery, where he has recently indicated that there may be a role for special advocates in the work of the Commission. The tailored approach adopted by Sir Declan can readily be seen as an attempt at a further confidence building measure in the context of a body and a process which, despite every effort on Sir Declan’s part, has faced and continues to face implacable opposition and non-engagement from a sizable number of those families the Commission is intended to serve. Sir Declan’s Commission, the statutory underpinning of that body and the political context in which it operates are far removed from independent statutory Inquiries.

[85] As was pointed out in para [75] above, Lord Turnbull expressed the view that the question of principle as to whether the 2005 Act does permit the appointment of special advocates does not appear to have been assessed in any real depth in either the submissions or the rulings in any of the previous Inquiries Act settings in which it arose. He also observed that the impact of the Investigatory Powers Act 2016 does not seem to have been considered in any of the previous debates. There is no doubt in my mind that, in his ruling, Lord Turnbull comprehensively addresses and thoroughly analyses this question of principle, having regard to the provisions of the Investigatory Powers Act 2016, and the robustness and rigour of that analysis will be considered in much greater detail below. However, before addressing that question of principle, I return to my consideration of whether common law principles of

fairness and/or the procedural obligations of article 2 ECHR mandate the appointment of special advocates in the context of this independent statutory Inquiry.

[86] The applicant and supporting notice parties argue that for the Inquiry to hold hearings of any sort in the absence of the family core participants would be a departure from common law procedural fairness. They argue that they have a right to be heard even in “closed” hearings and that this right is based on natural justice considerations. They rely on the case of *The Petition of Greater Glasgow Health Board for Judicial Review* [2025] CSOH 12. This was a judicial review which considered the application of the principle of fairness to an inquisitorial process. It concerned a decision of the chair of the Scottish Hospitals Inquiry dated 1 August 2024 in which he refused an application by Greater Glasgow Health Board to have an expert report received into evidence and to hear from its authors during the Inquiry. In para [33] of her judgment, Lady Wise stated:

“[33] ... The parties agree that the fundamental principles of natural justice apply to Inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings. It includes the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument and evidence that may conflict with a possible or proposed finding, “... that a person represented at the inquiry, whose interests (including in that terms career or reputation) may be adversely affected, may wish to place before him” *Mahon v Air New Zealand Ltd and Others* [1984] AC 808, at 820. The requirement to hear both sides, traditionally expressed by the maxim *audi alteram partem*, requires to be followed by those exercising an investigative jurisdiction, such that principal parties must be able to contradict any information obtained *Reg v Deputy Industrial Injuries’ Commissioner, ex parte Moore* [1965] 1 Q.B. 456. In its application to modern statutory Inquiries, fairness demands that they be “and be seen by the public to be, as thorough and balanced as possible” *R (Associated Newspapers Limited) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para [56]. That will include considering all material evidence on the core issues. Once it is known that there is expert evidence on technical and scientific matters available, the conclusions of which are contradictory to that led to date by Inquiry experts, it is difficult to regard its complete exclusion from consideration could be fair.

[34] Application of the principle of fairness will not always require allowing an Inquiry participant to have evidence tendered by them heard. Much depends on the

context. It is not inconsistent with the principle of fairness that norms of procedure will be adopted that may generally discourage core participants from submitting their own expert evidence. A challenge of this type cannot be brought on the basis of disagreement with the Chair's conclusion on such matters – *R (on the application of EA) v Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) per Sharp J, at paragraph 87. In the present case however, the application presented was by a core participant for whom the risks, including loss of public confidence, are incalculable in a situation where the expert evidence adduced to date had all been to the same effect. The existence of contradictory expert evidence should have been regarded as a significant development when considering the need for balance, ... It is sufficient to record that, given the complexity and magnitude of the safety issue, there is considerable force in the Health Board's position that cross-examination of the Inquiry experts would be an inadequate method of challenge without a basis in contradictory expert evidence heard by the respondent.

[35] I have reached the view that the issue of principle was wrongly decided and consequently unfair, in breach of section 17(3) of the 2005 Act. The Health Board as a core participant who would indisputably be impacted severely by adverse findings on the matter, invited the Chair to receive additional expert evidence that reached conclusions contrary to those reached by the Inquiry experts. The act of doing so would not have the inevitable result of turning the process into an adversarial one. It is not for this court to direct the Inquiry as to management of its process. However, receiving the report and calling the authors to give evidence could all be achieved under the inquisitorial procedure adopted to date. Counsel for the Inquiry would take responsibility for leading the evidence, with core participants submitting questions in the usual way."

[87] Reliance is also placed on such authorities as *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, and *Mahon v Air New Zealand Ltd* [1984] AC 808. It is established law that tribunals and independent statutory inquiries must adhere to the principles of natural justice and this equates to a requirement to act fairly. See *Humphrey Errington (t/a H J Errington & Co) v Mrs Elizabeth Wilson and Others* 1995 SC 550 at 555:

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

[88] In the *Errington* case, a local authority sought an order for food to be destroyed on the ground that it was unfit for human consumption. At the hearing before a justice of the peace, there was conflicting scientific evidence on the point. One of the parties with an interest in the outcome of the proceedings sought permission to cross-examine some of the witnesses rather than relying on the justice of the peace exploring certain issues with the witnesses. This request was refused. The decision was subsequently successfully challenged and on appeal from said challenge, the court held that even in administrative proceedings, if fairness required cross-examination, then the justice of the peace was obliged to permit it, as a matter of duty, not discretion. The court held that it was a denial of natural justice for the justice of the peace to refuse to allow cross-examination of some of the witnesses. Under the relevant provision (section 9(5) of the Food Safety Act 1990) any person who might be liable for prosecution in respect of the said food “shall if he attends before the justice of the peace by whom the food falls to be dealt, be entitled to be heard and to call witnesses ...”

[89] There can be no dispute that inquiry proceedings must be fair and what that actually means is very much fact and context specific. The *Greater Glasgow Health Board* case is a recent example of unfairness being found to exist in the context of inquiry proceedings. In that case the Inquiry refused to consider relevant evidence simply on the basis of an unfounded fear that the admission of new expert evidence which conflicted with that which had already been admitted as evidence would somehow mean that an inquisitorial investigation would be translated into an adversarial process. That, with respect, seems to be a very obvious example of unfair procedure and very little direct support can be garnered from that decision for the proposition that fairness dictates the facilitation of the engagement of special advocates in “closed” hearings in this Inquiry.

[90] It is argued that if special advocates are not engaged in this Inquiry, the family core participants will not be able to advance or safeguard their interests in “closed” hearings and will be placed at a disadvantage as compared to state core participants, who will be able to attend “closed” hearings, with their representatives being able to question witnesses and make submissions during these “closed” hearings. It is argued that article 2 ECHR imposes requirements which the Inquiry is obliged to meet. The family core participants must be involved in the procedure to the extent necessary to safeguard their legitimate interests. Whilst the right to disclosure may not be absolute, any unfairness must be counterbalanced. It is argued that the right to involvement provided for by article 2 ECHR will not be met in the absence of special advocates being appointed to represent the interest of the family core participants, and, in this regard, reliance is placed on the authorities of *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, *Jordan v United Kingdom* App 24746/94, *Regner v Czech Republic* app 35289/11, and *IR v United Kingdom* App 14876/12.

[91] It is argued that both domestic and ECtHR case law demonstrates that even when procedural rights are denied on legitimate grounds, there is nevertheless a duty to instigate steps which compensate for that denial of normal standards of procedural fairness (see *R (Roberts) v Parole Board* [2005] 2 AC 738, *R (E (Russia) v Secretary of State for the Home Department* [2012] 1 WLR 3198, *Regner v Czech Republic* and *IR v United Kingdom*). The use of special advocates has been recognised as being one means of bringing the scales of justice back into balance. It is argued that any derogation from open justice, as may be authorised by section 19 of the 2005 Act, should be to the most limited extent necessary and, in the context of the present Inquiry, that means that the chair of this Inquiry should do all that he can to avoid unfairness, as required by section 17 of the 2005 Act. In essence, he should facilitate the instruction of special advocates in order to protect the interests of the family core participants in the “closed” hearings. The applicant and supporting notice parties argue that the case law demonstrates that the appointment of special advocates is not dependent on the existence of express statutory authority (see *R (Roberts) v Parole Board*). Further, powers and duties necessary to ensure fairness can be implied into statutes (see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245).

[92] As recognised by Lord Turnbull, Mr Southey KC’s overarching submission is that the family core participants have a right to be represented in some fashion at any “closed” hearing. That right can be seen as emanating from the principles of natural justice, procedural fairness and/or arising out of the procedural obligations encompassed within the article 2 ECHR framework. It is argued that on the basis that such a right exists, there must be a means within 2005 Act proceedings of giving effect to it. It follows that section 17 must be viewed as being broad enough to facilitate the ability of special advocates to participate in “closed” hearings and thus give effect to the right possessed by the family core participants.

[93] Mr Southey KC places reliance on the judgment of Lord Reed in *R (Osborn) v Parole Board* [2014] AC 1115 in which he discusses the purpose and importance of procedural fairness. Mr Southey KC argues that the family core participants would be significantly affected, in the manner contemplated by Lord Reed, by the outcome of the Inquiry. They have for many years campaigned for the setting up of this Inquiry. Their experiences over those years have left the families with an understandable distrust of state authorities and this distrust underpins their interest in seeing that all the evidence is properly challenged and tested. Their meaningful participation in the “closed” hearings would enhance the quality of the decisions reached by the Inquiry. The family core participants clearly have an interest in ensuring that the Inquiry reaches conclusions which they had confidence in.

[94] Mr Southey KC notes that in para [68] of *Osborn*, Lord Reed identifies one of the purposes of a fair hearing as being the avoidance of a sense of injustice which could arise where persons whose rights were significantly affected by decisions taken in the exercise of administrative or judicial functions were denied input from special advocates which respected their right to participate in the proceedings by which that

decision is made. Mr Southey KC also relies on para [70] of Lord Reed’s judgment in *Osborn* where he acknowledges that courts have recognised the feelings of resentment that will be engendered if a party to legal proceedings is placed in a position where it is impossible for him/her to influence the result. Mr Southey KC contends that the sense of resentment referred to in *Osborn* would readily manifest itself in these proceedings in the minds of the family core participants if, having campaigned for so long for the setting up of this Inquiry, key findings were to be made in circumstances where the ability of the family core participants to influence the outcome was restricted because of the fact that they had not been represented in the “closed” hearings by special advocates, especially in circumstances where special advocates had been heavily involved in the “closed” hearings of the judicial review, the outcome of which led to the Inquiry.

[95] Like Lord Turnbull, I am of the view that the perceived need for reassurance forms a central plank of the oral arguments made by Mr Southey KC and, indeed, Ms Askin. Mr Southey KC starts from the proposition that independent statutory inquiries are set up to address matters of public concern, as is reflected in section 1(1) of the 2005 Act. It follows that the ability to test and challenge the evidence on behalf of the family core participants will go some way towards providing them and the public with reassurance and would serve to enhance public confidence in the outcome of the Inquiry. Conversely, to deny the family core participants representation during hearings at which important evidence was heard would have the potential to undermine public confidence in the work of the Inquiry. Even if the families and their legal teams were not permitted to be present at a “closed” hearing, it is argued that they would be reassured by the participation of special advocates who were acting in their interests alone; especially where those same special advocates had been instructed in the judicial review, the outcome of which resulted in the setting up of the Inquiry.

[96] Great emphasis was placed by the applicant and the supporting notice parties on the importance of a fair procedure as a means of providing reassurance to the family core participants and bolstering public confidence. This, it is argued, is recognised in the case law which stipulates that where there is a power to consider material in “closed” hearings in the absence of one of the parties, because this inevitably raises a concern about fairness, there is also a duty on the court or tribunal to ensure fairness; and, where necessary, this duty includes a power to appoint special advocates, in order to protect the rights/legitimate interests of the individual who was being denied access to the “closed” proceedings. It is argued that the case law demonstrates that special advocates have been appointed in a range of different court processes, such as criminal proceedings, civil proceedings and family proceedings. Decisions such as *R v H* [2004] 2 AC 134, *R (Roberts) v Parole Board* [2005] UKHL 45 and *Re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048, demonstrate that the power to request or arrange for the appointment of special advocates exists even in circumstances where there is no express statutory authority.

[97] It is argued that the case of *Roberts* is particularly apposite as it constitutes a close analogy to the situation under consideration in this application. According to the applicant, the principle which can be extracted from the decision in *Roberts* is that in the context of an administrative decision maker, where there is an express power to withhold material from a party during some part of the proceedings and the exercise of this power is perceived as giving rise to unfairness, special advocates can be employed to represent the interests of that party and thus mitigate the unfairness. It is argued that the principles of procedural fairness and natural justice are mirrored in the procedural obligations which are an important aspect of the article 2 ECHR rubric. Relying on the authorities of *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 at para [20], and *Jordan v United Kingdom* (2001) 37 EHRR 52 at para [102], it is argued that even where it is legitimate to hold parts of an investigative process in private, for example where the police are gathering evidence, it is still necessary to demonstrate compliance with the oft quoted test, namely, that the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests. It is further argued that the safeguarding of interests is not restricted to questioning witnesses. It is also concerned with being able to assess whether there has been an error in law in relation to proceedings conducted in a “closed” hearing and whether there is an evidential basis for findings reached on the basis of evidence heard in “closed.” Mr Southey KC argues that it is easy to conceive of circumstances where the legitimate interests of family core participants during “closed” hearings would not be effectively safeguarded in the absence of the involvement of special advocates, thus giving rise to a breach of the article 2 ECHR procedural obligations. The example which both he and Ms Askin give is where there is a ruling on a matter of law in “closed” where the family core participants have absolutely no input in respect of that ruling. It is argued that it is highly unlikely that the Inquiry legal team would alert the family core participants to potential issues with a ruling made in “closed” by the Inquiry chair when that ruling was made by the Inquiry chair following the consideration of advice from his legal team.

[98] Reliance is also placed on European cases concerning the interplay between article 6 and matters of national security. It is argued that the ECtHR has recognised that although restrictions may be put in place to ensure that the state’s interests are protected, this necessitates the implementation of adequate safeguards to, so as far as possible, ensure equality of arms in the context of adversarial proceedings. This, it is argued, is the rationale behind the Grand Chamber’s endorsement of the use of special advocates in *Regner v The Czech Republic*, Application no. 35289/11 which was handed down 19 September 2017. Even though 2005 Act proceedings are not adversarial, it is argued that the concept of equality of arms remains important as a number of state core participants would be present and represented during any “closed” hearings.

[99] It is further argued that the importance of promoting public confidence has been highlighted in the cases of *R (JL) v Secretary of State for Justice* [2009] 1 AC 588 and *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. It is submitted

that one way of testing whether the family core participants' legitimate interests have been adequately safeguarded is to examine whether the safeguards made available to them would inspire or promote public confidence. It is argued that the appointment of the same special advocates, who had represented the interests of the families in the judicial review which resulted in the setting up of the Inquiry, to represent the family core participants in the Inquiry would clearly promote public confidence in the Inquiry as these special advocates clearly enjoy the confidence of the family core participants. I regard this argument as a fine example of circular reasoning.

[100] It is argued that the need for representation of the interests of the family core participants during "closed" hearings stems from the inquisitorial nature of the proceedings and the role of counsel to the Inquiry. Neither the Inquiry nor counsel to the Inquiry represent the interests of the families. It is argued that counsel to the Inquiry must be strictly neutral and cannot be seen to vigorously pursue a line of inquiry which might be suggested by family core participants. Further, it is argued that in considering whether state objections to disclosure are well grounded, in the context of an application for a restriction order, the state core participants would have a distinct advantage in that they would be able to instruct experienced counsel to present submissions on their behalf and counsel to the Inquiry would be expected to provide impartial advice, whereas special advocates acting on behalf of the family core participants would be able to effectively argue against the state and in support of further disclosure. Expanding on the example given in para [96] above, it is argued that counsel to the Inquiry could not be expected to indicate to the family core participants' "open" legal representatives that any error of law had occurred in "closed" hearings. If counsel to the Inquiry argued in favour of disclosure but the chair rejected that submission in favour of a submission made by a state core participant, it is unlikely that the family core participants would ever be informed about such a ruling and the fact that counsel to the Inquiry argued against, thus stymieing any possibility of the family core participants launching a challenge to that ruling. Even if counsel to the Inquiry believed that the decision of the chair constituted an error of law, there would be no method by which this opinion could be communicated to the family core participants' "open" legal representatives as counsel to the Inquiry's duty would be to the Inquiry. It is further argued that this sort of disadvantage applies not only in the context of decisions made during "closed" hearings but also to findings made upon the evidence led in such hearings. In the absence of special advocates, it is argued that family core participants would have no opportunity to challenge findings made on the basis of evidence heard during "closed" hearings. Further, the presence of such advantages being available to the state core participants, and being denied to the family core participants, graphically demonstrates an inequality of arms. That inequality, it is argued, constitutes a breach of the domestic requirement of procedural fairness and natural justice. It also means that the family core participants are unable to safeguard their legitimate interests with the consequence that the proceedings are incompatible with the procedural obligations attached to article 2 ECHR.

[101] The applicant and supporting notice parties seek to illustrate the potential for unfairness to the family core participants arising from the status of Sir Ronnie Flanagan, the former Chief Constable of the RUC and PSNI, as a core participant. It is argued that as he is the target of criticism from some of the families, it is likely, if not inevitable, that he will be present and represented in the “closed” hearings in which the “closed” documentation to which he had access during his time as Chief Constable will be scrutinised. It follows that he will be in a position to assess whether there should be any challenge to decisions or findings made by the Inquiry during those “closed” hearings. In the absence of special advocates representing the interests of family core participants during those “closed” hearings, he will be in an advantageous position when compared to those family core participants. Alternatively, in the unlikely event that a decision is taken to exclude Sir Ronnie Flanagan from “closed” hearings, that would put counsel to the Inquiry in the difficult position of having to raise and explore issues on behalf of core participants with obviously conflicting interests and points of view.

[102] During the hearing before me it was indicated by counsel to the Inquiry that the approach that would be adopted in this case would be to allow Sir Ronnie Flanagan to be present and represented during the “closed” hearings where relevant matters were being investigated and for him to have access to “closed” material relating to those relevant matters was being examined. Counsel to the Inquiry would ensure that Sir Ronnie Flanagan complied fully with his duty to assist the Inquiry in fulfilling the Terms of Reference and this would include keeping the legal representatives of the family core participants apprised of material developments in “closed” including rulings on legal matters made by the chair of the Inquiry, insofar as it was possible to do so (by gist or otherwise), bearing in mind the sensitive nature of the proceedings. Counsel to the Inquiry was keen to emphasise that this level of engagement between counsel to the Inquiry and counsel for the family core participants was much greater than what would ordinarily be permitted if special advocates were to be instructed to represent the family core participants in “closed.” This proposed arrangement, it is argued, is clearly sufficient to fulfil the article 2 ECHR procedural obligation which is to facilitate participation to the extent necessary to protect the legitimate interests of the family core participants. It was pointed out that this approach was adopted in the Inquiry into the Manchester bombing and it worked, as is demonstrated by the fact that the “open” representatives of some core participants were able, on the basis of information provided by counsel to the Inquiry as to a legal ruling made in “closed”, to challenge that ruling by way of judicial review.

[103] It is clear from the *Greater Glasgow Health Board* case and the *Mahon* decision both referred to above that the chair of an Inquiry must listen fairly to any relevant evidence and rational argument that a person represented at the Inquiry and whose interest may be adversely affected by its findings may wish to place before him. The key issue in this situation is the potential for an adverse finding. It is very easy to understand why core participants, who are represented at an Inquiry, and who may be affected adversely by a finding to be made by the Inquiry chair, should be given

an opportunity to be heard on whether that finding should be made. In fact, rule 13(3) of the Inquiry Rules 2006 provides that no explicit or significant criticism of any person may be included in any report unless a warning letter has been sent to that person and they have been given an opportunity to respond to that letter. It is, therefore, patently obvious why Sir Ronnie Flanagan, who has been the target of criticism from certain family core participants in relation to the police management of the threat posed by dissident republican elements in the lead up to the Omagh bombing and in respect of police actions in relation to the bombing operation itself, should be present and represented in the “closed” hearings. The same rationale does not apply to the family core participants. There is, of course, no possibility whatsoever of any victim or family member being blamed for what occurred, or any possibility of criticism being attached to any of them in relation to the bombing.

[104] The question for this court is whether, notwithstanding the absence of any prospect of any criticism being levelled at any of the family core participants, it is necessary in order to protect their legitimate interests for them to be represented by special advocates in the “closed” hearings. Is there such a right and, if so, is it derived from the Convention or the principles of natural justice or both? Such a right is now commonly recognised as an integral component of adversarial proceedings. However, this does not mean that such a right also exists in Inquiries Act proceedings. Any such read across must depend on the specific factual circumstances encountered in the Inquiry in question. What is required by way of natural justice will depend on the circumstances. It is worthwhile setting out the passage of Lord Mustill’s speech in *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, where he addresses this issue:

- “1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
5. Fairness will very often require that a person who may be adversely affected by the decision will have an

opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

[105] The guidance builds upon the earlier equally well-known and oft repeated passage from the judgment of Tucker LJ in the case of *Russell v Duke of Norfolk and Others* [1949] 1 All ER 109 at page 118 where he stated:

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

[106] In order to determine the requirements of fairness, whether based on the Convention or the common law, in the specific context of an independent statutory Inquiry set up under the 2005 Act, it is necessary to pay particular regard to the nature of such proceedings, in particular, their inquisitorial nature and what this actually means. Looking firstly at the issue of who controls the process, it is clear that in adversarial proceedings it is the parties who control the proceedings, either through written pleadings or the evidence they choose to lead. In inquisitorial proceedings it is the judge, coroner or Inquiry chair who does so. As Lord Turnbull pithily put it, the function of the Inquiry chair is not to adjudicate but to investigate. How this impacts upon this running of the Inquiry and the role which the family core participants can expect to play in this Inquiry was helpfully illustrated by Lord Rodger in *R(JL) v Secretary of State for Justice* [2008] UKHL 68 where he stated at para [76]:

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

[107] More recently, the Divisional Court in *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319, had this to say at para [52]:

“It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence.”

[108] Moving on to examining the role of counsel to the Inquiry; although the appointment of counsel to an independent statutory inquiry is not mandated in every case by the 2005 Act, it is unquestionably the case that where the issues are complex and/or surrounded by significant controversy, counsel to the inquiry will be appointed. The role of counsel to the inquiry is to lead the evidence to be heard by the inquiry. Counsel to the inquiry works closely with the chair of the inquiry and usually questions witnesses on behalf of the chair of the inquiry. Counsel to the inquiry also liaises closely with the legal representatives for core participants in order to understand whether there are any matters that they wish to have explored in particular chapters of evidence. Counsel to the inquiry might then ventilate any such matters with the relevant witness or decide to leave the matter to the legal representative to raise in the context of an application for permission under rule 10. The role of counsel to the inquiry is not replicated in any form of *inter partes* litigation.

[109] An independent statutory inquiry is expressly forbidden from making any determination of civil or criminal liability and this may be of particular importance when it comes to understanding what is meant by safeguarding the legitimate interests of core participants. Further, there is no burden of proof to be met in an inquiry. In fact, it is expressly stated in the legislation that the rules of evidence do not apply. In relation to the collection and disclosure of evidence; under section 21 of the 2005 Act and rule 9, the inquiry team sets about to garner in all the documentation relevant to the terms of reference. After the inquiry team has assessed and analysed all the material that has been garnered, the inquiry may disclose some, but not all, of this material to the core participants. It is for the inquiry to decide what is relevant and should be disclosed and it is for the inquiry to decide whether disclosure needs to be tailored to address any concerns about the sensitive nature of any of the material. Further, there is no automatic right given to a core participant to question witnesses and there is no right whatsoever to call evidence on their own behalf.

[110] Although it is abundantly clear that the duty to act with fairness in making any decision as to the procedure or conduct of an inquiry is embedded in section 17 of the 2005 Act, it is equally clear that the nature of the inquiry process will inform what will be required to comply with the section 17 duty. Furthermore, any assessment of fairness must take account of the procedures implemented by each individual inquiry. An illustration of this is contained in the Protocol published by the Inquiry on 11 July

2025 (Omagh Bombing Inquiry Protocol Pursuant to Rule 10 of the Inquiry Rules 2006). Para 9 of this Protocol explains the timetable which will apply in relation to witnesses and their evidence as follows:

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

- (a) During Week 1: the Inquiry Legal Team will circulate an Evidence Outline in relation to each witness who is to give evidence during Week 4.
- (b) Tuesday of Week 2: CP to submit R10 Requests in respect of the proposed questioning of any witness who is to give evidence during Week 4.
- (c) Thursday of Week 3: the Solicitor to the Inquiry will provide a response to the R10 Request.
- (d) During Week 4: Witness gives evidence.”

[111] Para 11 explains what is meant by an Evidence Outline:

“The Evidence Outline will:

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

Para 6 makes it plain (and this was emphasised during the hearing before me) that the Protocol will apply to evidence heard in either “open” or “closed” hearings. In advance of “closed” hearings, the intention is that the Evidence Outline will conform as closely as possible to the description given in para 11 but may have to take the form of gisting.

[112] The applicant and supporting notice parties are keen to emphasise that the concept of meaningful participation stretches well beyond the notion of a right to direct questions to witnesses and/or suggest what issues should be addressed during the questioning of those witnesses but extends to being able to meaningfully scrutinise the compliance of the state core participants with their duty to provide all relevant

materials in “closed” and to judge the propriety of any legal rulings made by the chair of the Inquiry in “closed.” However, as pointed out by Lord Turnbull, the monitoring of the work of the Inquiry by a second tier of legal representatives (special advocates) in order to verify the compliance of state core participants with their duty of disclosure and in order to check for possible legal errors is inconsistent with the core notion of an independent investigation carried out by an Inquiry chair with the necessary expertise to undertake the particular Inquiry, as is required by section 8(1) of the 2005 Act, particularly in circumstances where the chair of the Inquiry is assisted by a well-qualified and experienced legal team.

[113] The applicant and supporting notice parties seek to rely on paras [66] to [71] of the judgment of Lord Reed in the case of *R (Osborn) v Parole Board* [2013] UKSC 31 in order to establish their entitlement to engage (through special advocates) in such a monitoring role. In the relevant section of his judgment, Lord Reed emphasised that procedurally fair decision-making contributes to the achievement of better decisions. Further, fairness requires the adoption of procedures that pay due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions so that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. Finally, developing and deploying procedures that require decision-makers to listen to persons who have something relevant to say promotes congruence between the actions of decision-makers and the law which should govern their actions. It should be remembered that the case of *Osborn* addressed the issue of whether the Parole Board was required to hold oral hearings in the context of recalled prisoners who had been deprived of their liberty and prisoners subject to indeterminate sentences. This case directly related to the deprivation of a person’s liberty.

[114] In terms of the practicalities of the propositions made by the applicant and the supporting notice parties, the proposition that family core participants would be able to provide special advocates with detailed instructions and the special advocates would then be able to present legal arguments in “closed” does not really reflect the reality of the situation as it is very doubtful whether such detailed instructions could be given by the family core participants when these family core participants will not be informed of the detail and substance of the material that will be addressed in “closed.” They will, however, be able to set out general areas of interest or concern, and there is no reason why the family core participants would be unable to give the same level and type of information to the chair of the Inquiry or to counsel to the Inquiry.

[115] In relation to the issue of the need for the perception of fairness, it is argued that the applicant and others fought for many years to have an independent statutory Inquiry set up to look into the circumstances surrounding the Omagh bombing and the successful judicial review which eventually paved the way for that independent statutory Inquiry to be set up involved “open” and “closed” hearings with special advocates representing the interests of the applicant and others in the “closed”

hearings. It is a matter of grave concern to the applicant and the supporting notice parties that they are now to be deprived of the assistance of special advocates when the applicant and others view them as having such a pivotal role in the judicial review. This decision by the Inquiry has generated a real sense of injustice. As has been pointed out by Lord Turnbull, the campaign carried on by the applicant and others was a campaign for an independent statutory Inquiry, not a specific outcome. That campaign has met with success. How can a sense of injustice arise out of success? I agree with Lord Turnbull that there is no legitimate basis for a sense of injustice simply because the applicant and those supporting the applicant's stance have not succeeded in moulding an independent inquisitorial process into a partisan adversarial process.

[116] It is also argued that as the applicant and supporting notice parties have openly and publicly expressed their reasoned disagreement with the approach being proposed by the Inquiry in relation to this issue, this will clearly damage public confidence in the Inquiry as the public rightly perceive the family core participants' satisfaction with the Inquiry's procedures as being an accurate indicator of the likelihood that the Inquiry will properly fulfil its Terms of Reference. I consider that the untethered windsock of public opinion is unlikely to become fixed in any particular direction until the Inquiry's evidenced findings have been produced. The thoroughness of Lord Turnbull's analysis of this issue and this judgment will hopefully provide public reassurance as to the ability of this Inquiry to fulfil its Terms of Reference.

[117] In summary, the arguments made out by the applicant and the supporting notice parties for the involvement of special advocates are largely misconceived in that the family core participants cannot give special advocates detailed instructions, because the family core participants will not see the "closed" materials and if and when the special advocates get sight of the "closed" materials, thereafter, they would not be able to communicate with the family core participants in any meaningful way. Any special advocates instructed in this Inquiry would not be instructed by a "party" to the proceedings and certainly would not be instructed by the family core participants. The legitimate interest which the family core participants have in the outcome of this Inquiry is that there should be a thorough and independent analysis of all issues and material relevant to the Terms of Reference and their important role is to assist the Inquiry perform that analytical task. The instruction of special advocates by whosoever would be responsible for their instruction for the purpose of simply marking the Inquiry chair's and counsel to the Inquiry's homework is not something that is necessary or warranted in order to satisfy the test of meaningful participation in the context of an independent statutory Inquiry.

[118] The argument that the rule of law is promoted by having a special advocate involved in "closed" hearings so that, if a point of law arises, all shades of opinion on that point of law can be directed to the inquiry chair, thus enabling the chair of the Inquiry to make a better-informed decision has not found favour in the context of any other independent statutory Inquiry in which the issue of the involvement of special advocates has been raised. From a practical point of view, who would formulate the

shade of opinion presented by the special advocates to the Inquiry chair and why has it to be assumed that the counsel to the Inquiry would not present this shade of opinion to the Inquiry in the conscientious exercise of his duty to the Inquiry? In essence, this exercise would be yet another example of special advocates being engaged simply to mark the homework of the Inquiry chair and the counsel to the Inquiry. Neither the procedural obligations of article 2 nor the requirements of natural justice/fairness require that such a supervisory role be grafted onto independent statutory Inquiry practice and procedure.

[119] The applicant and the supporting notice parties also rely on the House of Lords majority decision in *R (Roberts) v The Parole Board* [2005] UKHL 45 in which it was held that the Parole Board as a body governed by statute with a general power to ensure fairness, in the context of having an express power to hold “closed” hearings but no express power to authorise the use of special advocates, had an implied power to appoint special advocates in “closed” hearings, as this was necessary to mitigate against the unfairness suffered by a prisoner who was not allowed access to material being considered by the Board in “closed.” It is argued by the applicant and supporting notice parties that the Parole Board’s duty to act fairly is comparable with the duty under section 17 of the 2005 Act. By the same reasoning as adopted by the majority of the House of Lords, there is a power to appoint special advocates in Inquiries Act proceedings. However, the two situations are very different.

[120] In the case of *Roberts*, it was held that article 5(4) ECHR was engaged. This provides that:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The proceedings before the Parole Board were considered to be the expression of that entitlement. These proceedings were essentially adversarial in nature, involving an oral hearing in which the prisoner was entitled to call and question witnesses and the duty to ensure that the procedures adopted at such hearings were fair had to reflect the importance of what is at stake for him. Where the Secretary of State wished to place before the Parole Board relevant material which could not be disclosed to the prisoner or his legal representatives, it was important from the perspective of fair procedure for the prisoner’s interests to be represented when such material was being presented to the Board. The majority of the House of Lords determined that this meant that there was an implied power vested in the Parole Board to recommend the instruction of a special advocate to represent the prisoner’s interests in “closed.”

[121] *Roberts* is really a world away from the 2005 Act proceedings in that *Roberts* involved adversarial proceedings where the liberty of the prisoner was at stake and the Secretary of State was putting forward a specific case based on “closed” materials which was adverse to the case being put forward by the prisoner. The implication of

a power on the part of the Parole Board to recommend the instruction of a special advocate to represent the prisoner's interests during the "closed" aspect of the proceedings was a necessary step to comply with articles 5(4) and 6(1) ECHR. No such considerations apply in the context of this Inquiry.

[122] In the context of this Inquiry in accordance with the published Rule 10 Protocol, as much information as it is possible to provide will be provided to the family core participants in advance of any "closed" hearings and the opportunity will be afforded to the family core participants to identify areas of interest or concern to counsel to the Inquiry and/or to the chair of the Inquiry. Once the evidence has been adduced and tested in "closed", there will be a process in which a gist of that testimony is provided to the family core participants and published. It is possible that more detailed information will be provided to the family core participants and their legal representatives on their undertaking not to disclose the additional information in public. All this demonstrates their meaningful participation in the Inquiry process.

[123] In the specific context of an article 2 ECHR compliant investigation into a suspicious killing, it must be remembered that in the Grand Chamber case of *Ramsahai and Others v Netherlands* (Application No: 52391/99) 15 May 2007, the ECtHR reiterated its position at para [353] that article 2 ECHR does not require all proceedings into a violent death to be in public. Therefore, "closed" hearings conducted under the provisions of section 19 of the 2005 Act, are not, per se, incompatible with article 2 ECHR. Further, article 2 ECHR does not mandate any particular form of investigation, with the form of the investigation being left up to the states parties. What is required is that the investigation possesses certain key characteristics one of which is that the next of kin of the deceased are able to meaningfully participate in the investigation to the extent necessary to protect their legitimate interests.

[124] It is also worth remembering that the Grand Chamber at para [347] in *Ramsahai* acknowledged that the disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects so that it cannot be regarded as an automatic requirement under article 2 ECHR that the next of kin be granted access to the investigation as it goes along. The right of access to materials enjoyed by the next of kin may be more properly engaged during other stages of the article 2 compliant investigation as demonstrated in the cases of *McKerr v United Kingdom* App. No.28883/95 and *Armani Da Silva v United Kingdom* App no. 5878/08. The ECtHR has recently provided a valuable reminder of what constitutes an article 2 compliant investigation in the context of the "involvement of the victims or their next of kin and public scrutiny" in the case of *Vyacheslavova and Others v Ukraine*, App no. 39553/16, at para [407] where the court stated:

"The Court notes at the outset that Article 2 does not automatically require applicants to have access to police files or copies of all documents during an ongoing inquiry,

or to be consulted or informed of every step. Nor does it require the investigating authorities to indulge every wish of a relative as regards investigative measures. What the Court must examine is whether the applicants were involved in the investigation to the extent necessary to safeguard their legitimate interests.”

[125] There is an innate flexibility in the concept of “to the extent necessary to protect their legitimate interests” and it is clear from the authorities that the appropriate level of involvement will vary according to circumstances. These include the nature of the investigation, the subject matter of the investigation, what the legitimate interests of the next of kin are in the particular investigation and the stage or aspect of the investigation that has been reached. This level of flexibility is necessary since article 2 ECHR does not mandate any particular form of investigation, only that it possess some key characteristics, the most fundamental of which are that it is independent and effective (see para [77] of the speech of Lord Rodger in *R (JL) v Secretary of State for Justice* [2008] UKHL 68). In relation to the issue of next of kin participation, Lord Rodger at para [76] acknowledged that they should be given an opportunity to participate but that it was not necessary for them to be given access to all aspects of an investigation, if this might cause prejudice.

[126] Given that the ECtHR has recognised that the non-disclosure of sensitive material to the next of kin does not, per se, involve a breach of the procedural obligations of article 2 ECHR, it cannot be argued that article 2 ECHR invariably mandates the presence of the next of kin at hearings where such material is to be considered. Neither the applicant nor any of the supporting notice parties can point to a decision of the ECtHR in which it has been held that the instruction of special advocates is necessary to safeguard the interests of next of kin where non-disclosure is appropriate in the context of an article 2 ECHR compliant investigation. Rather than mandating that participation or representation of victims or next of kin is essential during the consideration of sensitive material, the ECtHR has frequently stated that the required degree of participation by victims and relatives may be provided for in other stages of the available procedures. In the domestic decision of *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, it is undoubtedly the case that Lord Bingham emphasised the importance of family involvement but it would be wrong to interpret anything Lord Bingham said as extending that entitlement to intimate involvement at every stage of the process. Nothing was said in *Amin* about what should happen in circumstances where the next of kin are excluded from hearings for good reason. When assessing whether the procedural requirements of article 2 ECHR have been met, it is important to look at all of the relevant aspects of an investigation together, rather than focusing on one aspect. The ECtHR, in the case of *Safi v Greece* (App. No. 5418/15), 7 July 2022, had this to say at para 116:

“The Court considers it appropriate to specify that compliance with the procedural requirement of Article 2 of the Convention is assessed on the basis of several essential

parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are interrelated and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of Article 6 of the Convention. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed."

[127] This was amplified in the more recent case of *Vyacheslavova and Others v Ukraine* (App. No. 39553/16), 13 March 2025 when the court stated at para [376]:

"Compliance with the procedural requirement of Article 2 of the Convention is assessed on the basis of several essential parameters: the adequacy of the investigative measures; the promptness and reasonable expedition of the investigation; its independence of anyone implicated or likely to be implicated in the events; as well as the involvement of the victim or the victim's family to the extent necessary to safeguard their legitimate interests and a sufficient element of public scrutiny. These elements are interrelated and each of them, taken separately, does not amount to an end in itself. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed."

[128] The question that this court has to consider is whether the totality of Inquiry procedures, practices and protocols as announced by Lord Turnbull (including the gisting out into the "open" hearings of the evidence led in "closed" hearings) will provide family core participants with a level of involvement that safeguards their legitimate interests. The applicant and supporting notice parties argue that just as their legal teams act in a monitoring role in "open" hearings in order to ensure that the evidence led in the "open" hearings is tested and explored in a thorough manner, a similar function needs to be performed on behalf of the family core participants in "closed" and that role can only be performed by special advocates. However, it is clear that the role of the "open" legal teams extends far beyond the monitoring role described above. The legal representatives of family core participants are there to provide advice and guidance in many other ways. They act as marshals of the very high volumes of documentation that has been and will be disclosed to the family core participants during the course of the Inquiry. They advise as to the meaning and import of such documentation. They can identify further areas of relevant inquiry. They act as conduits for communication and correspondence between the Inquiry and the family core participants and they can liaise with the Inquiry legal team in relation to the leading of evidence. These are important functions, many of which cannot be replicated by special advocates in "closed."

[129] Acknowledging that the legitimate interests of family core participants do include having a means of being reassured that the evidence led during “open” hearings is tested and explored in a thorough manner; it is clear that this will, in the main, be achieved by the family core participants seeing how counsel to the Inquiry, utilising any suggested areas of questioning which family core participants may identify, engage in that process of thorough testing and diligent exploration. The ability to judge how effectively counsel to the Inquiry engages in that process should give reassurance to the family core participants that counsel to the Inquiry will do likewise in the “closed” hearings. Although family core participants and their “open” legal representatives will be limited to suggesting areas of general interest or concern in respect of testing and exploring the evidence to be heard in “closed”, the performance of the counsel to the Inquiry in “open” can and should be taken as a good indication of the level and quality of testing and exploration of the evidence which will take place in “closed.” The applicant and supporting notice parties do not really take issue with this point. Instead, as has been indicated above, they home in on two other issues and they argue, firstly, that there is an inequality of arms in circumstances where the state core participants are present and represented in “closed” hearings and the family core participants are entirely unrepresented, and, secondly, they are deprived of an effective means of monitoring the work of the Inquiry in “closed.”

[130] The monitoring issue has been addressed at paras [112] to [114] above. The final refinement of the argument made by the applicant and the supporting notice parties is that in the absence of special advocates representing the interests of the next of kin core participants, there would be no one to perform the necessary role of independently determining whether any error of law was occasioned in the Inquiry’s approach to fact finding. Such a proposition is novel in the context of the identification of the content of the article 2 ECHR procedural obligations. Time and time again, the ECtHR has stressed the need for independence and effectiveness in the context of article 2 ECHR compliant investigations (see the recent enunciation of these necessary characteristics in the case of *Ramsahai*). Article 2 imposes a requirement that there should be some form of effective official investigation. As Lord Turnbull noted there is nothing in the ECtHR or domestic case law to indicate that an official investigation will fail to comply with the procedural requirements of article 2 ECHR in the absence of some separate but contemporaneous process for assessing the effectiveness of the machinery set up to carry out the independent investigation. This court notes that no European or domestic judicial pronouncements have been brought to its attention that state that an effective investigation requires representation on behalf of next of kin in some form of monitoring role such as might be found in contested adversarial litigation where rights are being determined. Bearing in mind the totality of Inquiry procedures, practices and protocols as announced by Lord Turnbull there is absolutely no legitimate basis for any concerns about the independence or effectiveness of the Inquiry at this time and, therefore, no basis for the instruction of special advocates to represent the interests of family core participants in “closed” hearings.

[131] The inequality of arms point has been examined above at paras [73] and [98] to [100] where reference was made to the case of *Regner v Czech Republic* which forms part of the ECtHR's body of jurisprudence on article 6 ECHR. It is argued by the applicant and the supporting notice parties that this line of authority demonstrates that where sensitive information has to be considered by a tribunal, the ECtHR has recognised that the legitimate interests of the state need to be protected and this can be achieved by conducting "closed" hearings but, if that occurs, it is necessary to ensure that, so far as possible, adequate safeguards are put in place to preserve equality of arms. This may well be the case in adversarial proceedings where a party has a right to know and be able to deal with the case being made out against him/her but this does not translate into a procedural obligation in an article 2 compliant inquisitorial investigation. There is no lis between the state core participants and the family core participants which has to be adjudicated upon by the court. The family core participants are not liable to be the recipients of any form of criticism. The family core participants and the state core participants are not in the same position in relation to the risks of a finding adverse to them in the context of being critical of them. They are not opposing each other on some form of metaphorical battle ground and, therefore, the argument that they need to be equipped with the same or similar arms is essentially void of merit.

[132] The absence of any ECtHR authority supporting the applicant's contentions in relation to the need to facilitate the instruction of special advocates has not deterred the applicant from making this argument, presumably on the basis that, even though there is no case or line of authority which specifically requires such a step to be taken, equally there is no ECtHR authority which directly prevents such arguments being mounted. That may be the case, but there is an ECtHR authority that, if anything, lends support to the proposition that the instruction of special advocates is not a prerequisite for an article 2 procedural obligations compliant investigation. In the case of *Carter v Russia* App no 20914/07, 28 February 2022, Mrs Litvinenko, who, along with her husband, had changed their names after being granted asylum in the UK, successfully argued that Russia was in breach of both the substantive and the procedural limbs of article 2. The ECtHR relied on the findings made by Sir Robert Owen in the Inquiry which he chaired. This case represents the only instance in which the ECtHR has considered and commented upon the operation of the "closed" hearings procedure authorised by section 19 of the 2005 Act. It should be remembered that in that independent statutory Inquiry, Mrs Litvinenko's application for a special advocate was refused by Sir Robert Owen. Following "open" and "closed" hearings, the Inquiry found that Mr Litvinenko had been poisoned by two individuals who were acting under the direction of the Russian Federal Security Service. The ECtHR considered whether such findings were reliable and at para [68] of its decision the ECtHR had this to say:

"The Court's reliance on evidence obtained as a result of a domestic investigation and on facts established within domestic proceedings has depended on the quality of the

domestic investigative process, and the thoroughness and consistency of the proceedings in question.”

[133] In assessing the quality, adequacy and fairness of the domestic investigative process which was conducted under the provisions of the 2005 Act, the ECtHR at para [81] noted that both the chairman and the Minister had power under section 19 of the 2005 Act to restrict access to hearings and to limit the disclosure of evidence. The ECtHR then specifically commented on “closed” hearings at para [108]:

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

[134] The ECtHR, therefore, concluded at paras [108] and [110] that to the extent possible under the circumstances, the taking and use of “closed” evidence was attended with appropriate safeguards and that it had no reason to doubt the quality of the domestic investigative process or the independence, fairness and transparency of the inquiry proceedings. The ECtHR was considering the utilisation of “closed” hearing procedures in the context of article 2 in the *Carter* case and, as Lord Turnbull concluded, its decision can be viewed as a robust endorsement of a process which included substantial “closed” evidence and hearings, conducted in the absence of family core participants and without the appointment of special advocates.

[135] Like Lord Turnbull, I reject the arguments made on behalf of the applicant and the supporting notice parties that the article 2 ECHR implied procedural obligation of investigation mandates the appointment of special advocates to represent the interests

of family core participants in “closed” hearings authorised by section 19 of the 2005 Act. The protocols and procedures which have been set out in detail above are sufficient to allow the family core participants to be involved in the Inquiry to the extent necessary to safeguard their legitimate interests and they are capable of producing a process which is manifestly fair and compliant with the principles of natural justice. Having reached those conclusions, I will now proceed to address the issue of whether the 2005 Act contemplates, envisages or permits the appointment of special advocates to represent the interests of family core participants in “closed” hearings authorised under section 19 of the 2005 Act where “intercept” material evidence is being adduced in evidence and considered during those “closed” hearings.

[136] The conclusions I have already reached in respect of the absence of any requirement to facilitate the appointment of special advocates to represent the interests of family core participants in “closed” hearings in the context of an article 2 ECHR procedural obligations compliant statutory public inquiry set up under the 2005 Act means that when I embark on the task of interpreting the 2005 Act, I need only look at the ordinary and natural meaning of the statutory language, bearing in mind the purpose behind the legislation, and I do not need to stretch or expand the meaning of any of the relevant provisions of the 2005 Act in order to ensure that it can be interpreted in a Convention compliant manner.

[137] In the context of an independent statutory inquiry set up under the 2005 Act, it is clear that the Inquiry is not a court of law and the chair is not a judge vested with an inherent jurisdiction. The powers of the chair in the conduct of an independent statutory inquiry are derived exclusively from the statutory framework, in this case the 2005 Act as amended and the Rules made under the Act. Lord Woolf when considering the powers of the Parole Board at paragraph [65] of *Roberts* had this to say about a decision-making body which was not vested with an inherent jurisdiction:

“The First Core Submission

As a matter of domestic law, the Parole Board is a statutory corporation, not a court of law possessed of an inherent jurisdiction, and as such it is limited and circumscribed by the statute which regulates it. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

As a submission of law, this is correct. The issue here is whether there is an express or implied authorisation. In my view, there is an express authorisation to withhold information contained in the current Rules but if this is wrong, the authorisation is to be implied from the duty of the Board to conduct hearings which will enable it to reconcile the triangulation of interests to which I have

referred. In the case of the appointment of a SAA, authorisation is implied from the undoubted implicit duty of the Board under section 28 of the 1997 Act to conduct its decision-making process in a manner which so far as is practical and appropriate in the circumstances ensures that the prisoner is fairly treated ... Courts should be slow to restrict the implied power of an administrative body to enhance the fairness available to a person who otherwise would be adversely affected by the lack of that power.”

[138] It is clear from the statutory framework and architecture of the 2005 Act and 2006 Rules that there is no express power or authorisation to facilitate the engagement of special advocates in the context of an independent statutory inquiry. Therefore, one must look at all the relevant material in order to ascertain whether it can be properly said that it was Parliament’s intention that there should exist such an implied power or authorisation. It is relevant to note that there are a number of other statutory schemes, complemented by sets of detailed rules, which clearly contemplate the appointment of special advocates when “closed” hearings are embarked upon. More will be said about these schemes in subsequent paragraphs of this judgment. If the omission of an express power or authorisation in relation to the appointment of special advocates was a deliberate decision by the sovereign Parliament when enacting the 2005 Act, then clearly no such power can be implied. In order to explore whether this omission was deliberate, one must engage in a consideration of the language used in the statutory scheme governing the conduct of inquiries and this will include a consideration of the changes made by Parliament to legislation which specifically deals with national security considerations which have been enacted since the 2005 Act.

[139] To my mind, there is much force in the argument that the statutory scheme under consideration ought to be viewed as providing a comprehensive code for the conduct of an inquiry, including, where necessary, “closed” hearings conducted pursuant to section 19 of the 2005 Act. The question of whether a particular implied power exists can only be properly determined by taking account of all of the relevant legislative provisions, rather than by focusing solely and exclusively on the terms of section 17 of the 2005 Act. From this perspective, it would appear that the 2005 Act and the associated Rules are clearly capable (without the need to imply the existence of any additional powers) of providing a comprehensive regime for the withholding of “closed” material, as necessary, and for the holding of hearings in the absence of the public, or in the absence of particular core participants, where there is a risk of harm or damage which necessitates the withholding of that material. That regime is principally to be found in sections 19 and 20 of the 2005 Act. Having regard to the overall structure of the Act and Rules, there is a strong argument for concluding that if Parliament had intended to include within the scheme a power to recommend the appointment of special advocates, it would have said so expressly. The fact that it had not done so is in my view a powerful indicator of the absence of any such power.

[140] Other aspects of the legislative scheme also signpost the reader towards this destination. Rule 10 which deals with oral evidence at an inquiry will be discussed below but it is important to note at this stage that this rule is prescriptive as to who is entitled to ask questions of witnesses. The only opportunity for a representative of a core participant to question a witness arises if permission is granted following an application made under rule 10 (4) and (5). In 2005 Act proceedings, strict control over the questioning of witnesses is held by the chair. It is clear that as a special advocate cannot be appointed to act as a “recognised legal representative”, in the manner provided for by Rule 6, there was no provision which would permit a special advocate to ask questions or to apply to ask questions. This not only points towards the absence of any role for a special advocate but also serves to emphasise the centrality of the role of the inquiry chair and counsel to the inquiry in leading the investigation. This, in turn, serves to reinforce the distinction between the 2005 Act procedures, which provide for an inquisitorial investigation, and *inter partes* adversarial litigation. I agree with Lord Turnbull that this distinction is crucial in ascertaining whether there is any need in 2005 Act proceedings for the sort of mitigating balance which may be provided by special advocates in adversarial proceedings, where rights or allegations were being determined by a judicial officeholder acting as an adjudicator.

[141] The decisions of *R (Daly) v Secretary of State for the Home Department* [2000] 2 AC 532 at 548, and *R (Westminster City Council) v National Asylum Support Service* [2002] All ER 654 at para [5], remind us that the purpose behind an Act of Parliament and the context within which it has been enacted provide a frame or orientation for the use of the language employed within the Act. It is clear from the detailed analysis carried out by Lord Turnbull that one of the motivating factors behind the enactment of the 2005 Act was the desire to control the cost of independent statutory inquiries. As will be seen, the terms of section 17(3) impose a duty on the chair to conduct the inquiry with regard to the need to avoid unnecessary cost. Section 39 gives the Minister the power to limit the scope of cost liability if an inquiry should depart from its terms of reference. Almost half of the 34 provisions within the Inquiry Rules 2006 concern costs. Given the emphasis placed on such matters, it would appear that Parliament is unlikely to have simultaneously granted the chair of an inquiry an implied power to appoint special advocates without making any provision whatsoever to address the cost consequences of doing so, which could be very significant in an inquiry in which hearings in “closed” are likely to feature significantly.

[142] Further, one cannot lose sight of the fact that the legislation created an inquisitorial scheme. This must be one of the most relevant factors when it comes to interpreting the provisions within the 2005 Act and accompanying Rules. The very obvious difference between 2005 Act proceedings and adversarial *inter partes* litigation is that the former does not involve parties pursuing competing pleaded cases, or agendas, each seeking to steer the adjudicator in different directions. Independent statutory inquiries are set up to look at matters of public importance and to do so by looking to the past but then looking to the future and making recommendations. This involves an independent objective investigation by the chair, assisted by counsel to

the inquiry. The disclosure provisions within the Act and the Rules are all crafted around that inquisitorial focus and reflect the intention that all of the participants ought to be focused on assisting the chair in conducting the investigation. Having special advocates to represent particular interests in the “closed” proceedings would be antithetical to the inquisitorial process.

[143] All of this is underpinned by the terms of section 2(1) of the 2005 Act, which made it clear that an Inquiry chair is expressly prohibited from making any determination of a person’s civil or criminal liability. The independent statutory inquiry is, therefore, a very different species from the inter partes adversarial trial where the judge’s role is to adjudicate between two competing cases. A proper appreciation of this distinction tends to explain why Parliament has made no provision for the appointment of special advocates in determining how it should strike the balance of fairness.

[144] Delving into the relevant legislative provisions in greater detail, it is clear that section 1 of the 2005 Act enables any Minister to cause an independent inquiry to be held where it appears to the Minister that particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred. It is clear that the references to public concern mean that one of the key functions of an independent statutory Inquiry is to allay public concerns or where those concerns prove to be well-founded to make recommendations which, if implemented, will reduce the chances of similar issues arising in the future.

[145] Section 2 of the 2005 Act makes it clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. Inquiries are not courts and their findings cannot and do not have legal effect. The aim of an inquiry is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone. However, section 2 (2) of the 2005 Act goes on to make clear that it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of a fact.

[146] The aim of section 3 is to provide Ministers with the flexibility to appoint an inquiry panel that is appropriate to the circumstances under investigation. The Minister may appoint either a chairman to sit alone or with one or more panel members. Section 4 ensures that where the chairman will not sit alone the Minister will consult him on the appointment of any other panel members. Under section 5 of the 2005 Act, the Minister is required to specify terms of reference for the inquiry. An inquiry is set up to investigate a particular set of circumstances. The remit of the inquiry must be set out by the Minister in the terms of reference before the setting-up date. The Minister must consult with the chairman when either setting or changing the terms of reference. The Act does not contain any specific requirement for the Minister to consult other individuals or organisations, but they can be consulted if the Minister considers it appropriate in the particular circumstances. The period of time leading to the setting-up date can be used for such consultation.

[147] Under section 5(6)(c) of the 2005 Act, the Minister must specify whether the inquiry is being asked to make recommendations. However, section 24(1) of the 2005 Act, which is concerned with inquiry reports, makes it clear that the panel may make recommendations even if this is not a requirement in the terms of reference set by the Minister. These provisions of the 2005 Act provide some general background but the important provisions of the Act for present purposes are sections 17 to 20.

[148] Section 17 deals with evidence and procedure. Section 17(3) of the 2005 Act requires the chairman to act fairly throughout the inquiry. This serves to underline the duty that already exists in the common law. In applying this duty the chairman may consider, for example, if certain participants require some form of legal advice or representation. Section 17(3) also ensures that the need to control cost is a valid consideration for the chairman when conducting and planning proceedings. The cost of inquiries will vary according to the complexity of the matters being investigated. The Minister is required, by section 39(3), to meet expenses incurred in holding the inquiry. Each decision to admit evidence, to hold oral hearings, or to allow legal representation adds to the cost of the inquiry. The requirement to have regard to cost although not a paramount consideration is still an important consideration but it clearly would not take precedence over the need to ensure that the procedures of the inquiry were fair.

[149] Section 18 makes clear that, subject to any restrictions issued under sections 19 and 20, the chairman is required to do what he considers reasonable to ensure public access to evidence in the ways set out in section 18(1)(a) and (b), namely: by being able to attend the inquiry hearings or by seeing and hearing a simultaneous transmission of proceedings at the inquiry; and/or by obtaining or viewing a record of evidence and documents given, produced or provided to the inquiry.

[150] Sections 19 and 20 of the 2005 Act set out the extent to which inquiry proceedings can be held in private and evidence and documentation can be withheld from the public domain. These provisions formally recognise that there may be circumstances in which part or all of an inquiry must be held in private and if not in private with some level of restriction imposed on public access. Power is granted for the issuing of restriction notices which can be given by the Minister to the chairman at any time before the end of the inquiry and restriction orders which can be issued by the chairman during the course of the inquiry. In either event, restrictions are only permitted if they are required by any statutory provision, assimilated enforceable obligation or rule of law or if the Minister or chairman consider that the restrictions are conducive to the inquiry fulfilling its terms of reference or are necessary in the public interest.

[151] When considering the issue of public interest, the Minister or chairman must have regard to the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern. They must also have regard to any risk of harm or damage that could be avoided or reduced by any such

restriction. In this context harm and damage includes death or injury, damage to national security or international relations, damage to the economic interests of the UK or any part thereof and damage caused by disclosing commercially sensitive information. The Minister or chairman must have regard to any conditions of confidentiality attaching to the information which has been provided to the inquiry and the extent to which any restriction imposed would either delay the inquiry or impair its efficiency or effectiveness or would otherwise result in additional costs being incurred.

[152] Cumulative restrictions can be imposed in the sense that the Minister can impose a restriction notice in respect of matters which are already the subject of a restriction order issued by the chairman and a chairman can impose a restriction order in respect of matters which are already the subject of a restriction notice issued by the Minister. However, a restriction notice can only be revoked or varied by a Minister issuing a subsequent restriction notice and a restriction order can only be revoked or varied by the chairman issuing a subsequent restriction order. Restrictions imposed under section 19 on disclosure or publication of evidence or documents continue in force indefinitely, unless, under the terms of the relevant notice or order, the restrictions expire at the end of the inquiry, or at some other time, or the relevant notice or order is varied or revoked. There is a catch-all provision which empowers a Minister at the end of an inquiry to publish a notice revoking a restriction order or restriction notice containing disclosure restrictions that are still in force or vary it so as to remove or relax any of the restrictions.

[153] Restrictions that can be imposed on attendance under section 19(1)(a) of the 2005 Act can range from the exclusion of the press or general public, whilst allowing those with an interest in the inquiry to attend, right up to the exclusion of everyone except the chairman, his/her legal team, the witnesses and, if appropriate, their legal representatives. Restrictions might be imposed on all hearings, or only where a particular witness is giving evidence or where evidence is being heard on a specified topic. The nature of the restriction will depend upon the reasons for it. Similarly, a range of different restrictions might be imposed on the disclosure or publication of evidence or documents. Section 21 of the 2005 Act gives the chairman of the inquiry the power to compel the productions of statements and the disclosure of documentation and evidence by issuing a notice under this section. If a person states that he is unable to comply with a notice issued under section 21 or that it is not reasonable in all the circumstances to require him to comply with such a notice, it is for the chairman of the inquiry to make a decision on this issue and the chairman may consider it appropriate to revoke or vary the notice accordingly, the public interest being a key consideration in his deliberations. On occasion, it is possible that the evidence being requested will be an intercepted communication. To ensure that such material can be disclosed to the inquiry, there is an amendment in para 21 of Schedule 2 to the Act to ensure that this is permissible under section 18 of the Regulation of Investigatory Powers Act 2000.

[154] Section 22 provides that any witnesses appearing before inquiries will have the same privileges, in relation to requests for information, as witnesses in civil proceedings. In particular, this means that a witness will be able to refuse to provide evidence: because it is covered by legal professional privilege; it might incriminate him or his spouse or civil partner or it relates to what has taken place in Parliament. Section 22 provides expressly that in the context of an inquiry held under the provisions of the 2005 Act, it is possible to make an assertion that documents or information should be withheld from the inquiry or from public disclosure, on the grounds that they are immune from disclosure in the public interest (“public interest immunity”) (“PII”).

[155] Section 41 confers a power on the Lord Chancellor to make procedural rules governing the conduct of inquiries under the 2005 Act. Such rules were made in 2006 and have been subject to some amendments since that time. Rule 5 deals with the designation of core participants. The chairman may designate a person as a core participant at any time during the course of the inquiry, subject to the person consenting to being so designated. In deciding whether to designate a person as a core participant, the chairman must consider whether the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates, has a significant interest in an important aspect of the matters to which the inquiry relates, or may be subject to explicit or significant criticism during the inquiry proceedings, in the report or any interim report.

[156] Rule 6 deals with the designation of recognised legal representatives for core participants and other persons who are required or permitted to give evidence or produce documents during the inquiry. Under rule 7 the chairman is required to designate a single recognised legal representative for a number of core participants if their interests in the outcome of the inquiry are similar and the facts that they are likely to rely on in the course of the inquiry are similar and it is fair and proper for them to be jointly represented. Rule 8 permits or enables a core participant or witness with a recognised legal representative to appoint a legal team in order to assist the recognised legal representative in the discharge of the recognised legal representative’s functions. It is clear that a special advocate can never be a recognised legal representative.

[157] Rule 9 stipulates that prior to calling someone to give evidence or produce any documentation to the inquiry that person must be requested to provide a written statement and any such request should include a description of the matters or issues to be covered in the statement. Under rule 10, when a witness is giving oral evidence before an Inquiry, the default position is that only counsel to the inquiry and the chair of the inquiry will question the witness. The recognised legal representative of a core participant or a witness can only ask questions of a witness giving evidence at an inquiry with the specific permission of the chairman. In order to obtain permission, it is necessary for the recognised legal representative to identify the issues in respect of which permission is being sought and if these are not new issues it is necessary for the recognised legal representative to explain why permission should be granted. Rule

11 deals with opening and closing statements being made by recognised legal representatives of core representatives.

[158] Rule 12 is of particular importance in the context of this application and it relates to the disclosure of “potentially restricted evidence” which is evidence in the inquiry’s possession that is the subject of a relevant application involving the withholding of evidence or information from the public that has not been determined or withdrawn. A relevant application is an application to the chairman for a restriction notice, an application that evidence or documents should be withheld on the basis of PII or should be withheld on the basis that the evidence or documents are subject to a restriction notice made by a Minister. The default position is that such material is restricted until such times as the relevant application is finally determined although some limited disclosure might be permitted if it is considered by the chairman to be necessary for the determination of the application. The rule permitted other persons, who would not otherwise be permitted to see it, to have access to the relevant material in order to assist the chair in making the relevant decision. It is clear that this provision does not contemplate disclosure to a special advocate because if it did then what would be the point of rule 12(5) which states that any person who is shown potentially restricted evidence in such circumstances is deemed to be subject to an obligation of confidence to the person who provided or produced the evidence to the inquiry.

[159] The final piece of legislation which is relevant to this application is the Investigatory Powers Act 2016 which sets out a framework for the use by the security and intelligence agencies, law enforcement and other public authorities of investigatory powers to obtain communications and communications data. These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. It is not lawful to exercise such powers other than as provided for by the Act. The Act also makes provision relating to the security and intelligence agencies’ retention and examination of bulk personal datasets. The Act governs the powers available to the state to obtain communications and communications data. In addition to setting out statutory safeguards, the Act clarifies which powers different public authorities can use and for what purposes. It sets out the statutory tests that must be met before a power may be used and the authorisation regime for each investigative tool, including the requirement for judicial commissioners to approve the issuing of warrants for the most sensitive and intrusive powers. Under the provisions of the Act, the Investigatory Powers Commissioner oversees the use of these powers. The Act also empowers the Secretary of State to require, by notice, communications services providers to retain internet connection records. The relevant provisions of the 2016 Act for present purposes are section 56 and Schedule 3.

[160] Section 56 prevents intercepted communications or secondary data being used or disclosed in legal proceedings or in an inquiry held under the 2005 Act. This includes adducing such material in evidence, asking questions about it, disclosing it, or doing anything from which it could be inferred that the material came from

interception or which suggests that interception may have occurred. This very wide prohibition is narrowed somewhat as a result of a number of exceptions which are specified in Schedule 3 to the 2016 Act. The importance of Schedule 3 for present purposes is that in specific cases or situations or types of legal proceedings where this wide prohibition is modified, the deployment of special advocates is contemplated and authorised, presumably to address issues of fairness, natural justice and compliance with article 6 ECHR.

[161] Paras 4 and 5 of Schedule 3 provide that section 56(1) does not apply in relation to proceedings before the Investigatory Powers Tribunal or the Special Immigration Appeals Commission. In proceedings before the Special Immigration Appeals Commission, disclosure is not permitted to the appellant or applicant or their representatives but may be made to special advocates appointed for the purpose of those proceedings. Para 6 provides that section 56(1) does not apply in relation to proceedings before the Proscribed Organisations Appeal Commission, providing there is no disclosure to certain persons or bodies, including the applicant and the organisation concerned. Disclosure is not permitted to their representatives but can be made to a special advocate appointed for the purpose of the proceedings.

[162] Para 7 provides that section 56(1) does not apply to “closed” material proceedings (ie section 6 proceedings as defined by section 14(1) of the Justice and Security Act 2013). However, this does not allow disclosure to anyone who is or was party to the proceedings, or any representative of theirs who is not a special advocate, other than the Secretary of State or the person making the disclosure of sensitive material that made the use of “closed” material proceedings necessary.

[163] Paras 8 and 9 provide that section 56(1) does not apply to TPIM proceedings or TEO proceedings (ie proceedings relating to terrorism prevention and investigation measures or temporary exclusion orders). However, this does not allow disclosure to any person involved or party to the proceedings, or any representative of theirs who is not a special advocate, other than the Secretary of State.

[164] Para 9A provides that section 56(1) does not apply in relation to any proceedings brought under section 38 of the Sanctions and Anti-Money Laundering Act 2018. However, this does not allow disclosure to any person involved or any party to the proceedings other than the Secretary of State or the Treasury or any representative of theirs who is not a special advocate

[165] Paras 10 to 12 provide that section 56(1) does not apply in proceedings relating to financial restrictions or the freezing of terrorist assets providing that there is no disclosure to any person who is party to the proceedings, or any representative of theirs who is not a special advocate, other than the Treasury. Para 12A provides that section 56(1) does not apply in proceedings relating to the release of prisoners in Northern Ireland (proceedings before the Parole Commissioners for Northern Ireland or any Sentencing Review Commissioners) providing there is no disclosure to any

person who is party to the proceedings, or their representatives who are not special advocates, other than the Secretary of State.

[166] Para 13 provides that section 56(1) does not apply in proceedings before the Parole Board in GB providing there is no disclosure to any person who is party to the proceedings, or their representatives who are not special advocates, other than the Secretary of State. Paras 14 and 15 provide that section 56(1) does not apply in relation to certain employment or industrial tribunal proceedings where the applicant or their representatives are excluded for all or part of the proceedings, providing there is no disclosure to the applicant in the proceedings or their representatives who are not special advocates.

[167] Paras 17 and 18 provide that section 56(1) does not apply in relation to appeal proceedings relating to claims of discrimination in Northern Ireland where the party to the appeal or their representatives are excluded from all or part of the proceedings, providing there is no disclosure to any person who is party to the proceedings or their representatives who are not special advocates. Of central importance to this application, paragraphs 22 and 23 of Schedule 3 deal with disclosures to Inquiries set up under the 2005 Act. Para 22 provides that disclosure can be made to the Panel of an inquiry held under the 2005 Act or to someone appointed as a legal adviser to such an inquiry including counsel to an inquiry or the solicitor to an inquiry if “the exceptional circumstances of the case make the disclosure essential to enable the inquiry to fulfil its terms of reference.” Para 23 provides that disclosure can be made during restricted proceedings of an Inquiry held under the 2005 Act and sets out who may be present at such proceedings. I set out this provision in full:

“(2) Proceedings of an inquiry held under that Act are “restricted proceedings” for the purposes of this paragraph if restrictions imposed under section 19 of that Act are in force prohibiting attendance at the proceedings by any person who is not—

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

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

(4) In this paragraph “relevant party”, in relation to any proceedings of an inquiry, means –

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

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

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

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

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

[168] What is immediately apparent and abundantly clear is that a “relevant party” in para 23 sub-paras (3) and (4) does not include any of the family core participants in this Inquiry and that is accepted by the applicant and the supporting notice parties. The applicant and supporting notice parties seek to argue that a special advocate deployed in “closed” on behalf of family core participants clearly falls within the provisions of para 23(2)(e) as the special advocate is necessary to ensure fairness, compliance with the principles of natural justice and the article 2 ECHR procedural obligations coupled with the obligations imposed under article 6 ECHR. In essence a special advocate in the context of this Inquiry is “a person performing functions necessary for the proper functioning of the proceedings.”

[169] This argument can be disposed of in short form. I have already held that in the context of this Inquiry, special advocates are neither necessary nor required to ensure fairness, compliance with the principles of natural justice and the article 2 ECHR procedural obligations. I do not consider that article 6 ECHR is relevant in the context of this Inquiry. Therefore, a special advocate cannot be properly described as a person performing functions necessary for the proper functioning of the “closed”

proceedings. A developed vetted court clerk or court official managing the presentation of video or audio evidence might be a person performing functions necessary for the proper functioning of the “closed” proceedings but a special advocate would not be.

[170] If I am correct in this conclusion then one has to ask why in all the other examples of types of proceedings set out in Schedule 3 there are specific references to special advocates but not in inquiries held under the 2005 Act. The obvious and only reasonable and rational answer is that the instruction of special advocates is neither contemplated nor permitted under the 2005 Act, particularly when intercept evidence and materials are going to be examined. The applicant and supporting notice parties have put forward a fall-back position which appears to entail special advocates being deployed in “closed” hearings apart from those “closed” hearings where intercept evidence and materials are going to be examined. This would result in two tiers of “closed” hearings. One where intercept evidence and materials were being examined would not involve special advocates and another where other sensitive materials were being examined where special advocates would be deployed. I simply ask rhetorically what useful purpose would such a convoluted arrangement serve?

[171] The legislative framework where the material to be considered includes intercept evidence and materials allows for only one rational interpretation and that is one which does not envisage or permit the deployment of special advocates in “closed” hearings. I entirely endorse Lord Turnbull’s conclusion that the deployment of special advocates is prohibited in the context of this Inquiry.

[172] The last issue to address is the theoretical issue of discretion. Again, this issue can be disposed of in short form. If the deployment of special advocates was deemed necessary to ensure fairness, compliance with the principles of natural justice and the article 2 ECHR procedural obligations coupled with the obligations imposed under article 6 ECHR, then, in such circumstances, that necessity would mean that there was no discretion vested in the chairman. Instead, there would be a duty on the part of the chairman to request the deployment of special advocates by the appropriate Law Officer. The question of discretion would only arise if my conclusions in respect of the absence of any such necessity were correct and my conclusions on the proper interpretation of the legislative framework were wrong.

[173] The question would then be whether in the absence of any necessity to instruct special advocates in circumstances where special advocates were permitted to be deployed under the legislative framework, Lord Turnbull wrongly exercised his discretion in refusing to request the deployment of special advocates in this Inquiry. Even if this court were to ignore all the weighty authorities that caution against substantive interference by a supervisory court with the exercise of judicial discretion, it is patently clear that the grounds put forward by the applicant and supporting notice parties for the exercise of discretion when properly scrutinised and analysed are all about pushing 2005 Act processes down the adversarial road and imposing a level of supervision and monitoring on an independent expert

investigator which is clearly contrary to the intention of Parliament in enacting that legislation. Such a course of action would unnecessarily lengthen the duration of an already lengthy Inquiry and would massively increase the costs burden with no material benefit in terms of article 2 ECHR effectiveness. The decision of Lord Turnbull in respect of the exercise of discretion is unimpeachable. This application for judicial review is refused and I conclude by making these final comments.

[174] Mr Greaney KC in his submissions relayed the views expressed by Mr Mansfield KC on behalf of the Rush family, in which they expressed their confidence in the Inquiry chair and legal team to assiduously fulfil the Terms of Reference of this Inquiry and they further expressed their wish that the Inquiry chair and legal team would now be allowed to go about that important and difficult task without further challenge or interruption. Mr Mansfield KC has been involved with some of the Omagh families from the time of the inquest into the deaths of those murdered in Omagh on 15 August 1998. I too was instructed in the Inquest on behalf of the health care providers who treated the injured and dying. The Inquest opened in early September 2000 and the memory of the palpable pain, shock, grief and suffering of the next of kin and the survivors in the Leisure Centre in Omagh during that Inquest has always remained with me and has driven me to do whatever I can to bring healing to those so devastatingly harmed by this event and many other events in the Troubles through my work as President of the Victims' Payments Board. I urge all those involved in this Inquiry to heed the wisdom and experience of Mr Mansfield KC and to let this Inquiry get to work and tackle a myriad of issues arising out of its Terms of Reference rather than getting bogged down and paralysed in issues relating to the instruction of special advocates. The wait for the truth in respect of the Omagh atrocity has been far too long. I recognise that special advocates played an important part in the adversarial judicial review which brought about a result where the end of that wait came into sight. I urge all concerned not to let the pursuit of agendas for the development of adversarial Inquiry procedures unnecessarily and fruitlessly prolong that wait. Have confidence in Lord Turnbull and his vastly experienced legal team and work with them in co-operation to uncover that long awaited truth.