manchester
arena
inquiry

Ruling on Application for Special Advocates

1. This application is made by the families represented by John Cooper QC and Duncan Atkinson QC who argue that the appointment of special advocates will enable the families to have more meaningful participation in any closed hearings that take place as part of the Inquiry. It is not supported by the families represented by Pete Weatherby QC and Guy Gozem QC who submit that it is inappropriate in the circumstances of this case; will achieve nothing for the families; and would be a waste of time and resources. The SSHD opposes the application and argues that, in any event, there is no power to appoint special advocates to a statutory inquiry. The application is opposed by GMP who accept that I have the power to appoint special advocates but argue there is no justification for their appointment in this case.

2. By way of background, special advocates are normally appointed by the Law Officers to represent the interests of a party in proceedings from which that party and his or her legal representative are excluded. Their functions are to represent the interests of a party by making written and oral submissions and examining witnesses at hearings. A special advocate can take instruction from the party they are appointed to represent before they review sensitive materials but they are precluded from having any contact after they have carried out their review. It follows that the contact between a special advocate and the families or their representatives would be very limited. The sort of occasions where special advocates might be appointed are where allegations are made against a party and he or she cannot know for legal reasons the nature of the allegations or where they come from. A special advocate can be appointed in those circumstances to test the evidence and make submissions to the tribunal. The appointment of special advocates is intended to be restricted to a limited number of circumstances.

3. The starting point for the Cooper/Atkinson submission is that closed hearings '*undermine every component of the purposes set out by Lord Bingham'* in *R (Amin) -v- SSHD* [2003] UKHL 51 and therefore '*where full openness is not possible, particular care should be taken to explore measures which may enable those purposes to be*

fulfilled'. As pointed out in the skeleton argument provided by CTI, the first part of that starting point does contain some advocates' hyperbole but it is correct that the '*full facts will not be brought to light'* if there is a closed hearing. Further the family CPs will not be able to directly participate in closed hearings and anything that could enable that to occur has to be considered.

4. First of all, I will consider the argument that I have no power to appoint special advocates. The submissions of GMP on this point set out the position in an economical and balanced manner, exploring the competing arguments. The starting point is that a public inquiry is a creature of statute and neither the statute or the rules introduced under the 2005 Act give express provision for the appointment of special advocates. Accordingly the only way special advocates can be appointed in law is if it is a *'necessary implication'* arising from the Act or the Rules.

5. Support for the fact there is such a necessary implication can be found in s.17 of the Inquiries Act 2005 which gives me the power to direct the procedure and conduct of an inquiry. Arguably, that could include the appointment of a special advocate. There is also authority supporting the existence of a general power to appoint a special advocate. In *R-v-AHK and others* [2009] EWCA Civ 287 it was stated that '*it is well established…that the courts may invite the A-G to appoint a special advocate in a case where there is no statutory procedure as long as the circumstances make it appropriate'.*

6. I consider that the case of *R (Roberts) -v- Parole Board* [2005] UKHL 45 is particularly relevant. In that case, the House of Lords decided narrowly that the Board did have the right to appoint special advocates in order to ensure that the procedure in a hearing complied with Article 5(4) ECHR. The issue in that case was that the police wanted to put information before the Board which it could not disclose to the prisoner or his legal representative and for which PII could properly be claimed. The Court therefore had the options of either (1) not allowing the Board when making the decision whether to direct release to take into account material which could be important information as to risk, or (2) adopting some procedure where the prisoner's interests could be maintained and which would be compliant with Article 5(4). Article 5(4) is the provision which requires the Board to adopt a fair procedure in making its decision. The Parole Board at that time did not have a statutory power to appoint special advocates, although it does now. It is also a creature of statute so the same issues arose as do in this case.

7. In this case I am required to comply with the requirements of Article 2 ECHR and, while it may be difficult to think of examples, I am not prepared to say as a matter of law that there is no power to appoint special advocates to an inquiry. In my judgment there is such a power and my ruling in that regard accords with the ruling by Sir Robert Owen in the Litvinenko inquiry.

8. I do accept that it would be rare to appoint special advocates to an inquiry because the need for special advocates normally arises where an accusation is being made against a party in proceedings and the party cannot know the details of the accusation. That normally arises in adversarial proceedings but can arise in inquisitorial proceedings. Proceedings before the Parole Board are generally regarded as being inquisitorial and have progressively become more so.

9. In most cases Counsel for the Inquiry are well able to carry out the role that special advocates would carry out, but it is possible that that is not always the case. Consider a case where a CP is subject to an accusation in a closed hearing which he cannot be told the detail of. If made out the accusation may result in the CP being criticised publicly. It may be difficult for CTI, who are in effect neutral, fairly to represent the CP's interests which might, as a matter of procedural fairness, need the intervention of a special advocate. While that is an example that has occurred to me while considering my decision, it has not been the subject of any detailed argument and is different from the situation that I am considering. One of the matters that Sir Robert Owen did think could weigh in favour of appointing special advocates in the Litvinenko case was that the family of the deceased in that inquiry did have special information which might feed into the closed proceedings. Despite that he did not consider that the appointment was justified. He considered that, even though the family had special knowledge relating to the involvement of the Russian State in the death that did not mean that special advocates should be appointed. In this case the family CPs do not have any special knowledge relating to the matters to be investigated in closed so there is a less persuasive argument than there was in the Litvenenko case.

10. So the power exists but should I exercise it in this case? Mr. Cooper and Mr. Atkinson rely on what the family CPs have already contributed to this process by questioning the evidence and coming up with new lines of inquiry. None of that is in issue. They also point out the further disclosure that has been made in relation to the closed information as a result of issues that they have raised with CTI. So they say I should draw the inference that special advocates would contribute meaningfully to my process.

11. On the other hand the interests of CTI and the families will be aligned. The families have no special information that they could feed into this specific part of the inquiry. A special advocate will in reality be acting as a check to make sure that CTI are doing their job properly. Does that justify their appointment? I have confidence in CTI to do their job properly and no-one has given me any reason not to have that confidence, indeed submissions have been to the contrary. Moreover, I will be able to judge during the hearings whether CTI are doing their job properly. I may ask questions myself of witnesses and am likely to do so. There is nothing to stop CPs speaking to CTI to suggest lines of questioning. While special advocates have expertise in deciding what material should be covered by PII and in gisting material, CTI do also have the necessary experience and skills to do that. Also, I think that it is important that the families are not given an inaccurate impression of what a special advocate can do.

Importantly once he or she has heard any of the PII material there can be no communication with CPs or their lawyers so they will never hear what, if anything, the special advocates have achieved or what happened in the closed hearings. So if the family CPs are looking for re-assurance that the investigation conducted in a closed hearing was done rigorously they will not be able to get it as they will not be able to have contact with the special advocate after he or she has been given the restricted information.

12. For all those reasons I have concluded that it is not necessary or desirable to appoint special advocates for the reasons advanced jointly by Mr. Cooper and Mr. Atkinson.

13. Finally, Mr. Cooper suggests that as a matter of fairness, if the families cannot be represented in the hearings nor should the Security Service or CT police. I have considered this. There are a number of answers to that submission. First, like all CPs the Home Office and GMP have the right to representation. Second, their presence in the closed hearings does not require new sensitive material to be disclosed to them, since those organisations know the information already. Third they, unlike the family CPs, do have special knowledge to input into the inquiry. They have said, like all CPs, that they will play their part in trying to uncover the truth and take steps to make sure this never happens again. There is no reason why they should not be given the chance to do so. Fourth, they may be criticised as a result of the evidence which is heard in closed session and they will have the right to make representations about any criticism. Fifth, their input will probably be required in closed session to enable further gists to be developed which can then be disclosed to CPs in open.

14. In all those circumstances, I refuse the application for special advocates.

Chairman

Sir John Saunders

7 October 2021