

## **ROSEMARY NELSON INQUIRY**

**Day 13: 1st May 2008**

### **Opening submissions by Mr Andrew Donaldson QC, Counsel to the PSNI (continued)**

Mr Donaldson opened by turning to the allegations made previously that Rosemary Nelson had been assaulted by police officers in the course of disturbances on the Garvaghy Road. He noted that many of the witnesses who had made statements about this alleged assault were not being called to give evidence to the Inquiry so that their statements could be questioned. He also noted that there was no medical evidence whatsoever to back up allegations that Rosemary Nelson had been “bruised from head to toe.”

Mr Donaldson continued by questioning the evidential basis of the report made by the UN Special Rapporteur, Mr Cumaraswamy. According to Mr Donaldson, Mr Cumaraswamy had placed too much reliance on information provided by NGOs which had not been properly verified. Mr Cumaraswamy stated that he was “confident that the information on which I based my comments was correct”. However, he stated that his Commission was “not a court of law and we do not test the materials which are provided to us”. He thought that the information provided by NGOs, particularly the Committee on the Administration of Justice (CAJ), British Irish Rights Watch (BIRW) and the Lawyers Committee on Human Rights (LCHR) was “generally well researched”, though he acknowledged that they were “coming from a certain perspective”.

Mr Donaldson turned to examine a letter from Jane Winter of BIRW to Mr Cumaraswamy, dated 6 March 1997. In this letter, Jane Winter stated that Royal Ulster Constabulary (RUC) officers had accused Rosemary Nelson of active involvement in the IRA. She referred to Colin Duffy as having been “an eye-witness of a murder that was almost certainly carried out with state collusion, and it appears that he was set up for... prosecution”. Mr Donaldson described this as “extremely opinionated” and as “factually incorrect”.

Mr Donaldson then turned to a letter from Jean Forest, of the NGO US Voice for Human Rights, which was sent to Mo Mowlam (Secretary of State for Northern Ireland) and Jack Straw (Home Secretary). This letter was extremely critical of policing and justice in Northern Ireland. She stated that the RUC had targeted Colin Duffy since 1990 without let-up and that this was also true of Rosemary Nelson. The police division of the Northern Ireland Office (NIO) replied to Jean Forest on 19 September 1997. The letter outlined the measures that had been taken to investigate complaints that RUC officers had issued threats against Rosemary Nelson to her clients. It noted that Rosemary Nelson had failed to co-operate with the investigation. Mr Donaldson referred to a copy of this letter apparently sent from Jean Forest to Rosemary Nelson, on which she had written “Rosemary, this makes you look irresponsible??”

Mr Donaldson then turned to a press release dated 1 October 1997 from Mr

Lynch of the Lawyers Alliance for Justice in America (LAJI), calling for the restructuring of the RUC. It called for the RUC to be disbanded and stated that rather than “a few rotten apples potentially spoiling the barrel. Rather, the entire orchard has been blighted”. Mr Donaldson questioned what credence the inquiry should give to this sort of “hyperbole”. Mr Donaldson also examined a letter from Mr Lynch to the Chief Executive of the Independent Commission on Police Complaints (ICPC), dated 8 June 2000. Mr Lynch apparently believed that there had been misconduct by police officers relating to Rosemary Nelson and that the various investigations conducted into these allegations were insubstantial. Mr Donaldson questioned how much weight the inquiry should give to such allegations.

Mr Donaldson then turned to issues 9, 10 and 11, relating to risk assessments made regarding threats to Rosemary Nelson. He reminded that inquiry of the security context in Northern Ireland at that time. Between 1991 and 1999/2000, 499 people were murdered in Northern Ireland. Within J Division (which covered Lurgan, Portadown and Banbridge), Loyalists were implicated in 25 murders and Republicans in 16. Mr Donaldson suggested that if this murder rate occurred in Manchester or Birmingham, it would be considered extraordinary.

Mr Donaldson contrasted the investigation into the murder of Fred Anthony, a cleaner at Lurgan police station, in 1994, with that into Rosemary Nelson’s murder. In the former case, 80 actions were taken and nobody was ever convicted. In the latter case 12,305 actions were taken by police. Mr Donaldson challenged Mr Harvey’s proposition that it was staggering that there was no intelligence relating to threats to Rosemary Nelson. He suggested that it was illogical and unreasonable to expect there necessarily to be intelligence and that if there had been more intelligence, perhaps Fred Anthony would not have been murdered either.

Mr Donaldson then reminded the inquiry of the considerable threats to police and army personnel in Northern Ireland during this period and of the large number of security force personnel who were murdered.

Regarding risk assessments, Mr Donaldson stated that a “specific threat” to Rosemary Nelson would have needed to be established if she were to be offered protection under the Key Persons Protection Scheme. He reminded the inquiry that no such “specific threat” intelligence had in fact been found.

He reminded the inquiry that Rosemary Nelson had never actually applied for protection under KPPS. He suggested that it may have been better for the police to have sent Rosemary Nelson a letter suggesting practical measures that she could take as regards her personal security, such as not parking her car in the driveway – even if this letter would have ended up in her wastepaper basket. He suggested that this would have been a cosmetic measure and that everyone in Lurgan would have been familiar with such measures in any case. Mr Donaldson concluded by questioning whether the inquiry should crucify the RUC over such a cosmetic matter.

**Opening submissions by Mr Michael Egan QC**, Counsel for Colin Port and certain members of the Rosemary Nelson Murder Investigation Team

Mr Egan opened by explaining that he was acting for certain members of the Murder Investigation Team (MIT). This team was made up of officers from within the Police Service of Northern Ireland (PSNI) and from other police forces in the UK. That was why they were represented separately in the inquiry.

He noted that the document “A summary of the murder investigation”, which had been distributed to Full Participants, was intended as a useful summary and could not pretend to be definitive.

He stated that only Mr Provoost had seen Chapter 15 of the Ayling Report and that this was why Mr Phillips had not been able to open the MIT’s reaction to this chapter previously. He stated that the MIT had responded to an earlier draft of the Ayling Report and that they did not accept many of his points.

Mr Egan then turned to the question of due diligence. He stated that the test expressed by Mr Phillips and Mr Ayling – “the qualitative assessment required in relation to the murder investigation in order to answer the question: was it carried out with due diligence?” – was the correct one, but that it was important to ask how this test was to be applied. The question of due diligence was different from other issues to be considered by the inquiry because it was not solely related to questions of fact – there was also a problem of judgement and a danger of hindsight. He suggested that any findings about due diligence must be evidence-based.

Mr Egan pointed out that Mr Ayling did not speak on behalf of the inquiry. His status was that of an expert witness. The fact that he had produced a lengthy report and had used inquiry resources to do so could not artificially enhance his status. Mr Egan questioned how relevant Mr Ayling’s expertise in fact was, given his lack of experience in Northern Ireland. He stated that Mr Ayling’s report should not necessarily be considered a balanced report simply because he made comments praising some aspects of the police investigation. It may have been the case that even this praise was too slight. Mr Egan also pointed out that Mr Ayling had not personally written every paragraph of his report and that in some cases a careful analysis of who had written particular opinions would be necessary.

Mr Egan then turned to the conduct of the murder investigation. He pointed out that the MIT began by considering the possibility of collusion at great length and that this meant they had begun on the correct basis. He went on to describe the members of the team.

Mr Port was in overall charge of the murder investigation from 6 April 1999 to 31 December 2002. He based himself in Lurgan and adopted a hands-on approach to the investigation. According to Mr Egan, Mr Port showed “sensitivity and concern”. He still continued to provide advice and assistance to the investigation team. Mr Kincaid, of the RUC, was Senior Investigating

Officer from 15 March 1999 to August 2000. He had considerable experience of investigating terrorist murders. An RUC officer identified as M540 was Deputy Senior Investigating Officer from 15 March 1999 to August 2000, when he succeeded Mr Kincaid, continuing in post until May 2005. Mr Egan suggested that the inquiry should treat Mr Kincaid and M540 as experts in their field and that it would be for the inquiry to determine whether their expert testimony was tainted by self-interest. Mr Provoost was deputy officer in overall charge from 12 April 1999 until 31 December 2002, when he succeeded Mr Port.

Mr Egan turned to the questions of victimology and of the raising and testing of hypotheses, which were raised by Mr Ayling. Mr Egan quoted from a statement by Sir David Phillips, who was briefly in charge of the murder investigation for the few days between the murder and Mr Port's appointment. Sir David stated that "one of the problems with... inquiries is that there is often a view that if things had been done differently, the outcome would have been different. These cases can be so difficult. Even with your best efforts, realistic evidence eludes you... Collusion, like murder, requires evidence. The problem is finding that evidence. It is very easy to speculate, but the acid test is whether there is any evidence to support that speculation".

Mr Egan stated that the inquiry was very different to an audit. The fact that there was not always a paper trail of every discussion that took place between police officers did not mean that no discussions took place. He asserted that hypotheses had in fact repeatedly been challenged and that a murder investigation should in any event not waste enormous amounts of time raising untenable hypotheses and dismissing them.

Mr Egan stated that the senior investigation team had taken an approach which was "prudent, appropriate, hard-working". He stated that the inquiry was looking for the truth, but that the question of due diligence would require the inquiry to make a judgement about the performance of senior officers. That judgement would require looking with a sense of proportion at the challenges facing Mr Port and his team from 15 March 1999 onwards.

### **Statement by Sir Michael Morland, Chairman of the Inquiry**

The Chairman thanked the Counsel for their opening statements. He stated that the Panel would always welcome suggestions which were genuinely constructive.

He stated that witnesses would appear from the following week onwards. Each witness would be asked to take an oath or to affirm before giving evidence. Witnesses would be treated with respect. They would not be cross-examined, but would be asked questions in a fashion appropriate to the inquisitorial nature of the inquiry.

The Chairman reminded participants and counsel that the cost of the inquiry, which was very considerable, was being borne by the public purse. This included the cost of counsel to the Full Participants. He stated that many

witnesses would be called to give evidence which would be of great importance to the inquiry Panel, but of little or no direct relevance to some of the Full Participants. He stated that the inquiry would alert all Full Participants of the names of witnesses to be called on a regular basis and make transcripts of proceedings available on the website. He encouraged Full Participants to bear this in mind and to consider carefully what representation they really required in the chamber at each stage.