Neutral Citation No.: [2009] NIQB 9 | *Ref:* **MOR7409**

Judgment: approved by the Court for handing down | *Delivered:* **11-02-09**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Chief Constables' Application (Rosemary Nelson Inquiry) (Leave stage) [2009] NIQB 9

AN APPLICATION FOR JUDICIAL REVIEW BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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MORGAN J

[1] This is an application for leave to apply for judicial review of a decision of the Rosemary Nelson Inquiry that the Panel does not intend to make findings of fact as to whether or not RUC officers made derogatory and threatening remarks about Rosemary Nelson while questioning her clients. The application also challenges the refusal of the Panel to indicate whether it is their intention to adopt the same approach in relation to an allegation that Mrs Nelson was subject to verbal and physical abuse by police officers at Garvaghy Road Portadown on 6 July 1997.

[2] On 1 August 2001 the British and Irish Governments made a commitment to appoint a judge of international standing to undertake a thorough investigation into allegations of collusion in the cases of the murders of Rosemary Nelson and a number of other people. Both governments undertook to establish a public inquiry if recommended by that judge. In relation to the murder of Mrs Nelson Justice Cory reported on 1 April 2004 and recommended such an inquiry. At paragraph 4.195 of his report he set out those matters which he considered constituted possible evidence of collusive actions. The first of these related to the allegation of threats and derogatory remarks and verbal and physical abuse at Garvaghy Road. He concluded that there must be a public inquiry to determine whether any such threats or remarks were made or such verbal or physical abuse occurred.

[3] The Rosemary Nelson Inquiry was established under section 44 of the Police (Northern Ireland) Act 1998. On 24 March 2005 the Secretary Of State published the terms of reference.

> "To inquire into the death of Rosemary Nelson with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary or Northern Ireland Office facilitated her death or obstructed the investigation of it or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of her death was carried out with due diligence; and to make recommendations."

[4] On 12 May 2005 the Rosemary Nelson Enquiry published a list of issues. The Inquiry believed in order to discharge the task conferred upon it by the Secretary Of State it would need to consider a number of matters including:

> "2. What threats were made to Rosemary Nelson's personal safety by any person or organisation; and the nature and extent of, and the reasons for, such threats….
>
> 4. Whether Rosemary Nelson was subject to any adverse behaviour or comments by any person or organisation including the RUC, NIO, Army or other state agencies; and the nature and extent of and the reasons for such behaviour or comments….
>
> 15. Whether any person within the RUC, NIO, Army or other state agency incited violence against Rosemary Nelson or incited her murder."

[5] Counsel to the Inquiry made an opening statement commencing on 15 April 2008. On 22 April 2008 he dealt with the allegations made by the clients and said that the first matter to be considered in relation to each of those nine cases was whether, on the material it had and the evidence it could read and later hear, the Panel concluded that the threats or an adverse behaviour or comment in fact occurred. He later referred to the incident on Garvaghy Road in the same context. The allegations of derogatory and threatening remarks were made by 9 clients of Rosemary Nelson who had been interviewed in police custody and alleged that the remarks were made to them by police officers in the course of the interviews. At least six of those making the allegations have given evidence before the Inquiry. A further statement has been made by a witness who is a prisoner serving a life sentence who says that a police officer suggested to him that he should kill Mrs Nelson.

[6] On 10 June 2008 the Inquiry delivered a ruling on applications by counsel for the applicant for leave to cross-examine 4 witnesses who were due to give evidence concerning the making of derogatory and threatening remarks. Those applications were refused and a subsequent judicial review challenge was dismissed on 15 December 2008. In the course of this ruling the Chairman indicated that the Panel were not concerned to try each and every complaint case in order to make findings in the report about particular cases, particular clients, particular police officers or their individual credibility. That suggested that the Panel did not intend to make individual findings about those police officers in relation to whom complaints were made by clients of Rosemary Nelson and this was confirmed by a letter of 20 June 2008 from the Solicitor to the Inquiry. By letter of 11 July 2008 the solicitor for the applicant suggested that the Inquiry could not properly deal with the list of issues it had formulated without engaging in a fact-finding exercise. In a reply dated 5 September 2008 the Solicitor to the Inquiry confirmed that the Panel did not intend to make individual findings about police officers. He asserted that the list of issues was a means of identifying matters which the Panel believed that they would need to consider during their investigation but that the list had to be read within the context of the Panel's overall obligation as defined by the Terms of Reference and were never intended to stand in place of the particulars of an indictment or as a pleading. He further stated that Counsel to the Inquiry in his opening was making submissions to the Panel which it did not have to accept. I note, however, that in its Ruling of 10 June 2008 the Inquiry quoted with apparent approval a passage from counsel's opening in which he stated that the first matter to be considered in relation to the 9 cases was whether the threats or adverse behaviour or comment in fact occurred.

[7] For the applicant Mr Larkin QC relied on 2 general submissions for the grant of leave. First he said that given the background of the Cory Report and the commitment of the governments the determination of these issues flowed from the Terms of Reference. Secondly he contended that as a matter of procedural fairness where the Inquiry had identified the issue as one to be considered it followed that a finding should be made on the evidence heard and to be heard by the Inquiry.

[8] For the proposed respondent Mr Eadie QC submitted that the court should follow the approach of Girvan LJ in the earlier judicial review and recognise that Tribunals have a wide discretion in the area of procedures in respect of which the role of the court is supervisory. He pointed out that the applicant represents only 2 of the 18 officers against whom complaints were made by the 9 interviewees. He submitted that there is no obligation on the Inquiry to make findings of fact. The Panel might be unable to do so because of the passage of time since the events or may have concluded that the allegations were not causally connected to the issues into which they were inquiring. Mr Eadie believed that the Panel's decision related to the making

of findings of fact and not alone to the publication of any such findings. He could not say whether this is because they had concluded that on the evidence they had heard to that point they could not do so or whether they had decided that it was not necessary to do so. He accepted that if the evidence made it clear that no threats were in fact made then no conclusions critical of the RUC could be reached by the Panel but said that such a conclusion might in any event be reached if it was found that there was no causal connection between the allegation of any such threats and the events with which the Inquiry was concerned. If the finding of fact became relevant to any issue with which the Inquiry was concerned the Ruling may have to be reconsidered.

[9] I recognise the latitude which the courts have accorded inquisitorial tribunals in the conduct of their enquiries. In this case the applicant contends that the Inquiry opened on the basis that issues would be investigated in evidence which might result in certain findings of fact which could prevent any adverse conclusion being reached in respect of the organisation for which he takes responsibility. The reasons for the change of approach on 10 June 2008 are not altogether clear and not assisted by the apparent approval of a passage dealing with fact-finding from counsel's opening speech within the Ruling itself. At this stage where there is still some considerable degree of uncertainty about the reasons for the respondent's decision not to make findings of fact the applicant faces a modest hurdle (Re Scappaticci's Application [2003] NIQB 40). I consider that this is a case worthy of further investigation as to the basis on which the Panel reached its conclusion not to find whether these threats or remarks were made and accordingly grant leave.