Ratcliffe-on-Soar Power Station Protest

Inquiry into Disclosure

By

The Rt Hon Sir Christopher Rose

December 2011

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Sir Christopher Rose is a former Court of Appeal Judge and member of the Privy Council. He was Vice-President of the Criminal Division of the Court of Appeal and retired in April 2006. Sir Christopher is currently the Chief Surveillance Commissioner, having been appointed by the Prime Minister in July 2006.

Background

1. I have conducted this independent inquiry at the request of the Director of Public Prosecutions, Keir Starmer QC.

2. On 13 April (Easter Monday) 2009, 114 people were arrested at Iona School near Ratcliffe-on-Soar Power Station. They had arrived from various parts of the country, many in vehicles hired for the purpose. Feeding arrangements were in place. Climbing and other equipment had been brought to the school. Information for the press had been drafted. There was a good deal of other evidence, which it is unnecessary to rehearse, indicating a well-planned intention to occupy and close down the Power Station. Of the 114 arrested, 26 were ultimately charged with conspiracy to commit aggravated trespass. 20 eventually admitted being party to the conspiracy, but their defence was that their conduct was necessary: they were referred to as "the justifiers". Six denied being party to the conspiracy alleged: they were referred to as "the deniers".

3. The justifiers were tried at Nottingham Crown Court and on 14 December 2010 convicted by a jury. The deniers were due to be tried at the same court in January 2011 but the prosecution offered no evidence against them. The convictions of the justifiers were quashed by the Court of Appeal Criminal Division (Lord Judge CJ, Treacy and Calvert-Smith JJ) on 20 July 2011, because of non-disclosure to the defence of sensitive material in the prosecution's possession relating to

the role and activities of Mark Kennedy, an under-cover police officer whom I shall refer to as “Kennedy” or “the UCO”. He was one of the 114 people arrested but he was not charged. Production of a box, containing part of that material, by a police officer to prosecuting counsel on 5 January 2011, resulted in the offering of no evidence against the deniers.

4. It is now accepted on all sides that that material was capable of undermining the prosecution of all the defendants and of assisting the defences of both groups of defendants and was also potentially pertinent to an abuse of process argument based on entrapment i.e. it should have been disclosed to the defence under the Criminal Procedure and Investigations Act 1996 Section 3 as amended and Section 7A as added by the Criminal Justice Act 2003. The crucial question at the heart of my inquiry is: why was it not disclosed? I make clear at the outset that, generally speaking, liaison between Nottinghamshire Police and the local CPS is, both agree, close and beneficial. The Police regard Ian Cunningham, the CPS reviewing lawyer in this case, as experienced, well-respected and approachable and D. Supt. Pearson, the SIO in this case, recognised the importance of working closely with the CPS.

5. My terms of reference were set out in a written statement by the Solicitor General to the House of Commons on 13 July 2011. They are as follows:

"The independent inquiry will examine and make findings in respect of the following matters:

a. Whether the CPS approach to charging in this case was right, bearing in mind the known existence of an undercover police officer in the operation.

b. Whether the CPS and prosecuting counsel complied with their disclosure duties properly in relation to the known existence of an undercover police officer in this case.

c. Whether the CPS arrangements in place for handling the known existence of an undercover police officer, including arrangements between the police and the CPS, the CPS and counsel and the local prosecuting team and the national co-ordinator, were adequate and properly followed in this case.

d. Whether the CPS followed all relevant guidance and policy in relation to the known existence of an undercover police officer in this case.

The independent inquiry will also make such recommendations it feels appropriate in light of the examination and findings set out above, including, if appropriate, recommendations about CPS policy and/or guidance and CPS arrangements for handling cases involving undercover police officers."

6. There have been several other reports and reviews into aspects of the events which I have summarised. In particular, I have read the review of Operation Aeroscope in relation to Ratcliffe-on-Soar Power Station

by Jack Russell, Head of East Midlands Regional Review Unit, commissioned by Nottinghamshire Police and the CPS report by Rene Barclay, Principal Crown Advocate, Special Crime Division. It is to be noted that Mr Russell did not have any statements from the CPS or prosecuting counsel and Mr Barclay did not have any statements from police officers.

7. I have also seen, in draft, the HMIC Review of Undercover tactics in public order and extremism, and the review of undercover deployment by the Serious Organised Crime Agency which is Annex A to that review.

8. The Independent Police Complaints Commission started an Inquiry earlier this year and supplied me with the documents in their possession at the time that I started my Inquiry at the beginning of September. These include statements from the disclosure officer, the file officer and the intelligence officer between April and October 2009, copies of entries from the Sensitive Policy File of the SIO between 28 April 2009 and 17 September 2009, notes of Gold meetings between 7 April 2009 and 7 January 2011, emails exchanged between Jack Russell and the SIO on 22 February 2011 and a letter from Deputy Chief Constable Eyre of Nottinghamshire Police to Judith Walker, Chief Crown Prosecutor for Nottinghamshire dated 17 March 2011.

9. The CPS also provided me with six other volumes of documents. These include the undisclosed sensitive material identified in

paragraph 17 below with the exception of items (i), (iv) and (ix), the advice dated 17 January 2011 of counsel Felicity Gerry who prosecuted all the defendants, the advice dated 25 March 2011 of Clare Montgomery QC and Alan Blake who, having expressed doubt as to whether they had seen all the documents, correctly advised that appeals by the justifiers could not be successfully resisted because of the non-disclosure, and statements supplied to Rene Barclay and subsequently given to the IPCC from Bethan David (from January 2010 Domestic Extremism Co-ordinator in the CPS Special Crime Division), Lesley Renfrew (Crown Advocate and Head of East Midlands Complex Casework Unit) and Mr Cunningham (Crown Advocate East Midlands Complex Casework Unit). I have read a transcript of the judgment of the CACD on 20 July 2011 and a quantity of emails within the CPS and passing between the CPS and police officers between 14 April 2009 and 2 March 2011, notes of conferences between the CPS and the police between 10 November 2009 and 23 June 2011 and of three CPS Case Management Review Panels in May and November 2009 and June 2010, CPS briefings between 28 May 2009 and 1 February 2011 and NPOIU briefing notes, minutes and other documents between 22 March 2009 and November 2010.

10. Subsequently, at my request, the IPCC obtained and provided me with statements from the SIO, the Deputy SIO (DI Roberts), a Detective Chief Inspector who was Head of the Confidential Intelligence Unit at the NPOIU ('the DCI NPOIU'), and Detective Chief Superintendent James (now retired) and ACC Ackerley of Nottinghamshire police. I

have also seen, in relation to Kennedy's use, conduct and participation in Nottinghamshire, the original authorisation on 5 November 2008 and all subsequent reviews and other documentation, until cancellation of the authorisation on 10 February 2010. ACC Ackerley was the authorising officer throughout. The IPCC have also provided me with written answers to written questions which I recently posed to the SIO, Deputy SIO and Mr Ackerley.

11. I have obtained written comments from Ms Renfrew, Ms Gerry and David Herbert (who was prosecuting counsel until, with the consent of the CPS, by whom he was instructed on a retrial in another case, he returned the brief in this case to Ms Gerry in September 2010).

12. I have seen and questioned Bethan David and Mr Cunningham.

13. I have consulted the CPIA Code of Practice; the AG's Guidelines on Disclosure; the Code for Crown Prosecutors (2004 and 2010 editions); CPS Guidance for Prosecutors and on Relations with the Police; the DPP's Guidance on Charging (February 2007 and January 2011); and the Prosecution Team Disclosure Manual, a document agreed between the CPS and the Association of Chief Police Officers of which chapter 8 in relation to sensitive material and chapter 9 in relation to highly sensitive material and CHIS are of relevance; and a protocol on local handling procedures for highly sensitive material between the local CPS and Nottinghamshire police.

14. It is apparent that there is no shortage of guidance for the CPS and the police in relation to disclosure.

15. The contemporaneous documents, which I have summarily identified, are, as is commonly found, of considerable importance, both for what they contain and for what they do not contain. Contemporaneous documentation, by the police and the CPS, is lacking in a number of instances. In relation to those from whom I have derived information, orally or in writing, I have borne in mind the possibility that they may wish to serve an interest of their own by being less than candid and that none of them has been subjected to cross-examination as would have occurred in a trial. I have also borne in mind that, in assessing the significance of all events, I must avoid the wisdom of hindsight.

16. As, in March 2011, the material before Mr Russell and Mr Barclay to whom I refer in paragraph 6, and Mr Eyre, to whose letter I refer in paragraph 8, was incomplete, no useful purpose would be served by my analysing the conclusions which they reached or the assertions which they made. It suffices to say that, had they had the advantage of seeing or hearing all the material which is before me, it is likely that a number of their conclusions would have been different and several of their assertions would not have been made.

The facts

17. The sensitive material before me falls into nine categories, none of which appears to have been listed, recognisably, in an MG6D:

    (i) The authorisation documentation in relation to Kennedy to which I refer in paragraph 10 whereby he was authorised throughout to participate in "criminal damage, obstruction and aggravated trespass onto land" and to use audio-recording equipment.

    (ii) Kennedy's notebook with entries between 10 January and 13 April 2009.

    (iii) Intelligence reports by NPOIU officers between 12 January and 7 May 2009.

    (iv) The audio recording made by Kennedy of the discussions at Iona School on 12 April.

    (v) The draft transcript of that recording.

    (vi) The corrected transcript.

    (vii) A draft statement by Kennedy.

    (viii) A statement signed by Kennedy on 23 September 2009.

    (ix) "A de-brief document" which some refer to as a single sheet and some as containing many pages.

    None of items (i)-(iii) or (v)-(viii) was capable of being on a single sheet of paper or could sensibly be described as a "de-brief document" and no one reading any of the documents, apart from (ix), or listening to item (iv) with any degree of care could sensibly characterise it as

merely “a health and safety briefing”, which, as will appear, is a description said to have been used by more than one person having read a document.

18. From April 2009 until January 2011 all the sensitive material which I have identified was continuously in the possession and control of the police. It is therefore convenient, before turning to the way in which the CPS dealt with disclosure, to consider the way in which the police dealt with that material.

19. Curiously, there was no SIO or Deputy SIO present at police Gold meetings on 25 March or 7 April 2009. On each occasion, the first objective of the Gold strategy was “to protect the source”. On 16 April 2009 there was a meeting between the SIO, the Deputy SIO and the DCI NPOIU. The contemporaneous note starts with the following: “Ian Cunningham – danger environmentally friendly. Local CPS reticent”. There is no material of any kind before me to suggest that Mr Cunningham was or is inappropriately “environmentally friendly” or “reticent” in relation to this prosecution. I do not know for how long or in the minds of which police officers that perception of Mr Cunningham persisted. But it was an unfortunate starting point to a relationship which required, if the interests of justice were to be served, complete mutual trust between the police and the CPS, albeit in a context in which the police officers involved in the authorisation and management of the UCO would, rightly, be concerned to take all proper steps to protect their source against exposure and other risks.

20. At the same 16 April meeting, there was reference to a transcript of recording and to the fact that, although the SIO and Deputy SIO were made aware of the involvement of the UCO, his identity was not disclosed to them by the DCI NPOIU “to ensure investigation by SIO was not clouded, to provide source protection and the involvement of UCO actions did not get preferential treatment”.

21. At a Gold meeting on 27 April Nick Paul of CPS Headquarters (Bethan David’s predecessor) was informed of the involvement and arrest of the UCO. The possibility of a PII application was discussed, “depending on the defence statements”. No decision was made to approach the SIO or CPS in Nottingham. No reference was made to the UCO having participated in anything. In an email to the SIO on the same day, Mr Cunningham envisaged necessity as a likely defence and said “we will always be vulnerable on disclosure especially matters covert”. On 28 April the SIO started a Sensitive Policy File and referred to “PII issues”. On 7 May he recorded that he had “been made aware of a de-brief document made by UPO” though he did not, until recently in answer to a question from me, specifically identify the document as a five and a half page draft witness statement. He commented in his 7 May note “the document has many implications for the investigation which I believe are best recorded in this file given the secrecy of the document”. In a further entry on the same date, the SIO says “the only people I am aware know of this document are DCS James and D. Superintendent Lowe. I have told DI Roberts, DC Malik, DS Hopkin. I will tell CPS Mr Cunningham. I will not tell the rest of the team”. There

is no note in this file or in any other contemporaneous document that the SIO ever told Mr Cunningham of this “de-brief document” still less handed it to him to read. There is a further entry in the Sensitive Policy File which was originally dated 17 May but was amended by the SIO to 7 May. This states “this evidence does not undermine the case. It does not minimise the role of any individual”. In answer to recent questions from me, he says this view was based on his knowledge of the enquiry, items seized, evidence from officers at the scene, documents that had been seized and the contents of the debrief document. The difficulty with this recent recollection is that it does not seem to accord either with the first 7 May 2009 note quoted above “I have been told” or with the further note of 7 May “this evidence does not undermine the case” etc. The SIO’s October 2011 statement refers to a meeting with police officers on 7 May at which he met the DCI NPOIU and learnt of the UCO’s deployment. He says “it was made clear the UCO would not be entering the evidential chain and his real identity must be protected”. At the same meeting he received “a de-brief document” from the UCO which was later converted into a statement. He is unable now to say what happened to the de-brief document save that he believes it to be listed among the scheduled undisclosed sensitive material: it is not. He was also told that a recording device had been used and that ACC Ackerley had been the authorising officer. He was apparently not told at any time that the UCO was authorised to participate, still less the extent of his authorised participation. He says he “never saw or thought to see” the wording of the authorisation. On 15 May the SIO records in his Sensitive File “I believe that the major impact of the UC de-brief is

that the main organisers of the event are not amongst the scope of the investigation and a high level CPS/police strategy needs to be agreed to shape the future of the investigation". The same note refers to "discussion with DCS James, Mr Cunningham and Deputy SIO post Gold meeting". There is no entry on this date or in any other contemporaneous document that I have seen to suggest Mr Cunningham was shown any sensitive material on 15 May. However, in his recent statement, the SIO says he saw Mr Cunningham on 15 May "and showed him the de-brief document which [the DCI NPOIU] had given me." His statement also refers to Mr Cunningham "describing the transcript of the recording as a safety briefing given by the UCO". On 26 May there is an NPOIU note (presumably made by the DCI NPOIU) "check statement with DI Roberts in name of Mark Kennedy".

22. In a recent statement the Deputy SIO refers to a meeting in Nottinghamshire on 6 May 2009 also attended by the SIO. NPOIU officers (unnamed though one seems likely to have been the DCI NPOIU) gave him a transcript of a recording made by Kennedy at Iona School which he read. At a meeting on 15 May, between himself, the SIO and Mr Cunningham, Mr Cunningham was supplied with the same transcript and "read the entire lengthy document". Mr Cunningham said "In his mind this was nothing more than a safety briefing. I also had the same opinion." His view was that he saw nothing which undermined the prosecution case or assisted the defence. Because of the commitment of those involved, he was extremely "disappointed at the collapse of the second trial and the quashing of the convictions". The

Deputy SIO has no relevant notes and in my judgment his recollection is in error in relation to a transcript, for several reasons. First, his account is entirely inconsistent with the email of 23 July to which I refer in paragraph 24 below. Secondly, as I said earlier, no one reading the transcript could sensibly conclude that it referred merely to a safety briefing. Thirdly, it is common ground between the SIO and Mr Cunningham that, prior to the charging decision, Mr Cunningham deliberately remained in ignorance of the UCO's identity: if he had read the transcript he would have known he was called Mark. Fourthly, the NPOIU note on 26 May 2009 shows a policy decision was yet to be made as to who should have the UCO's statement: such a decision would have been otiose if the Deputy SIO and Mr Cunningham had already been given a transcript by the NPOIU three weeks before. Fifthly it seems that, contrary to the claim that he received the transcript on 6 May in Nottinghamshire, he told Mr Russell in March this year that he received the draft transcript from the DCI NPOIU in London on 11 May and, having read it, gave it to the SIO. This version accords with the recent statement made by the DCI NPOIU.

23. It is to be noted that in none of the contemporary documents is there any reference to Mr Cunningham or anyone else at the CPS being told of the UCO making an audio recording, of any transcript of such recording, of any statement made by the UCO, that the UCO had been authorised to participate or of the terms of his participation.

24. On 23 July 2009 an email from the DCI NPOIU to Nick Paul refers to having seen the Deputy SIO and the intelligence officer that day and said “the SIO or Deputy have not given the local CPS any details of the asset but they are aware there is an asset involved”. (Earlier in July 2009 Nick Paul had rejected the DCI NPOIU’s “tactical suggestion” that the UCO be removed from the charging pool). He went on “if the asset remains in the charging pool we will need to interject in some way to prevent charging”. This email is important because, as indicated in paragraph 22 above, it is inconsistent with the Deputy SIO’s recollection, because it illustrates the DCI NPOIU’s determination, throughout, to keep Kennedy “out of the frame” and because it shows, to put it no higher, a lack of urgency in supplying details of the UCO to the local CPS.

25. The intelligence officer had secure care of the sensitive material, apart from the authorisations, from April 2009 until he left the case in October 2009. According to him, the transcript of the audio recording was handed over to the Deputy SIO by the NPOIU at a meeting at which he, the DCI NPOIU and others were present on 2 June 2009 (a date, it is to be noted, still 7 weeks before the DCI NPOIU’s email). He, the SIO and the Deputy SIO looked at the transcript and the SIO decided that any further dissemination would be made only under the direction of the SIO or Deputy SIO. The SIO’s recent statement refers to a meeting on 2 June but makes no reference to a transcript or any decision about its dissemination. At meetings in June and July 2009 between Mr Cunningham and the investigating officers, the use of a

UCO was discussed, but the intelligence officer could recall no discussion of the transcript. The transcript was not entered on the Holmes database; the intelligence officer's report about it was not given to the disclosure officer, but was referred to in the SIO's Sensitive Policy File. It is difficult for me to place reliance on the intelligence officer's memory, particularly when unsupported by contemporaneous notes.

26. The disclosure officer, who was not appointed until 23 April 2009, had never previously had to deal with the product of a UCO or, indeed, with a UCO. He was first told of the involvement of a UCO by the Deputy SIO in September or October 2009, at which time he became aware that the intelligence officer had some sensitive documents concerning the UCO. The transcript was not correctly disclosed to him (the disclosure officer). He believed, wrongly, that it was a part of document D575 which was scheduled in MG6D as part of phase two of disclosure on 17 December 2009, although the entry for D575 makes no reference to a transcript. He was wrong because document D575 contained not a transcript but intelligence items unrelated to the Ratcliffe-on-Soar case. None of the police disclosure schedules for the prosecution refers to a transcript or authorisations.

27. As a consequence of the media comments about Kennedy on 22 October, in early November 2010, a week or so before the start of the justifiers' trial, the DCI NPOIU, (who on behalf of NPOIU had first met Kennedy on 9 March 2009 and managed him thereafter throughout the

relevant period), met Bethan David for the purpose of briefing her about Kennedy in relation to an Operation in which Kennedy was involved which was separate from and unconnected to Ratcliffe-on-Soar Power Station. He provided her with copies of five secret briefing notes. (Her statement refers to four, but number three, dated 7 October 2010, is stapled to the back of number two. Nothing turns on this.) For present purposes, there is a potentially significant entry on page 7 of the first note dated 19 May 2010. The DCI NPOIU, in relation to Ratcliffe-on-Soar, refers to the fact that Kennedy was deployed with a recording device and the DCI NPOIU records his opinion that "essential he had participating status".

28. In no contemporary document, nor in the DCI NPOIU's recent statement, is there any indication that, save for handing the briefing notes to Bethan David in the context which I have identified, he at any time shared that opinion with any member of the CPS. That is, to some extent, understandable. But the route for intelligence gathered by Kennedy was via NPOIU to Nottingham SB and then to ACC Ackerley. I see no sign of the route continuing from Mr Ackerley to the SIO or any other investigating officer before or after 13 April and, as appears in paragraph 29, Mr Ackerley did not favour such a route in relation to information about Kennedy's authorisation. The DCI NPOIU told Bethan David that Mr Cunningham had been "fully briefed". At that time (November 2010), she had not seen any of the Ratcliffe-on-Soar papers nor had she any knowledge of possible disclosure issues in the case. She told me that, at the time, the possible significance of the 19

May entry did not occur to her: in the circumstances I do not find that surprising. (It is convenient here to comment, parenthetically, that, in several officers' statements, the words 'briefed', 'fully briefed' or 'debriefed' are used. Such words are vague to the point of being meaningless unless the subject matter of the briefing is identified).

29. As I have already said, the authorising officer throughout in relation to Kennedy's use, conduct and participation in Nottinghamshire was ACC Ackerley. On 7 April 2009, Mr Ackerley reviewed the existing authorisation and confirmed the authorisation for him to participate in "criminal damage, obstruction and aggravated trespass onto land" and to use audio-recording equipment. In view of the terms of paragraphs 11 and 18 of their judgment, it seems unlikely that the Court of Appeal were aware of this authorisation. Mr Ackerley, in answer to written questions from me, does not suggest that he told anyone investigating the case, or from the CPS, the terms of his authorisation. No such person is among those he named as present at the "authorising meeting" on 7 April. His view is that the correct procedure for informing the SIO and CPS was for it to be done by an NPOIU officer. He saw the DCI NPOIU on 3 occasions of review between July and September 2009, on renewal in October 2009 and on cancellation in February 2010. On each occasion the DCI NPOIU told him he was "in consultation", "liaison" or "dialogue" with the CPS and/or the SIO. On no occasion is there any apparent record that Mr Ackerley asked whether, or the DCI NPOIU told him that, the SIO or CPS had been told of the authorisation's terms. At review on 10 September, there was

discussion regarding “1. Need for CPS involvement. 2. There must be no misleading of the court.”

30. In the course of an investigation, the proper exercise of functions by an authorising officer under the Regulation of Investigatory Powers Act 2000 requires that there be a degree of separation between him on the one hand and the SIO and other investigating officers on the other. This is to ensure that no improper pressure is brought to bear on an authorising officer, whose responsibility it is to decide what covert activity should or should not be authorised. But when the stage is reached that disclosure in relation to a pending trial is being addressed, such a separation is not necessary, appropriate or permissible. On the contrary, it is essential that, to enable the prosecutor’s obligations under the Criminal Procedure and Investigations Act 1996 and the police’s obligations under the Code of Practice under the Act to be properly carried out in relation to disclosure, there be complete frankness between the police officers involved as well as between the police and the CPS. Whether Mr Ackerley’s view of the correct procedure for informing the SIO and CPS about a participating UCO is widely shared among other authorising officers or Assistant Chief Constables, I do not know. But his approach made no useful contribution to the necessary dissemination of information during disclosure which was vital if the court was not to be misled. And I find it particularly surprising that Mr Ackerley apparently made no specific enquiry of anyone, during the period of 18 months that disclosure was in play in this case, as to whether those directly involved with

disclosure in the police and CPS knew the terms of his authorisation of Kennedy.

31. On 5 January 2011, shortly before the deniers were due to be tried, and probably as a consequence of a defence request for disclosure following the conviction of the justifiers, a box of materials was delivered to Ms Gerry by the file officer in the case. He had taken possession of it earlier that day from the disclosure officer, in whose secure possession it had been since he had received it in September or October 2009 from the intelligence officer. There is nothing before me to suggest that the disclosure officer ever examined the contents of the box or was ever briefed about its contents by the SIO or anyone else and the intelligence officer's report about the transcript never came into the disclosure officer's possession. The disclosure officer had a meeting with Mr Cunningham on 10 November 2009 "to discuss the UCO and the product" and to ask how it was to be disclosed, to which Mr Cunningham said "on form MG6D". The disclosure officer also says he referred to a transcript: leaving aside Mr Cunningham's account to which I shall come later, it is difficult to accept this part of the disclosure officer's account in view of the defect in his understanding about the transcript to which I referred in paragraph 26. Ms Gerry's advice also records that, on 11 January 2011, an officer produced at a conference further material, namely Kennedy's notebooks and statement, an amended transcript of the recording and intelligence logs of information supplied by Kennedy.

32. No satisfactory explanation has been given to me as to why the contents of the box and the further material were not delivered at an earlier stage to counsel or to a member of the CPS or as to why they were not listed in any disclosure schedule. The most significant item in the box was a transcript of the recording made by the UCO on 12/13 April 2009. Ms Gerry read the transcript on the 5th and realised its significance in relation to the imminent trial of the deniers. She telephoned Mr Cunningham who was abroad and the decision was made to offer no evidence against the deniers. That decision was manifestly correct. Ms Gerry gave a written advice on 17 January 2011 in which, among other matters, she dealt with the potential significance of the transcript in relation to the safety of the justifiers' convictions.

33. I turn to the history of events from the standpoint of the prosecution lawyers. I have referred in paragraphs 27 and 28 to Bethan David. The principal focus of my attention at this stage will be Mr Cunningham, but I shall also refer to the three meetings of the CPS Case Management Review Panel and prosecuting counsel.

34. According to Mr Cunningham's statement on 10 February 2011 and as he also told me, he learnt of the deployment of a UCO at a meeting on 27 April 2009 attended by Detective Chief Superintendent James, the SIO and Deputy SIO. He was shown a single piece of paper (which he assumed had been prepared by those responsible for the UCO). He was told that the UCO had been properly authorised. He was subsequently shown a copy of the authorisation which was in order so

it did not further hold his attention. He did not note its date. He saw only one page, bearing a signature, which he knew later was Mr Ackerley's. He told me that the terms of the authorisation, if he saw them at all, made no impact on his mind at that time. He did not know the UCO was authorised to participate in criminal conduct including aggravated trespass: if he had known, he would have asked more questions, particularly as agent provocateur was in his mind. If the SIO had said the UCO was an agent provocateur the case would have gone no further. Mr James told him the UCO had provided a health and safety brief to climbers and it was decided, following discussion, that this did not make him an agent provocateur because those he was addressing had already decided to climb. The single piece of paper, which was subsequently shown to both prosecuting counsel, was the only material he was shown about the UCO. Although he had not previously dealt with a UCO who was central to the case, he did not check the guidance about UCOs in the Disclosure Manual. Mr Cunningham sent an email to the SIO later the same day referring to the "strong desire to see a court prosecution", the need for sufficient evidence, analysing many relevant considerations, referring to a likely defence of necessity, the need for a robust prosecution and concluding "we will always be vulnerable on disclosure, especially matters covert".

35. Mr Cunningham's statement referred to a Gold meeting on 15 May 2009 attended by the SIO, Deputy SIO and Mr James. The use of the UCO was discussed. At a further meeting on 16 June attended by Nick Paul, Mr James, the SIO and Deputy SIO and an officer from NPOIU,

the likely defence of necessity/duress of circumstances was considered. All agreed that the UCO had no “CPIA potential”. There were two sifts of the 114 arrested to identify those who should be charged. The UCO was in the sift and remained there until, at the second sift, the numbers were reduced to 26 not including the UCO. Mr Cunningham and the SIO agree that, deliberately, Mr Cunningham should not know the UCO’s name lest his review of the sift were to be influenced.

36. When, on 17 December 2009 at the second phase of disclosure, Mr Cunningham twice signed “no CPIA issue” he told me that he had not looked at the documents listed. He agreed that, in accordance with CPS guidance, he should have done but points out, rightly, that there is no reference in the schedule to a transcript.

37. On 17 February 2010 at a conference with David Herbert (who had earlier been instructed to prosecute) the Deputy SIO and others, the defence statements were discussed. In relation to the UCO Mr Cunningham says he had shown Mr Herbert the same material (i.e. the single piece of paper) which he had been shown on 27 April 2009 (as was Felicity Gerry when she took over from Mr Herbert in September 2010). The UCO was described in the discussion as being “on the cusp of being participating” and as still being in the 114. There was no CPIA issue “but do think need to tell Judge – PII hearing. But defence aware … nothing people haven’t already guessed. Not raised in defence case

statements. Counsel = no action required yet". These comments are in the contemporaneous note.

38. Mr Cunningham told me that he accepted he knew that Kennedy was authorised to make a recording but he (Mr Cunningham) believed, if he were wired up, this would have been too risky in relation to maintaining his cover. It was only later that he learnt the nature of the recording device. He agreed that he had asked no questions about any recording.

39. There were three meetings of the Case Management Review Panel, which Mr Cunningham attended. There are contemporaneous records of each – on 28 May 2009, 30 November 2009 and 24 June 2010. On each occasion there were at least two lawyers senior to Mr Cunningham present. At the first meeting Mr Cunningham explained that, if a prosecution occurred, there were likely to be many disclosure issues. At the second meeting Mr Cunningham was asked what risks there were on the intelligence and he said that the media had written that the police had intelligence and there was a clear insider and "once CPIA was applied there is no potential problem". Covert techniques were deployed and there were "risks concerning the "right" questions being asked by the defence regarding covert practices". At the third meeting Mr Cunningham was asked about the UCO and said he was "fully authorised" and "remained within his tasking". He had given a statement "but due to its contents cannot be used". The UCO provided a health and safety briefing. He was in the initial sift of suspects but Mr

Cunningham did not know his name until the sift was completed. At none of these meetings was Mr Cunningham asked what, if anything, he had read of the sensitive material which he knew existed, in particular, the statement made by the UCO which it was said could not be used because of its contents. He was not asked what the UCO's tasking was. He was not asked how he could make a decision about appropriate charging without knowing what the UCO said or questioned as to why he did not know the UCO's name. He was not probed at the third meeting as to the possible impact of the defence statements on his previously stated view that "once CPIA was applied there is no potential problem". Mr Cunningham says the meetings were informal: but informality should not be an excuse for an absence of effective oversight.

40. I turn to counsel. At the conference on 17 February 2010 with Mr Cunningham and Nottinghamshire police Mr Herbert learnt of the involvement of a UCO. He asked if there was any issue of concern, for example in relation to him being an agent provocateur and was told by Mr Cunningham that he was not - he had not brought anyone into it. Mr Herbert was given the impression that the UCO was "on the periphery of what was happening". Mr Cunningham was not contradicted by any of the police officers present. I have set out in paragraph 37 above the relevant parts of the contemporaneous note. No mention was made of UCO notebooks, statements or transcripts. Until Mr Herbert read the Court of Appeal's judgment he was unaware of the sensitive material. If Mr Cunningham or the police had known

about it, Mr Herbert would have expected to be told and if he had known about it he would have said it should be disclosed. It is inconceivable that this could have been Mr Herbert's state of mind at and following the conference if he had known the terms of Kennedy's authorisation or the other sensitive material listed in paragraph 17 above.

41. When Ms Gerry took over the prosecution brief at her first conference on 12 October 2010 she was shown "a single sheet" by the SIO in the presence of Mr Cunningham. She was told it was "a de-brief" by the UCO and it was agreed that it was not disclosable. She asked if disclosure was complete and was told that it was. No other sensitive material was brought to her attention until delivery of the box on 5 January 2011. There was nothing to suggest to her that the file officer or Mr Cunningham knew of the contents of the box previously. On the contrary, when she telephoned Mr Cunningham that day and read to him extracts from the transcripts he said he was unaware of the recording and would have wanted to know about it to inform his decisions on charging. On 10 January she had a further conference at which a police officer produced to her the UCO's pocket notebook entries and witness statement, an amended transcript of the recording, and intelligence logs of information supplied by the UCO. In her advice of 17 January 2011 she comments, among other things, on the fact that the recordings show that many who arrived at the school did not know what the action was going to be and were persuaded to take part in it. She rightly concluded that on this basis there was a triable issue

as to whether some or all of the justifiers were induced to participate in the proposed action and this was a matter for primary disclosure and might be relevant to an abuse of process argument. She advised that the pocket notebook, witness statement, recordings and transcript should be disclosed immediately. She would have advised against charging the defendants had the level of infiltration been known.

Discussion

42. Nothing that I have seen or heard suggests that, at any stage of this prosecution, there was any deliberate, still less dishonest, withholding of information which the holder believed was disclosable in compliance with the CPIA or Code of Practice. The general picture of what occurred is that, at several stages, there was a failure between police officers and between the police and CPS to pass on such information. The principal reasons for that failure were that those police officers with knowledge of the detail of the authorisation of Kennedy's involvement (in particular the authorising officer and the DCI NPOIU) were anxious to limit the dissemination of that knowledge in order to protect the source and those (in particular the SIO and Mr Cunningham) who should have received the information failed to ask pertinent questions in order to obtain it. In consequence charges were laid which would not have been and the defence were later prejudiced because potentially helpful material never reached them, as it should have done, long before the trial of the justifiers.

43. The contemporary documents show that, from an early stage following the arrests, the possibility of Kennedy being a participant or agent provocateur was repeatedly addressed at conferences between the police, counsel and the CPS, at Case Management Review Panel meetings and in emails between the CPS and the police. The high point of the assessment of his status, in February 2010, was that he was "on the cusp of being participating". Had the terms of Kennedy's

Nottinghamshire authorisation been known to those taking part in those discussions, particularly the lawyers, it is inconceivable that there could have been any doubt as to Kennedy's status. Indeed, such discussions would not have been necessary. He was authorised to participate in the exact conduct which was ultimately charged against those arrested, namely conspiracy to commit aggravated trespass onto land. There could be no clearer case of the need to disclose his role as a participating informant to the court (see CACD's decision in Early and others 2003 1CAR19 - the principle of which in relation to disclosure applies whether or not the participating informant gives evidence). The contents of the transcripts of the recording emphatically underlined that Kennedy adopted the role which he was authorised to carry out. If Mr Cunningham had known the terms of Kennedy's authorisation it is inconceivable that any of the defendants would have been charged and that knowledge would, of course, have expressly alerted Mr Cunningham to what there might be in the material considered for disclosure.

44. The material before me does not show that Mr Cunningham ever read a transcript of the recording or a Kennedy statement. He says that he did not. The police accounts do not effectively distinguish between a briefing document, a transcript and a statement from the UCO and they conflict as to the date of relevant meetings. There are no pertinent contemporaneous notes. Mr Cunningham denies that he knew that there was or thought it likely that there would be any recording made. He had never previously dealt with product from a UCO. If he read the

transcript he certainly did not grasp its significance, nor, it appears, did Mr James if he read it: it was plainly not merely a health and safety warning. Equally, if the SIO read it, his notes in early May demonstrate that he did not appreciate its disclosable significance. Equally, if Mr Cunningham ever made a comment about health and safety it was to be expected that any police officer present with knowledge and understanding of the transcript would have corrected him. What is clear is that the terms of the authorisation were never known to the SIO, Deputy SIO, or disclosure officer. Very few lawyers, even in the CPS, are familiar with the usual documentation generated in the authorisation of a UCO which, in this case, amounted to a dozen or so pages at every stage. I am satisfied that, until 5 January 2011, Mr Cunningham did not know the terms on which Kennedy was authorised to participate. No police officer claims to have shown or described to him, those terms. Mr Ackerley says this was the DCI NPOIU's job. The DCI NPOIU is silent on the subject.

45. Because the CPIA puts the responsibility for disclosure on the prosecutor, Mr Cunningham, as the prosecutor and reviewing lawyer, must bear the primary responsibility for non-disclosure to the defence. He relied too heavily on what he was told by the police in relation to the UCO and failed to probe what material there was in relation to the UCO's activities. In relation to disclosure he was entitled to and needed to see what Kennedy was authorised to do, what was in his statement and pocketbook (whether it might result in him giving evidence or not) and what was in the initial and amended transcripts of the recording.

He needed this information before a decision could properly be made about charging. His statutory responsibility to keep disclosure under review meant that he should have continued asking such questions following service of the defence statements and up to the time the justifiers were convicted. He failed to ask such questions. Furthermore, when the disclosure schedules were presented to him by the disclosure officer, Mr Cunningham repeatedly and wrongly endorsed the schedules to the effect that they raised no disclosure issues when he had not himself examined the documents. These failures were serious even in the context of the unusual demands of this case arising from the large number of defendants, the huge numbers of potential exhibits and the, by no means straightforward, points of law which arose at various stages and in relation to which he gave thoughtful and generally sound advice.

46. The Case Management Review Panels' failure to ask questions as referred to in paragraph 39 above showed, it seems to me, a failure by the panel to do what they were there to do i.e. sensibly to oversee the way in which Mr Cunningham was doing his job as prosecutor and reviewing lawyer.

47. As to counsel, both say they asked more than once if disclosure was complete but neither apparently sought to see such material as they might have assumed there was relating to the undercover officer, of whose existence they were aware. This would, in many cases, lay them open to justifiable criticism. But there were a number of unusual

features about this case. First, for reasons I have touched on and will revert to later, several of the police officers involved, including the SIO, disclosure officer and authorising officer, had not acted as they should in relation to disclosure and collectively had not alerted Mr Cunningham or Mr Herbert at his conference in February 2010 to the variety of sensitive material which existed. Secondly, Mr Cunningham had failed, virtually throughout, to ask pertinent questions of the police in relation to that material. Thirdly, there is nothing before me to suggest that Mr Herbert or Ms Gerry knew more about the UCO than was contained on the single sheet of paper to which Ms Gerry and Mr Cunningham refer. Fourthly, Mr Cunningham was a mature solicitor with 30 years experience and working in the Complex Casework Unit; they knew from previous experience he was conscientious; and his instructions to counsel throughout were based on his assessment, albeit unsound, that no CPIA issues were raised and he told me he assured counsel all along that there were no complications from the UCO. Fifthly, so far as Ms Gerry is concerned, coming into the case at a late stage in the footsteps of a junior then of 18 years call, she was entitled to expect disclosure issues would already have been effectively addressed and, having asked, was told by Mr Cunningham that this was so.

48. I turn to the police. It is striking that all the police officers most closely involved in the disclosure process were new to the case and, in two instances, unfamiliar with UCO product. Mr Pearson, the new SIO was appointed at or about the time the arrests were made. The Deputy SIO

was appointed on 14 April 2009. The DCI NPOIU first met Kennedy and began to manage him on 9 March 2009. The disclosure officer was not appointed until 23 April 2009.

49. I have been given no explanation why a new SIO and Deputy SIO were suddenly introduced into this case. But Mr Pearson had two obvious handicaps. He had only arrived at the Nottinghamshire force a few weeks before and knew little, if anything, of the officers with whom he was working and he only became SIO after all the suspects had been arrested so he knew nothing of the prior involvement of Kennedy in undercover activity nor what he had been authorised to do. In most cases, the SIO would have been involved, if not from the outset then at least from an early stage of the investigation and he or someone on his behalf would have been likely to seek authorisation for the undercover officer. Remarkably, as is clear from his notes, he says it was not until 7 May, nearly a month after the arrests, that he was told that a UCO had been deployed and he was the sole source of intelligence. It is equally remarkable that that information came to him not from the authorising officer or any other Nottinghamshire officer but from an NPOIU officer. At the time he was appointed SIO there were 114 suspects in custody and approximately 25,000 potential evidential exhibits. He had other major time-consuming responsibilities. He had joined Nottinghamshire police as Head of Public Protection, which included responsibility for the child abuse investigation unit, the sexual exploitation unit and the level 3 management of public protection arrangement offenders. He had no handover as such from his

predecessor. He was very dependant on his Deputy SIO who, as is apparent, had no previous knowledge of the case and, it appears, little previous experience of covert policing. He was later provided with a disclosure officer who had no previous experience in dealing with a UCO or product from a UCO and he had good reason (which I shall not ventilate) for having less than 100% confidence in his intelligence officer. To put it no higher, none of this was ideal. That said, his commendable contemporaneous notes raise more questions than they answer. In particular, his conclusion that the sensitive material did not undermine the prosecution case or support the defence demonstrates either that he had not seen all the sensitive material or that he had not understood it. In either case he was not in a position effectively to discharge his role as officer in charge of the investigation under the Code of Practice or as the investigator under Chapter 8 and Chapter 9 of the Prosecution Team Disclosure Manual. If he had read a 6 page document which formed the basis of Kennedy's statement he should have appreciated, when the Defence Statements arrived, that the deniers' statements accorded closely with Kennedy's statement. With that knowledge he should, at the very least, have discussed the implication for the prosecution of the deniers with Mr Cunningham. Furthermore, he seems to have taken an unduly restrictive view of his role in relation to disclosure. He says that "a sterile corridor from intelligence to evidence has to be strictly enforced and managed". For reasons I have given in paragraph 30, during an investigation this is true up to a point; but it ceases to be true when disclosure for a pending trial is under consideration. He apparently accepted, without

question or further enquiry, the DCI NPOIU's assertion that "the UCO would not be entering the evidential chain… and his real identity as a police officer must be protected". This was only a tenable position at the disclosure stage if the nature of his authorisation and actual conduct were such as not to require either disclosure or a PII application to the judge: the facts of the present case required one or other or both.

50. The October 2011 statement of Detective Chief Superintendent James gives me no assistance. Although, while on holiday, he had suggested Mr Pearson's name to ACC Ackerley for appointment as SIO, he does not appear to have been significantly involved in the disclosure aspects of this case or, if he was, his statement contains no date after 20 April and, although he makes a number of general comments he demonstrates no specific grounds for his expressed satisfaction "that all parties were in no doubt as to the participating informant involvement…and that the management of the CHIS and subsequent legal/disclosure issues could be managed appropriately".

51. The DCI NPOIU is specific about many dates. But I am unable to accept his statement that on 6 April 2009 ACC Ackerley "authorised the deployment at Ratcliffe-on-Soar and specified the use of an audio recording device as requested" is a full or fair description of the authorisation process. What happened on 7 (not 6) April 2009 was that Mr Ackerley carried out a further review of an authorisation he had first granted on 8 November 2008. The part of that authorisation material

for present purposes and repeated in the review on 7 April was for the undercover officer to participate in criminal activity namely “criminal damage, obstruction and aggravated trespass onto land” as well as the authorisation to use audio recording equipment. It is not obvious to me why reference to participation in such criminal conduct is not included in the DCI NPOIU’s recitation of the authorisation. The DCI NPOIU refers to a number of meetings, particularly with Mr Ackerley, on specified dates, a meeting with Nick Paul on 27 April 2009 when the DCI NPOIU mentioned that a transcript was being prepared, a meeting on 1 June with Mr Pearson to “discuss the case”, a number of meetings with Kennedy, and a meeting with Mr Pearson on 10 September when he handed him a copy of Kennedy’s draft statement. He refers to a meeting on 15 September 2009 with Mr Cunningham, senior CPS lawyers and the Deputy SIO when Kennedy’s release from the charging pool was discussed and Mr Cunningham said that, subject to defence statements, he did not envisage a need for a PII application as an application of the CPIA would suffice. Mr Cunningham declined the offer of a copy of Kennedy’s statement and transcript because of inadequate secure storage. The DCI NPOIU said he would lodge it at Nottingham police headquarters, but he made an unsuccessful attempt to do so on 23 September and the document thereafter remained in his office. His statement expresses satisfaction “that both the SIO and Mr Cunningham were fully sighted on the presence of Kennedy in the case and that he had provided a statement and produced a transcript”. He nowhere suggests he told Mr Cunningham the terms of Kennedy’s authorisation or refers to having discussed the terms of the statement

or transcript with either Mr Cunningham or the SIO. As I indicated earlier, there is no suggestion in his secret briefing notes that he discussed these matters with Bethan David and his statement does not suggest that the purpose of his meeting with her was to discuss Kennedy's Nottinghamshire activities. I accept that the DCI NPOIU was fully entitled to do all he properly could to protect his asset. But, at the disclosure stage, he was not entitled to withhold from the SIO, the deputy SIO or Mr Cunningham material in relation to Kennedy which they needed to know in order to make charging decisions and proper disclosure to the defence.

52. ACC Ackerley was not only the authorising officer in relation to Kennedy he was also the most senior officer with knowledge of the case and it was he who appointed Mr Pearson as SIO. For the purposes of RIPA, the paper trail which he provided throughout in relation to Kennedy, from the initial authorisation, until the ultimate cancellation, was impeccable. In my judgment, however, that does not, in this case, dispose of his obligations under the CPIA and Code of Practice when the stage was reached that arrests had been made, charges had to be considered, and disclosure became necessary in relation to pending trials. In most cases it would not be necessary for an authorising officer to become involved in the disclosure process because the SIO would know what was in the authorisation. In the present case the circumstances were unusual and the obvious means of rectifying the SIO's ignorance of the terms of the authorisation was

for ACC Ackerley to tell him. The fact that this did not happen contributed significantly to what went wrong with disclosure.

Conclusions

53. Drawing all the strands together, I reach the following specific conclusions:

(1) The UCO's authorisations and the transcript of his audio recording, in particular, were never effectively distributed between all relevantly interested police officers or to the CPS, so charging decisions were not made on an informed basis and it was inevitable that proper disclosure could not be made to the defence.

(2) There could and should have been a meeting, probably by the end of June 2009 and certainly before charging decisions were made in September, between Mr Cunningham, the SIO, the Deputy SIO, the DCI NPOIU, the disclosure officer and the authorising officer at which the sensitive material, particularly the UCO's authorisations and the content of his audio recording could have been made clearly known to all present and their significance discussed.

(3) If there had been such a meeting it is highly unlikely that anyone would have thought it in the public interest for charges to be brought, bearing in mind the DCI NPOIU's determination that the UCO should not give evidence and his identity should be protected and the likelihood that a PII application to a judge to protect the UCO's identity and involvement would fail.

(4) Proper disclosure was not made to the defence and no PII application to a judge was made or considered because of

failures, over many months and at more than one level, by the police and the CPS.

(5) The failures were individual, not systemic and not due to any want of printed guidance. All involved were well aware, or should have been if relevant guidance had been consulted, of what they needed to do to comply with the CPIA obligation.

(6) There was no significant failure by prosecuting counsel.

54. It follows that the answers to the questions posed by my terms of reference can be summarised as follows:

(a) The CPS approach to charging was not right because, knowing of the existence of a UCO, they did not see, or ask to see, as they should have done, all the relevant sensitive material.

(b) There was no failure by prosecuting counsel to comply with their disclosure duties in view of their instructions from the CPS, but the CPS failed properly to comply with their disclosure duties partly because they failed to ask questions of the police, partly because the police failed to tell the prosecutor the extent of the UCO's participating authorisations and partly because the Case Management Review Panels' oversight of the prosecutor was not as effective as it could or should have been.

(c) The CPS arrangements for handling the known existence of a UCO were adequate but not properly followed.

(d) Relevant guidance and policy in relation to the known UCO were not followed.

Recommendation

55. In all the circumstances there is only one recommendation which I would consider making. At some convenient place, perhaps in Chapter 8 or Chapter 9 of the Prosecution Team Disclosure Manual, it would make explicit what is obviously implicit if there were to be inserted words such as: “where a participating informant has assisted an investigation it is essential, before any charging decision is made, that the prosecution be informed, by the officer in charge of the investigation or some other officer with knowledge, of the terms of the informant’s authorisation”.

56. I couch this recommendation in such tentative terms for two reasons. First, I have no experience in running an organisation as large as the CPS, which I understand has nearly 3000 lawyers. Secondly, although a newly qualified lawyer no doubt requires all the help he or she can get in dealing with disclosure, I would not expect such a lawyer to be dealing with a case of this complexity; and if, as here, the case merits handling by the Complex Casework Unit, I would expect the lawyer dealing with it to have the experience and skill not to need such guidance – or not, at least, once this report has been published.

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The Rt Hon Sir Christopher Rose

December 2011