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*(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McDonnell's (Elizabeth) Application [2015] NICA 72

IN THE MATTER OF AN APPLICATION BY ELIZABETH McDONNELL FOR JUDICIAL REVIEW

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Treacy J who dismissed the appellant's judicial review proceedings challenging decisions taken by the senior coroner in connection with the anonymity and screening of certain prison service witnesses who gave evidence at the inquest touching the death of James McDonnell (the deceased). The challenges concerned, firstly, the decision, finalised on 17 April 2013, to grant anonymity and screening to all of the prison service witnesses who applied for it and, secondly, the determination by the coroner that he was *functus officio* in respect of an application to review whether the anonymity decisions should remain in place made by letter dated 22 May 2013, after the inquest verdict had been delivered and signed on 16 May 2013. Ms Quinlivan QC and Ms Doherty QC appeared for the appellant, Mr Simpson QC and Mr Daly appeared for the coroner and Mr Lyttle QC appeared with Mr Robinson for the Northern Ireland Prison Service. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The deceased died in prison on 30 March 1996 after suffering a heart attack. A short time earlier he had been subject to a control and restraint procedure by prison officers. The background was that the deceased was being transferred from HMP Belfast to HMP Maghaberry that morning. He had just learned that his father had

died and indicated that he did not want to share a cell with another prisoner. When another prisoner was brought to share his cell he left and walked towards the circle area of the landing contrary to instructions. That led to the implementation of the control and restraint procedure. The principal issue for the jury at the inquest into his death related to the use of control and restraint procedures by the prison service and what role, if any, such procedures played in the death. We are not required to deal with the inordinate and unacceptable delay which has occurred in the hearing of this inquest since that has been dealt with in other proceedings.

[3] The coroner decided to call as witnesses those prison officers involved in the control and restraint procedure. Most of those witnesses applied for anonymity and screening. Threat assessments were obtained from the Security Service which stated that in each case the proposed witness was assessed to be at a moderate threat from Northern Ireland related terrorism in Northern Ireland which reflected the threat to him from dissident republicans. The definition of moderate is that an attack is possible but not likely. The assessment concluded that should the witness deliver his evidence at the inquest without the benefit of screening/anonymity the Security Service could not rule out the possibility that the level of threat would rise to substantial meaning that an attack was a strong possibility.

[4] The coroners have devised a protocol to deal with such applications. On the basis of the threat assessments the senior coroner concluded that there was evidence of a real and immediate risk to life and therefore the threshold for engagement of Article 2 ECHR had been met. His provisional decision was that anonymity and screening should be granted to those who applied. The next of kin subsequently made written submissions to him challenging that conclusion and on 29 March 2013 he issued his final decision confirming his earlier provisional decision.

[5] In accordance with the anonymity protocol an oral hearing was then held on 17 April 2013, the first day of the inquest. The coroner received submissions from the parties and those proceedings have been transcribed. Ms Quinlivan relied upon portions of the transcript in which the coroner described the threat assessment as vague, unexplained and lacking the material to show how the conclusion in the assessment was reached. She also sought to demonstrate that the coroner had not in fact conducted a proportionality assessment despite his assertion in his replying affidavit that he had done so. In addition to those criticisms she submitted that no consideration had been given to whether anonymity or screening would satisfy the needs arising from the threat assessment. Finally, she complained in particular about the provision of anonymity and screening for Officer H. He had been the supervisor of the control and restraint team. His name was initially contained within the papers which had been forwarded by the coroner to the next of kin prior to his making an application. He had also been involved in a separate matter in which his name and a photograph were disclosed in a local newspaper and he had appeared on a local television programme in which his name had been disclosed. The point made on his behalf was that, although there was no paramilitary background to this case, the threat arose from the giving of evidence in this inquest. The coroner maintained the

ruling on anonymity and screening but varied it to allow the family to see the witnesses.

[6] The jury returned a verdict on 16 May 2013. In the narrative portion of the verdict the jury concluded that the Northern Ireland Prison Service had explained the majority of the injuries sustained by the deceased, however it had not explained the injuries to the deceased's neck and lumbar region. It also recorded that the Northern Ireland Prison Service failed to carry out best practice in regard to the bereavement next of kin of a prisoner.

[7] In answer to a series of questions the jury concluded that the deceased was subject to a control and restraint procedure as a result of his violent behaviour. The procedure was necessary but was not carried out correctly. In particular, it was not carried out only insofar as was necessary. The jury concluded that it was probable that the deceased during his initial restraint was grabbed by the neck and sustained the neck injuries recorded at the post-mortem. In addition, the deceased sustained a bruise to his lumbar region which was probably sustained during the initial restraint procedure. The jury then identified initial restraint, neck compression, the control and restraint procedure as carried out in this instance, an underlying heart condition and emotional stress as contributory factors to the deceased's fatal heart attack. The jury concluded that the Northern Ireland Prison Service had not explained how the deceased sustained all of the injuries found at autopsy and found that excessive force, lack of training in aspects of the prison guidelines on control and restraint and failures in the duty of care towards prisoners had caused or contributed to the death of the deceased.

[8] The jury and the coroner then signed the verdict. The coroner expressed his congratulations to the jury on giving a unanimous verdict after a very lengthy inquest where the evidence was not easy. Ms Quinlivan on behalf of the members of the family extended their gratitude and indicated that the verdict was that which they were hoping to achieve. The jury were then discharged. In light of the verdict Ms Quinlivan submitted that this would appear to be an appropriate case in which a report should be sent to the DPP. It was agreed that the parties should have a short period to make submissions on that issue. The coroner did refer the issue to the DPP but a decision not to prosecute was made on 27 November 2014.

[9] By letter dated 22 May 2013 the solicitors for the appellant wrote to the coroner submitting that the test in section 35(3) of the Justice (Northern Ireland) Act 2002 was met and that the matter should be referred to the DPP. The correspondence then turned to the question of anonymity: –

> "The jury's findings must be a matter of considerable public concern. As a result we write to request that the Coroner reconsider his ruling on anonymity for the prison officers who gave evidence. In the course of his judgement in the case of Re C and others [2012] NICA 47 Girvan LJ acknowledged that:

> 'the coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review..'

> The circumstances of this case are such that one or more prison officers has been found, on the balance of probabilities, to have used excessive force on Mr McDonnell. In our submission the coroner should now consider whether anonymity for the prison officers should be maintained. In this regard it should be noted that they were not seen by the public throughout the inquest and it would only be their names that would now be revealed….

> Given the jury's findings, accountability under Article 2 requires that the identification of those who used excessive force against Mr McDonnell, which force contributed to his death, ought no longer to be withheld from the next of kin, or the general public. This is particularly the case as some of those whose conduct is at issue continue to serve within the Prison Service. It is our submission that the jury finding has shifted the balance against anonymity and in favour of identification."

[10] The coroner's affidavit indicates that he sought advice from senior counsel on 8 June 2013 on the matters raised in this letter. He received senior counsel's opinion on 17 July 2013. The solicitors for the appellant wrote again to the coroner on 8 July 2013 asking "if he could advise us when we might expect to receive a ruling in respect of our application on anonymity in respect of officer H". A further letter was sent by the appellant's solicitor on 8 August 2013 again asking when they would expect to receive a ruling in respect of their application on anonymity in respect of Officer H.

[11] The coroner sent a holding response on 12 August 2013 and replied substantively on 15 August 2013. He noted that he was being asked to reconsider the anonymity ruling made in the course of the inquest. The relevant portion of the letter continued: –

> "I have concluded, however, that I am now *functus officio* in this inquest. I have considered Terry v East Sussex Coroner [2002] QB 312 and the judgement of Simon Brown LJ (as he then was). I have also considered the judgement of Weatherup J in Re Bradley's Application. At paragraph [12] he said,

> 'The Inquest having been completed, the Coroner is *functus officio* and has no power to hold a second inquest, unless the first Inquest has been quashed by the court… In addition a second inquest may be held if the Coroner is so directed by the Attorney General under section 14 of the 1959 Act…'
>
> I acknowledge that I have some limited administrative powers even when I am *functus officio* (see paragraph 16 of the above judgement). These include administrative oversight of documents (Rule 36 of the Coroner's Practice and Procedure Rules (Northern Ireland) 1963) and post-mortem investigation. I do not have further investigative powers in relation to the death once the Inquest has been completed. When I am *functus officio* I cannot reopen an Inquest.
>
> I have also considered the facts of Re Millar's Application (2005) NIQB 34. I am satisfied that a decision to revisit my ruling on anonymity falls into the broad category of investigation into the death (which I cannot reopen when I am *functus officio*) as opposed to administrative correction (which I retain power to oversee even when I am *functus officio*). The latter category would include correcting an error in a death certificate.
>
> In conclusion I consider that my ruling, which I am now asked to revisit, was an integral part of the substantive inquest, which has now been concluded by the acceptance of a lawful verdict pursuant to Section 31 of the Coroners Act (Northern Ireland) 1959. Because I am now *functus officio* I do not have power to revisit this ruling."

[12] The Order 53 statement in this case was not lodged until 3 October 2013. The appellant's solicitor made an affidavit on 4 November 2013 explaining the delay. He explained that he had considered making an application for legal aid in the weeks following the letter of 22 May 2013 but did not do so because his experience of making such applications was that the Legal Services Commission would not make a decision until a response was received. Alternatively they would refuse the application thus necessitating an appeal to a panel of the Legal Aid Committee which would take a number of weeks to come to hearing. He spoke to junior counsel who considered that he should await the Coroner's response to the letter of 22 May given that it could possibly resolve the matter.

[13] Although further letters were sent on 8 July and 8 August 2013, the papers were not forwarded to counsel until 20 August 2013 subsequent to the receipt of the letter of 15 August 2013. An opinion was received signed by senior and junior counsel on 10 September 2013 and an application for legal aid was made on 12 September 2013. Legal aid for junior and senior counsel was granted on 25 September 2013 and draft pleadings were provided by counsel on 30 September 2013 which were then lodged and served on 3 October 2013.

[14] A further issue arose in relation to the service of the notice of appeal which was mistakenly sent to the Departmental Solicitor's Office rather than the Crown Solicitor's Office, the solicitors on record for the Northern Ireland Prison Service. It also appears that the notice of appeal was not served on the Coroner. This was the result of an administrative error or mistake and no one was prejudiced as a result of it. In the circumstances there was no objection to the extension of time for service of the relevant documents.

Treacy J's decision

[15] The verdict in the inquest was given on 16 May 2013. In Re C and others [2012] NICA 47 this court expressed its concern about satellite litigation prior to the conclusion of the inquest and adopted with approval the remarks on that issue by Higgins LJ in Re McLuckie [2001] NICA 34. It was common case, therefore, that time did not run in relation to any challenge to the decisions made on anonymity and screening in the course of the inquest until the verdict was given at 16 May 2013. The application in this case was not made until 3 October 2013 which was neither prompt nor in accordance with the three months period prescribed by Order 53 Rule 4 of the Rules of the Court of Judicature. The learned trial judge did not consider that there was any good reason for extending the period within which the application was made. The judge rejected the submission that the time-limit prescribed in Order 53 Rule 4 was subject to Order 3 Rule 3 which states that the period of the Long Vacation shall be excluded in reckoning certain periods prescribed by the Rules. He considered that the purpose of the Rule would be completely undermined by such an outcome.

[16] Secondly, he did not consider that the impugned decisions were inconsistent with the applicant's Article 2 rights. The applicant is happy with the verdict and the jury were thanked on her behalf. The proceedings were attended by important safeguards. The officers (whilst anonymous and screened from the public) gave evidence in public. They were not screened from the coroner or the jury who were therefore able to see, observe and hear them give evidence and be cross examined by counsel for the next of kin. The officers gave evidence in sight of both the family and the family's lawyer. The judge did not consider that it was ordinarily open to an applicant to challenge such procedural rulings which had no impact on the verdict or the effectiveness of the inquest. In those circumstances the utility of the proceedings was questionable.

[17] Thirdly, the inquest having been completed the coroner was *functus officio* for most purposes. It was not open to the coroner to reopen his rulings on anonymity and screening after the verdict had been given and signed. There was no procedure under the Coroner's Act (Northern Ireland) 1959 which would permit the coroner to embark on any such enquiry by reconvening the inquest, securing representation for all affected parties and possibly requiring an updated threat assessment.

Delay

[18] There are two decisions being challenged in these proceedings. The first relates to the decision made on 17 April 2013 when the coroner decided to grant screening and anonymity to the prison officers. The second is the decision by the coroner that he was *functus officio* in relation to the application made to him to revisit the anonymity of those prison officers. We consider that we should deal with each of those decisions separately.

[19] In light of this court's decision in Re C we are satisfied that time began to run in relation to a challenge to the coroner's decision of 17 April 2013 on 16 May 2013. The judicial review proceedings were issued on 3 October 2013 which was neither prompt nor within the three-month time-limit prescribed by Order 53 Rule 4. It was submitted on behalf of the appellant that the period of the Long Vacation should be excluded in light of Order 3 Rule 3: –

> "*Long Vacation excluded from time for service, etc of pleadings*
>
> 3. Unless the Court otherwise directs, the period of the Long Vacation shall be excluded in reckoning any period prescribed by these Rules or by any order or direction for serving, filing or amending any pleading."

[20] We do not accept that submission. It proceeds on the basis that the sentence contains two statements. The first is that the period of the Long Vacation shall be excluded in reckoning any period prescribed by the Rules. The second is that the period of the Long Vacation shall be excluded in reckoning any period prescribed by any order or direction for serving, filing or amending any pleading. If the first of these statements were correct it would lead to the effective shutdown of large parts of the civil justice system over the Long Vacation. To extract such a proposition from the contents of a portion of a sentence would be extraordinary. We are satisfied that the phrase "for serving, filing or amending any pleading" governs both the reference to the Rules and that to orders or directions. That is consistent, first, with the plain purpose of the rule; secondly, with the practice where extensions of time are sought if a notice of appeal is not served during the Long Vacation; and, thirdly, with the heading to the Rule itself. The Rule is concerned with pleadings. The application for judicial review is not a pleading. We are satisfied, therefore, that the challenge to the decision made in 17 April 2013 is significantly out of time. Even if the Long Vacation

were excluded the application was significantly delayed. Such applications must be made promptly.

[21] Turning then to the issue of whether there is good reason to extend the period within which the application should be made, we note first that the letter upon which the applicant relies sent on 22 May 2013 was a letter concerned with whether or not the coroner should maintain anonymity for the prison officers in light of the verdict. It was not a challenge to the decision of 17 April 2013. The subsequent letters of 8 July 2013 and 8 August 2013 focused solely on Officer H. None of the correspondence referred at all to screening. The first reference to screening was contained in the Order 53 statement lodged on 3 October 2013. We do not consider that there has been any satisfactory explanation for the failure to raise the decision of 17 April 2013 until the issue of these proceedings. The obligation is to act promptly. No good reason has been advanced for extending the period within which the application in relation to that challenge should be made. For that reason the appeal in relation to that decision must fail.

[22] Although the date for the challenge to the maintenance of the anonymity and screening applications also ran from 16 May 2013 we consider that different considerations apply. The judgment of Girvan LJ in Re C with which the court agreed acknowledged that coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review. The issue in this challenge is concerned with the procedure that the coroner should follow when the delivery of the verdict raises materially new issues on whether anonymity should be preserved. Upon receipt of the appellant’s letter of 22 May 2013 the coroner sought legal advice on its contents on 8 June 2013. We have not seen that legal advice which was received on 17 July 2013. Despite the receipt of the advice a holding letter was sent on 12 August 2013 and it was not until 15 August 2013 that the coroner indicated that he considered himself *functus officio*.

[23] It was submitted that the transcript of the hearing on 16 May 2013 includes a passage where the coroner expressed the view that he was "really *functus officio*" and that the appellant was therefore on notice at an early stage that his view was that it was too late to review the issue of anonymity. This statement was made after the verdict had been given and signed and the jury discharged. The parties were considering the issue of referral to the DPP. It was an indication of the coroner’s view that the investigation had finished but we accept that this was an issue upon which the coroner needed specific advice. That was why he failed to respond promptly to the letter of 22 May 2013. We take into account that the appellant did not receive any substantive response to her solicitor's letter of 22 May 2013 and the chasing letters of 8 July and 8 August until 15 August 2013. Thereafter the appellant’s solicitor acted expeditiously in obtaining legal aid for the purpose of issuing these proceedings. There is no direct authority on when the coroner becomes *functus officio* in relation to an inquest and this is an issue which may arise in future hearings. For all those reasons we consider that we should extend time in relation to the issue of whether the coroner was required to reconsider his decision on

anonymity in light of the verdict. We have previously held that claims for damages against any relevant party as a result of delay or other breaches of the investigative duty should be made within one year of the closure of the inquest. Such claims can be made by Writ so different considerations on time arise. The time frame for damages claims is not affected by this judgment.

Consideration

[24] By virtue of section 13 (1) of the 1959 Act a coroner for a district may hold an inquest where a dead body is found or an unexpected or unexplained death, or a death in suspicious circumstances, occurs. Where the death occurs in prison the inquest must be held with a jury. Once the coroner has held the inquest he becomes *functus officio*. Even if important new evidence then comes to light there cannot be another inquest into the death unless such is directed by the Attorney General under section 14 of the 1959 Act (see Re Bradley [2007] NIQB 98 and Terry v East Sussex Coroner [2002] 2 All ER 141).

[25] Section 36 of the 1959 Act provides that Rules may be made to regulate the practice or procedure at or in connection with inquests. The relevant Rules are the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 as amended. The 1963 Rules provide detailed procedures for the conduct of inquests between Rules 2 and 23. Rule 4 provides that every inquest shall be opened, adjourned and closed in a formal manner. The importance of this lies in the fact that once the inquest is closed the coroner no longer has power to take any steps in relation to the conduct of the inquest. To do so would offend the rule that he has become *functus officio*. That includes any steps in relation to questions of anonymity and screening which he had to deal with in the course of the inquest.

[26] Rule 11 is also of some significance. It provides the coroner with wide powers to adjourn an inquest and makes specific provision that if he adjourns the inquest after the jury has been sworn he may discharge the jury. It follows, therefore, that if the coroner has not closed the inquest and an issue arises as to whether or not anonymity should be reconsidered, it would be open to the coroner to take the verdict, discharge the jury and adjourn the inquest to receive further submissions if he felt that such a course was necessary in order to vindicate any rights under Article 2 or to satisfy the requirements of open justice.

[27] The first question to be answered on this aspect of the appeal, therefore, is whether the inquest was closed by the time the appellant wrote to the coroner on 22 May 2013. If so he was *functus officio* and had no power to make any further ruling in relation to the issue of anonymity. We are fortunate in having available a transcript of the proceedings on 16 May 2013. There is no express statement by the coroner as to whether the inquest was closed on that date but there is in our view ample material to demonstrate that it was closed on 16 May 2013.

[28] In particular, the transcript shows that after the verdict had been signed by the jury and the coroner the jury was congratulated by the coroner and by senior

counsel on behalf of the family. There was then an expression of sympathy by the coroner on behalf of all concerned to the appellant. The coroner then continued: –

> "So, that's it, members of the jury, you have achieved the goal that was mapped out for you four weeks ago, you are free to go, thank you again."

The jury were then discharged. There was then a discussion about the coroner's obligations under section 35 (3) of the Justice (Northern Ireland) Act 2002. When the issue of submissions on that matter was raised the coroner indicated:-

> "When I say submissions, the submissions in the Hegarty case were written only. There was no convening, I am really *functus officio*."

[29] The first statement set out in paragraph [28] is in our view sufficient to demonstrate that the coroner had closed the inquest. The second statement puts the matter beyond doubt because the coroner could not have considered himself *functus officio* if the inquest had not been closed. We are satisfied, therefore, that, although the coroner did not use express words to close the inquest, he had indicated that the inquest was closed on 16 May 2013 and he was, therefore, *functus officio* by the time the application was made to him by letter dated 22 May 2013.

[30] The remaining issue to be determined in this appeal is whether the coroner erred in failing to review the question of anonymity once the verdict had been given. We have referred at paragraph [22] above to the requirement for the coroner to keep under review the question of anonymity during the course of an inquest. Where there has been some material change in the circumstances affecting the question of anonymity the coroner has an obligation to reconsider. The question is whether or not there was such a trigger in this case.

[31] The verdict contained a finding that there had been excessive use of force by prison officers which had caused or contributed to the death of the deceased. It did not, however, identify any particular prison officer or identifiable group of prison officers as persons who had engaged in any unlawful act. Secondly, the coroner's conclusion at the beginning of the inquest was that the level of risk pertaining to each individual applicant set out in their risk assessments was sufficient by itself for him to conclude that the Article 2 threshold had been met by all the applicants.

[32] The importance of that conclusion can be found in the observations of Lord Carswell at paragraph [29] of Re Officer L [2007] UKHL 36:

> "I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test, with an excursion, if the facts require it, into the territory of article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to

> the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for that anonymity would be required by article 2 and it would be unnecessary for the tribunal to give further consideration to the matter."

In the short period of weeks which had passed since the evidence had been heard there was no reason for the coroner to conclude there was any likelihood of a difference in the risk assessment as a result of the verdict.

[33] The very limited circumstances in which a witness in respect of whom there was a finding that he would be subject to a real and immediate risk to life would lose the protection of anonymity were recognised in R v Marine A [2013] EWCA Crim 2367. In dealing with the issue around the release of video images in that case the court accepted that if there was a real and immediate risk to life then the judge was obliged to refuse the release of any images that gave rise to such a risk. There was no place for a balancing exercise (paragraph [60]). At paragraph [89] the court referred to the observations of Lord Carswell at paragraphs [20] and [21] of Officer L where he discussed whether there may be circumstances in which countervailing considerations of public interest could outweigh Article 2 rights.

> "It has not been definitively settled in the Strasbourg jurisprudence whether countervailing factors relating to the public interest--such matters as the credibility of the inquiry and its role in restoring public confidence--as distinct from the practical difficulty of providing elaborate or far reaching precautions, may be taken into account in deciding if there has been a breach of article 2. It does appear that it may be correct in principle to take such factors into account (cf *In re Donaghy's Application* [2002] NICA 25 and *In re Meehan's Application* [2003] NICA 34), but I would prefer to reserve my opinion on the point."

[34] Where there has been a finding of unlawful conduct on the part of an individual contributing to a death, we recognise that it may be necessary to conduct such a balancing exercise even where the Article 2 threshold in relation to that individual has been met. We are satisfied, however, that no such countervailing considerations arise in this case where the Article 2 threshold in respect of the witnesses has been reached and no individual or group of individuals has been identified as personally responsible for any wrongdoing. We conclude, therefore,

that there was no change of circumstances in this case which required the coroner to review his earlier decisions on anonymity.

Conclusion

[35] For the reasons given the appeal is dismissed. The learned trial judge decided that there was no basis for the conclusion that there was a breach of the investigative duty under Article 2 in this case. All of the witnesses were seen and heard by the next of kin and subject to cross examination by their representatives. The appellant knew the identity of Officer H on whom the correspondence of 8 July and 8 August 2013 was focused and saw him give evidence. There was a public hearing which led to a finding of the use of excessive force and a referral to the DPP. Taking into account the threat assessments in relation to the prison officer witnesses, the requirements of accountability and transparency were met. Although it is not a necessary part of our conclusion in this appeal we see no reason to depart from that finding by the learned trial judge.