IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000029
[2015] NZHC 1227

BETWEEN	SCOTT WATSON Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 20 May 2015

Appearances: K H Cook and C B Morrall for Applicant
P T Rishworth QC and T Westaway for Respondent

Judgment: 4 June 2015

JUDGMENT OF DUNNINGHAM J

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Introduction

[1] In the early hours of 1 January 1998, two Blenheim teenagers, Ben Smart and Olivia Hope, were dropped off at a boat by a water taxi driver and never seen again. The following year, Scott Watson was convicted of their murders and is currently serving a life sentence at Rolleston Prison with a minimum period of imprisonment of 17 years.[1]

[2] Mr Watson has steadfastly protested his innocence since his arrest. However, he has exhausted his appeal rights and an application for the Royal Prerogative of Mercy has been rejected.

[3] Mr Watson's conviction has not been without controversy. Mr Watson says "[b]ooks and articles have been written about my trial and conviction that agree that I should not have been found guilty". Similarly, the affidavit evidence of Mr Michael White, a journalist, says:

> I have increasingly become unsettled by Mr Watson's conviction, given the amount of evidence that has altered or come to light since his trial. At the time of his conviction, knowing what the jury had been presented with, I believed the correct verdict had been reached. ...
>
> However, subsequently there has been a great deal of new information, evidence and analysis which calls into question … the grounds on which he was convicted.

[4] Given Mr White's interest in the case, Mr Watson's lawyer approached Mr White to see if he was willing to interview Mr Watson in prison, and perhaps write a feature regarding his case. However, that required the permission of the Chief Executive of the Department of Corrections. Permission was sought and was declined.

[5] Mr Watson now applies for judicial review of the Chief Executive's decision on the basis that it is unreasonable in a public law sense. He argues that the right of freedom of expression has been abrogated in favour of protecting the victims from further media coverage. However that latter consideration is an "illusory goal". Mr Watson says that the focus on protection has resulted in a decision which so

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1 *R v Watson* HC Wellington T2693-98, 26 November 1999.

disproportionately weights the interests of the victims to be left alone, against Mr Watson's freedom of speech, and against the public's right to have debate about the correctness and transparency of our justice system, that this Court should intervene.

[6] Put simply, this case is about whether the decision to decline permission for the face-to-face interview was unreasonable in the sense that it "goes beyond the range of responses open to a reasonable decision-maker" having regard to the context in which the decision was made, including considerations such as the right to freedom of expression as affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA).

My decision

[7] I have allowed Mr Watson's application for judicial review. Although I go on to set out my reasoning in detail, it can be summarised as follows:

(a) The right to freedom of expression as affirmed in s 14 of NZBORA is of vital constitutional significance in any functioning democracy.

(b) That right is not unlimited. In the present context, where the applicant is a prisoner, fetters on that right can be demonstrably justified for two primary reasons:

(i) the need to ensure that the security and good order of prisons can be maintained;

(ii) as a component of the punishment for committing a crime of sufficient gravity to result in imprisonment.

(c) In this case I had to consider whether the Chief Executive's decision could be said to be a demonstrably justifiable fetter on Mr Watson's right to freedom of expression as a serving prisoner.

(d) I have found it is not for the following reasons:

(i) the decision is only to prohibit one mode of communication with the journalist, Mr White;

(ii) the Chief Executive has expressly said Mr Watson can communicate with Mr White through written correspondence;

(iii) the adverse effect on the victims of having Mr Watson assert he was wrongly convicted, is inevitable however he expresses that view. The mode of communication will not alter that.

(iv) no reasons other than the effect on the victims are identified as justifying the decision;

(v) the purpose of the interview is to allow a journalist to investigate Mr Watson's assertion that he is a victim of a miscarriage of justice. That is recognised as a circumstance which, in a free society, points strongly in favour of permitting communication.

The request for an interview

[8] Mr White, as a reporter at the Marlborough Express, covered the initial disappearance of Ben Smart and Olivia Hope, and the subsequent arrest and trial of Scott Watson in 1999. He has maintained a continuing interest in the case. In late 2007 he took another look at the case, and wrote an extensive feature in *North & South* magazine.

[9] In terms of the events leading to this proceeding, Mr White's involvement was initially to attend as a third party to a meeting between Mr Hope, the father of Olivia Hope, and Mr Watson. However, the Department of Corrections declined Mr White's presence at such a meeting. Subsequently, Mr Watson, through his lawyer, Mr Cook, approached Mr White to see if he was willing to interview him and write an article on his case. Mr White was prepared to do that, but only on the basis that he would not consent to any "restrictions, editing or conditions by Mr Watson or

Mr Cook", saying "[t]his writer has no opinion on Mr Watson's guilt or innocence. There is evidence that can support both arguments".

[10] The exchanges between Mr White and Mr Cook resulted in a request being made of the prison manager to allow an interview or meeting (likely more than one) between Mr Watson and Mr White. The reasons for the request were set out in a letter from Mr White to Mr Cook which was attached to the application. The letter said, among other things:

> I am aware of Mr Watson's unwavering position of innocence and his attempts to prove this. I am also aware that his avenues for proving that a miscarriage of justice has occurred are limited at this stage.
>
> Thus I am interested in visiting Mr Watson and speaking to him. This may require more than one visit and interview.
>
> However, I stress that if this can be arranged, any final decisions as to whether I write a story for *North & South* magazine will be taken by myself in conjunction with my editor. At all times we would control the content of any story and will not accept any conditions on this.
>
> Can I also be clear, there will not be, nor would there ever be, any payment made by *North & South*, its parent company Bauer Media, or myself, for this or any interview.

[11] Mr Vincent Arbuckle, the Deputy Chief Executive of the Department of Corrections, acting under a delegation from the Chief Executive, declined the request on 9 December 2014. He advised Mr White of that decision by letter dated 18 December 2014, the crux of which provides:

> I am aware of the importance of Mr Watson's right to exercise freedom of speech and to seek to involve the media in publishing his claim to innocence.
>
> Under the Corrections Regulations I am required to consider the effect of the interview on other persons, including the protection of their interests. I have spoken to Mr Hope and Mrs Smart. Neither support the interview taking place.
>
> On balance, taking all of the relevant factors into account, I have declined your application.

The Chief Executive's decision

The regulatory framework

[12] The Chief Executive's decision to decline permission for the interview was not made in a vacuum. There are restrictions upon interviews and recordings of prisoners. These are set out in regs 108 and 109 of the Corrections Regulations 2005 as follows:

> **108 Restrictions on interviews and recordings**
>
> (1) Without first obtaining the written approval of both the chief executive and the prisoner concerned, no person may—
>
> (a) interview a prisoner, for the purpose of—
>
> (i) obtaining information and publishing or broadcasting it; or
>
> (ii) publishing or broadcasting a transcript or description of the interview; or
>
> (b) make a sound recording of a prisoner, or an interview with a prisoner, for the purpose of—
>
> (i) broadcasting it; or
>
> (ii) publishing a transcript of it; or
>
> (c) make or take a film, photograph, videotape, or other visual recording of a prisoner, for the purpose of publishing or broadcasting it.
>
> (2) Without first obtaining the written approval of both the chief executive and the prisoner concerned, no person to whom subclause (3) applies may—
>
> (a) interview a prisoner; or
>
> (b) make a sound recording of a prisoner, or an interview with a prisoner; or
>
> (c) make or take a film, photograph, videotape, or other visual recording of a prisoner.
>
> (3) This subclause applies to a person who is—
>
> (a) a publisher of books, or a magazine, newspaper, newsletter, circular, or other similar publication; or
>
> (b) a broadcaster or producer of radio or television programmes; or
>
> (c) a disseminator of news or opinion by electronic means; or
>
> (d) a writer, a journalist (whether in electronic or print media), a radio or television broadcaster, or a producer of radio or television programmes; or
>
> (e) an employee, contractor, or agent of a person described in any of paragraphs (a) to (d).
>
> (4) In this regulation and regulation 109,—
>
> (a) a reference to any film, information, interview, photograph, recording, transcript, or videotape includes a reference to any part of it:
>
> (b) interview includes interview by telephone or electronic message:
>
> (c) publish includes publish in a book.

109 Approvals

(1) The chief executive must, in deciding whether to give approval under regulation 108, have regard to the need to—
  (a) protect the interests of people other than the prisoner concerned; and
  (b) maintain the security and order of the prison concerned.

(2) The chief executive must not give that approval unless satisfied that the prisoner understands—
  (a) the nature and purpose of the filming, interviewing, photographing, recording, or videotaping concerned; and
  (b) the possible consequences to the prisoner and other people of the publication or broadcasting of the film, interview, photograph, recording, transcript, or videotape concerned.

(3) The chief executive may give that approval subject to any conditions reasonably necessary to—
  (a) protect the interests of any person other than the prisoner; or
  (b) maintain the security and order of the prison.

(4) Subclause (1) is subject to subclause (2).

[13] In summary, any attempt to communicate with a prisoner or to record what a prisoner has to say, including where it is intended to publish the prisoner's views in any way, requires prior approval of the Chief Executive. In deciding whether to give approval, the Chief Executive is constrained by certain mandatory considerations.

Consideration of relevant factors

[14] In order to guide his decision-making process, Mr Arbuckle used a form prepared by the Department of Corrections. This provided an evaluative framework in the form of a series of questions, which ensured that he turned his mind to all factors relevant to the decision, including the mandatory considerations in the Regulations.

[15] In respect of the requirement to have regard to protecting the interests of people other than the prisoner, the form included the following question:

> Is the interview expected to have a negative impact on the offender's registered victims, or any other victims? What impact is it likely to have?

The recorded response was:

> Yes, it is expected to have negative impact on the families of both of the victims.

They have been spoken to.

The reference to "they" was to both Mrs Smart, the mother of Ben Smart, and Mr Hope, the father of Olivia Hope.

[16] The form also addressed the need to maintain the security and order of the prison, but it was accepted that there were no obvious issues of concern in this regard.

[17] In terms of consideration of the right to freedom of expression, the form was completed as follows:

32	Does the prisoner have any other means to express their case/opinion/problem? If the interview were declined what effect would that have on the prisoner's situation? For example, is their issue currently before the courts or otherwise addressed in the media? Or do they have open avenues for redress such as appeals, internal complaints procedures or contacting the ombudsman, prison inspector or the Human Rights Commission?	He is able to write to a journalist at any time, though not be interviewed.
33	How important is the interview to the individual prisoner? For example, consideration of who is driving the request for an interview, has the prisoner requested the interview or are they participating at the urging of the media? Is the subject matter something the prisoner is particularly invested in?	Mr Watson has exhausted all of his legal avenues in seeking to prove his innocence and therefore publicity and a first interview from prison would be the next step for him.
34	To what extent would denial of the request restrict or control the media's ability to cover news events or issues in which the public may have an interest?	Mr Watson's trial and imprisonment has been very widely covered, a denial of this request would not hinder further media coverage and public debate.

[18] In the section headed "Consideration of other factors, if relevant in the circumstances", one of the questions was: "Is the prisoner claiming to be a victim of a miscarriage of justice and, if so, have they exhausted all avenues of appeal?" In response it was recorded: "Yes and they have exhausted all legal avenues".

[19] No criticism was made of this evaluative framework and I am satisfied it identified all the considerations which were relevant to the decision.

How was the decision reached in light of the relevant considerations?

[20] Mr Arbuckle clearly explains his decision-making process in his affidavit. He states:

> 39. Mr Hope and Mrs Smart did not support the interview taking place. They were very strong in their views on this. In particular, Mr Hope did not support the interview and he referred to Mr Watson's earlier request in October 2013.
>
> 40. The need to protect the interests of people other than the prisoner concerned is a mandatory consideration I need to take into account in considering applications such as these. The views of the parents and the negative impact upon them in hearing or reading about Mr Watson's professed innocence conveyed to me that they were firmly against the interview taking place.
>
> 41. Although it is a mandatory requirement to take into account the interests of people other than Mr Watson, such as the victims, I was aware that the interest and views of those people are not determinative. They needed to be balanced against other factors.
>
> 42. … I considered the relevant factors relating to the security and order of the prison as neutral in this case.
>
> 43. I considered Mr Watson's right to freedom of expression. I also took into account that Mr Watson has other means available to him to express his concerns. For example, he may write to a journalist at any time. I was aware that he had gone down several legal avenues in seeking to prove his innocence.
>
> 44. Neither I nor the Department would seek to interfere with Mr Watson meeting with Mr White on an ordinary face to face basis.
>
> …
>
> 47. I took into account the fact that Mr Watson's trial and imprisonment has been widely publicised, as had his claim of wrongful conviction, and that a refusal to approve the interview with Mr White would not hinder media coverage and public debate. Nor would it hinder Mr Watson communicating with Mr White by other means.

[21] It is clear from his evidence that there were two key considerations which Mr Arbuckle weighed in making his decision. The first was Mr Watson's right to freedom of expression, particularly when he was alleging a potential miscarriage of

justice, and had exhausted his appeal rights. The second was the opposition of the parents of the victims to the interview taking place.

[22] Mr Arbuckle decided that Mr Watson had other means available to him to express his concerns, such as his ability to write to a journalist at any time, and so his rights were not entirely fettered. However, he considered that the adverse impact that an article would have on the families of the victims, could not be addressed by conditions, as Mr White had made it clear he would not countenance any restrictions on his, or his magazine's, ability to publish details of any interview with Mr Watson.

[23] Taking into account these factors, against the requirements of regs 108 and 109, he "formed the view that the reasons against allowing the interview to occur outweighed those in favour" and declined the request accordingly.

Unreasonableness as a ground of judicial review

[24] Mr Watson's application is brought on a confined ground, asserting only that the Chief Executive's decision was "unreasonable". Of course when challenging a public body on the basis of "unreasonableness" I am not concerned with the meaning of that term in common parlance, but as it is applied by the Courts.

[25] However, as Professor Philip Joseph notes on this subject, "unreasonableness is the most problematic of the grounds of review".[2] While earlier cases followed the stringent standard of irrationality, set in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, it is clear that this test has been modified in subsequent decisions.[3] The Courts now adopt a "somewhat lower standard of unreasonableness than 'irrationality' in the strict sense".[4]

[26] The correctness of a decision can be challenged where it is unreasonable in an administrative law sense. Examples of what constitute unreasonableness in the context of judicial review include the case where a decision-maker had more than

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2 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 997.

3 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

4 *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 433.

one option, but the decision reached was unsupported by a reasoned justification.[5] It may also include where the decision was so disproportionate in its weighing of competing factors, that the outcome was unreasonable.[6] As observed by, Elias CJ in *Morse v Police*:[7]

> [l]ack of proportionality and outcome (more restriction than is necessary to achieve the legitimate outcome of preservation of public order under s 4(1)(a)) is a result that is substantively unreasonable and amounts to an error of law able to be corrected on appeal restricted to point of law …

[27] Similarly, in *Conley v Hamilton City Council*, Hammond J said:[8]

> [t]he practical advantage of the doctrine [of proportionality] is that it is a respectable tool for assessing two categories of cases, namely where something is challenged as being unreasonably oppressive or where there is a distinctly or manifestly improper balancing of relevant considerations.

[28] That said, the Courts still regularly disavow embarking on a true "merits-based" review. As was said in *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries*, "[t]he concern is with the process of decision-making. It is not part of the Court's function to consider what decision should have been made".[9] Allied with that accepted approach is a willingness of the Courts to show deference to the decision-maker in recognition of the context in which the decision is made and any special skills the decision-maker has to make such decisions.[10]

[29] The merits of the decision are nonetheless relevant where they demonstrate a flaw in the decision-making process itself. As summarised by Hammond J in *Lab Tests Auckland Ltd v Auckland District Health Board*:[11]

> If … judges are going to approach the merits of a decision, the analysis has to be undergirded by something other than concern about the decision as such. That is, there has to be something or some things in a sense standing "outside" the particular decision which rightly attracts judicial concern.

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5 *C v Medical Council of New Zealand* [2013] NZHC 825, [2013] NZAR 712.
6 *Shaw v Attorney-General (No 2)* [2003] NZAR 216 (HC).
7 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [40].
8 *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789 at [54].
9 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 557.
10 *Taylor v Chief Executive of the Department of Corrections* [2013] NZHC 2953 at [37].
11 *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA) at [386].

[30] Ultimately, there was no real debate between the parties as to the test for unreasonableness, both acknowledging that the New Zealand Courts had loosened the bounds well beyond *Wednesbury* unreasonableness, to include decisions which were unreasonable in the ways discussed above.

[31] However, the Chief Executive argued that this decision was not one which engaged such concepts when the decision was viewed in its statutory context, and in light of the skills of the particular decision-maker to make such decisions. As Mr Rishworth QC submitted (and Mr Cook agreed), issues of reasonableness and proportionality depend on context, and have to be applied against "a backcloth of the prison environment".[12] The Chief Executive's stance was that the decision declining the interview request was "well within the range of reasonable outcomes which could be reached having regard to the mandatory considerations in the applicable regulations".

Reasonableness depends on context – so what is the context?

[32] Both parties emphasised the importance of context in this case. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department*:[13]

> … 'the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving convention rights. *In law context is everything.*

[33] Similarly, in *Pham v Secretary of State for the Home Department* (*Open Society Justice Initiative Intervening*), Lord Sumption said the range of rational decisions depends upon the circumstances of any case and, in assessing the appropriateness of the balance drawn by the decision-maker, the Court "must of course" have regard to the fact the decision-maker has the statutory power to make the decision, and that the decision-maker has "special institutional competence".[14]

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[12] *R (Hirst) v Secretary of State for the Home Department and another* [2002] EWHC 602 (Admin), [2002] 1 WLR 2929 at [31].

[13] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28] (emphasis added), citing *Regina (Mahmood) v Secretary of State for the Home Department*, [2001] 1 WLR 840 at [18].

[14] *Pham v Secretary of State for the Home Department* (*Open Society Justice Initiative Intervening*) [2015] UKSC 19, [2015] 1 WLR 1591 at [108].

[34] In this case, Mr Rishworth argued that the context was the prison environment, which was unique, and one in which prison administrators are best placed to make decisions affecting the prison, its inmates, and other people. The Chief Executive has been granted statutory authority to make decisions under regs 108 and 109 of the Regulations, and the Court must respect and take into account that context when determining the proper scope of any review. He submitted that this was a case with analogies to *Huang v Secretary of State for the Home Department*, where Lord Bingham said:[15]

> The giving of weight to factors such as these [that is, Parliament having designated a particular decision-maker who has authority and expertise in the field] is not in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.

[35] Relying on Lord Steyn's observations in *R v Secretary of State for the Home Department, Ex parte Simms and Anor* (*ex parte Simms*), Mr Rishworth noted that oral interviews with journalists are not in the same category as visits by relatives and friends, and require more careful controlling regulation as there are a number of practical reasons which necessitate their restriction and regulation.[16]

[36] Mr Cook acknowledged the decision was made in the context of the management of the prison, and under regulations which vested this decision-making power in the Chief Executive. However, that context had to take account of s 14 of NZBORA which affirms:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[37] Mr Cook emphasised that the right to freedom of expression was protected in many other democracies.[17] He states that the importance of the right was captured by Lord Steyn in *ex parte Simms*, when His Lordship said:[18]

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15 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [16].

16 *R v Secretary of State for the Home Department, Ex parte Simms and Anor* [*ex parte Simms*] [2000] 2 AC 115 (HL) at 131.

> [t]he starting point is the right to freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible.

[38] While much has been written about the rationale for protecting this right, it was pithily summarised by Lord Bingham in *Jennings v Buchanan*:[19]

> In New Zealand, as in other liberal democracies, a very high value is attached to freedom of speech and expression as the necessary condition of good government, intellectual progress and personal fulfilment.

[39] Having adopted that starting point, Mr Cook acknowledged that freedom of expression is not an absolute right, and that the right is legitimately abridged for persons serving sentences of imprisonment. However, New Zealand jurisprudence makes it clear that a prisoner's freedom of expression cannot be completely abrogated.

[40] The exercise of controls on a prisoner's freedom of expression is governed by regs 108 and 109. The predecessor to those regulations was considered by the Court of Appeal in *Television New Zealand Limited v Attorney-General*.[20] While that case unsuccessfully attacked the legality of the regulations, the decision to decline the interview with the prisoner was quashed.

[41] The Court of Appeal stated that the power authorised in the relevant regulations is to be applied in a manner consistent with the right to freedom of expression under s 14 of NZBORA. However, it accepted that there were a number of sound policy reasons justifying limitations on news media interviews with prison inmates. The Court noted:

> [16] In a case in which an inmate was fully informed of the implications of doing so desires to be interviewed, the inmate's right to freedom of speech would support the application. In those situations, the decisions of the Chief Executive on the application for approval, requires a balancing of that right against conflicting values. In the case of inmates who have been convicted of criminal offending, the Chief Executive would have to take into account

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17 For example, the Canadian Charter of Rights and Freedoms s 2(b); United States Constitution, First Amendment; Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, Entered into force 3 September 1953), at 10(1).

18 *R v Secretary of State for the Home Department, Ex parte Simms and Anor* [2000] 2 AC 115 (HL) at 125, per Lord Steyn.

19 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577at [6].

20 *Television New Zealand Limited v Attorney-General* (2004) 8 HRNZ 45 (CA).

> the interests of the victims which is specifically addressed in [the regulations]. It is also relevant that part of the effect of imprisonment as a punishment is curtailment of some of the freedoms including that of free speech.

[42] The real issue, therefore, is when can a prisoner's right to free speech be fettered justifiably because of other considerations such as the interests of the victims.

[43] This issue was squarely confronted in *ex parte Simms*, where two inmates wished to pursue claims that they had been wrongly convicted. They challenged a total ban on journalists' access to prison inmates as being inconsistent with the right of free expression. The only right which they claimed was the right to an oral interview with a journalist, confined to the question of whether they had been wrongly convicted.

[44] Lord Steyn, delivering the primary judgment, held that a limitation upon free expression could be found to be justified only if the right to free expression could be shown to be outweighed by a contrary interest. He accepted that restrictions upon media access were generally justified in relation to prison inmates for two reasons. First, for reasons related to prison administration and, second, as an inherent element of a sentence of imprisonment. In the circumstances, he held that an absolute restriction upon an inmate's access to the news media could not be justified, as the media represented the only practical means by which the inmates could pursue their claims of wrongful convictions, their appeals having been exhausted. Interviews for that narrow purpose fell into an exceptional category and it would be a disproportionate use of the authority to prevent interviews with journalists, for that narrow purpose of attempting to obtain review of convictions.

[45] Importantly, Lord Steyn saw that as fulfilling a wider role than simply meeting the needs of the prisoner in question. His Lordship commented that:[21]

> investigative journalism, based on oral interviews with prisoners, fulfil an important corrective role, with wider implications than the undoing of particular miscarriages of justice.

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[21] *R v Secretary of State for the Home Department, Ex parte Simms and Anor* [2000] 2 AC 115 (HL) at 129.

In other words, as Elias J noted in *R (Hirst) v Secretary of State for the Home Department*, the decision in *ex parte Simms* confirms that prisoners still retain the right to free expression in certain, sufficiently important contexts.

[46] The balancing of these considerations was illustrated in *Taylor v Chief Executive of the Department of Corrections*.[22] In that case, Mr Taylor, a serving prisoner at Auckland Prison, sought judicial review of a decision made by the Chief Executive which refused to allow face-to-face interview with Television New Zealand in relation to Mr Taylor's challenge to the steps taken to create a smoke free environment in New Zealand prisons.

[47] Mr Taylor was assessed as a security risk and Heath J accepted that reg 109(3) made it clear that the obligation to maintain good order in a secure environment could prevail over the rights of individual prisoners, and there was no error in the decision-maker declining the interview on that basis. However, Heath J noted that the type of situation in which an interview with a journalist might be permitted would be, as in *ex parte Simms*, where journalists wanted to interview two prisoners who had been convicted of murder but who continued to protest their innocence.

[48] To summarise, in the prison context, I accept it is appropriate to accord weight to the Chief Executive's assessment of what is required to ensure the security and good order of the prison. I also accept that a prisoner's right to freedom of expression is necessarily limited, both because that is inherent in the punishment imposed, and for reasons related to the effective administration of the prison.

[49] However, the courts have regularly recognised that the right to express concerns about an alleged miscarriage of justice is a legitimate exception to those restrictions and there is both an individual, and a public, interest in facilitating a prisoner's ability to ventilate these issues where that can be done in a responsible and considered way. In this area, the Chief Executive is not in any better position than the courts to judge how concerns about the interests of the victims should be weighed against the protection of the right affirmed in s 14 of NZBORA.

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[22] *Taylor v Chief Executive of the Department of Corrections* [2013] NZHC 2953.

Applying the principles in the context

The degree of interference with Mr Watson's right to freedom of expression

[50] In *ex parte Simms*, Lord Millet concluded:[23]

> A refusal to allow the prisoner to be interviewed by a responsible journalist investigating a complaint that he had been wrongly convicted would strike at the administration of justice itself.

Given that clear directive, it was understandable that Mr Rishworth sought to differentiate the present circumstances. He did this by identifying that *ex parte Simms* was a case where a total ban on media interviews was being challenged, whereas in Mr Watson's case, there were still avenues for him to communicate his miscarriage of justice concerns. Under the Corrections Act, Mr Watson was entitled to have visitors, to send and receive mail, and to make short outgoing telephone calls.[24]

[51] While it was accepted that these forms of communication were subject to restrictions, they were not subject to censorship and they were "all means by which he may voice his concerns about his convictions". In particular, Mr Rishworth emphasised that Mr Watson could communicate with the outside world through mail and, while that could be opened and examined, it could only be withheld on grounds specified in s 108(1) of the Corrections Act 2004, and there was no obvious basis on which communications between Mr Watson and Mr White (or anybody else) would be likely to be withheld under s 108.[25]

[52] Mr Rishworth argued that the cumulative effect of these entitlements meant that, despite the Chief Executive's decision, Mr Watson retained an ability to communicate with persons outside the prison about his convictions. The decision, therefore, was not a substantial interference with Mr Watson's right to freedom of expression.

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[23] *R v Secretary of State for the Home Department, Ex parte Simms and Anor* [2000] 2 AC 115 (HL) at 145.

[24] Corrections Act 2004, s 77, which specifies a minimum entitlement of one outgoing telephone call of up to five minutes duration per week.

[25] Section 108 addresses threats to the security of the prison or the maintenance of the law as well as matters which might endanger the safety or welfare of any person.

[53] In any case, Mr Watson's right to freedom of expression was not absolute, it must yield to other cogent social interests, which include the interests of victims. Limitations on the right to freedom of expression are of course permitted if they are demonstrably justifiable in a free and democratic society, as provided for in s 5 of NZBORA.

[54] However, when analysed, the right to have a five minute telephone call per week is clearly a cumbersome and impractical way of conveying a large amount of information to a journalist such as Mr White. In addition, it would greatly affect Mr Watson's ability to contact family members. Similarly, the entitlement to have visitors is intended to maintain familial and social relationships of the prisoner in order to promote the prisoner's reintegration into the community on release. This points against such visits being used for the purpose of an interview with a journalist.[26] The inability to record what is said at such visits would also largely eliminate the utility of such an exercise.

[55] The reality appears to be that the Department is suggesting that Mr Watson give his account to Mr White via letters. However, as Mr White responds:

> That seems, with respect, an odd thing to state. I cannot understand why I am allowed to interview him over months via letters but I am not allowed to interview him in person. I query whether this is because the "interview by letters" approach allows Corrections to read what is being written by both parties. There is also a totally different dynamic in talking to someone face to face than writing letters. I, like all journalists that I know, far prefer to communicate face to face … as that is the most accurate and honest way to undertake any interviews.

[56] In short, as Mr Rishworth acknowledged in the hearing, the Chief Executive's decision was intended to control the "mode" of communication between Mr Watson and Mr White, limiting it to the less interactive and more drawn out process of communicating by letters. While I accept that means the Chief Executive's decision does not entirely fetter Mr Watson's freedom of speech as was the case in *ex parte Simms*, the real issue is whether the limitation on how he exercises that right is "demonstrably justifiable" when weighed against the consideration which was relied on to decline the application, being the interests of the victims.

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[26] Corrections Regulations 2005, reg 98(1).

Uncertainty over what might be published

[57] Another factor which Mr Rishworth argued was relevant to the context in which the decision was made, was the uncertainty over what might result from an interview between Mr Watson and Mr White. As there were no controls over content, because as a responsible journalist Mr White would not accept them, the Chief Executive considered he could not impose conditions which might be required to protect the interests of any person other than the prisoner.[27]

[58] However, as the Chief Executive expressly disavowed the Department screening or censoring any written correspondence, I could not see any justification for declining the oral interviews on this basis. If Mr Watson was free to express his views in a written communication, where Mr White could use those communications in an unfettered way to write an article, then it was impossible to see why this was a reason for controlling the mode of communication Mr Watson wished to use.

[59] I also think it important to note that Mr White's insistence that he retain editorial control was precisely so that he could write a responsible and independent article where he was neither beholden to Mr Watson, nor to the Department or the victims, in researching and presenting his findings.

Importance of the interests of the victims

[60] Finally, Mr Rishworth submitted that the regulations highlighted the importance of victims' interests and envisaged that these could prevail over the right to freedom of expression in appropriate cases.

[61] Obvious cases of this include where a prison refused to allow publication of a prisoner's autobiography which contained details of the murders he had committed, because of its likely effect on the inmate's victims and the public generally.[28] However, that case can clearly be distinguished from the present as the purpose of the communication did not engage issues of personal liberty, or of public confidence

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[27] For completeness, no challenge was raised to Mr White's credentials as a journalist, nor to his assertion that he would endeavour to publish a considered and balanced article.

[28] *R (Nilsen) v Governor of Full Sutton Prison* [2004] EWCA Civ 1540, [2005] 1 WLR 1028.

in the justice system, through debating potential miscarriages of justice which the present case has the potential to do.

[62] Another example referred to was *Bamber v United Kingdom*, where the European Commission of Human Rights upheld a restriction on a prisoner's ability to contact journalists by telephone despite his assertions of being the victim of a miscarriage of justice.[29] However, that case turned on the possibility of the prisoner making live communications through broadcasting media, which could lead to the victims of the crime experiencing "further distress or outrage upon hearing the live voice of the convicted and imprisoned offender on the radio or telephone offering a one-sided protestation of his innocence and alleging expressly or impliedly that the victim had been mistaken or untruthful". It was held that it was reasonable to restrict such communication as "the applicant could contact the media by letter and may, in more limited circumstances, be interviewed by the media".

[63] Thus, in that case, the mode of communication was relevant to the decision, as the mode which was being restricted had the potential to cause distress to the victims or their families which would not arise if the prisoner communicated his concerns to the media in other ways.

[64] In the present case no challenge was made to the relevance of the victims' views, nor could there be in light of the regulations. It is also not disputed that an article which ventilates Mr Watson's view he should not have been convicted will be likely to cause distress to the Hope and Smart families. However, the critical issue is whether the Chief Executive's decision controlling the mode by which Mr Watson communicates with Mr White will mitigate or avoid that consequence for the victims. It can only do so if the practical effect of the decision is to prevent Mr Watson from communicating with Mr White altogether.

[65] In this case, there is no justification articulated for limiting Mr Watson's contact with the media to written communication for the purpose of preparing an article, rather than a direct interview. Both may result in an article which could cause the victims distress if it challenges the reliability of Mr Watson's conviction or

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[29] *Bamber v United Kingdom* (33742/96) First Chamber, ECHR 11 September 1997.

reiterates Mr Watson's denial of the offending. Nowhere does the Chief Executive identify why a face-to-face interview (which is Mr White's preferred method of hearing Mr Watson's side of the story), is more harmful to the victims than an article inconveniently stitched together through a protracted series of written communications.

[66] I consider that, unless the Chief Executive's decision is, in effect, a total ban on Mr Watson communicating with the media about an alleged miscarriage of justice, then he has failed to identify why a restriction on the mode of communication will achieve the objective of limiting the harm to the victims. The decision is, therefore, not reasonable.

[67] Because I have decided the case on the basis that the decision controlling the mode of communication was not rationally connected to the reason given for making it (which was to protect the victims from distress), I do not need to go on to consider the issue of proportionality. However had the decision been to prevent any communication with the journalist for the stated purpose, then in light of *ex parte Simms*, I do not consider it would have been a proportionate decision.

[68] Where a prisoner wishes to raise an allegation of miscarriage of justice when all other avenues of appeal have been exhausted, that is to be treated as an exceptional circumstance. Even the Department's evaluative framework for making a decision under the Regulations identifies this as a circumstance justifying particular consideration.[30] Where no concerns of prison security are raised, and where the communication is to a reputable journalist, then that is a circumstance where the rights in s14 of NZBORA should almost always prevail. The effects on the victims which arise naturally and inevitably from any debate over the soundness of the prisoner's conviction, cannot reasonably, without more, justify declining the right to speak out on such issues.

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[30] See para [18] above.

Conclusion

[69] The Chief Executive does not identify any reason why his decision to control the mode of communication Mr Watson can have with journalists will achieve the objective of minimising harm to the victims, when the harm identified is the inevitable consequence of Mr Watson's views being conveyed to the media through any mode. Accordingly, given the value of the right to freedom of expression, and the importance of freedom as to the manner of its exercise, the Chief Executive has not demonstrated why the limitation he has placed on Mr Watson's exercise of that right is justified.[31]

[70] As a result, I conclude that the decision is unreasonable.

Relief

[71] As I have found the decision to decline permission for Mr White to interview Mr Watson was unreasonable in an administrative law sense, I now turn to the appropriate relief.

[72] Mr Watson sought:

(a) an order allowing the applicant's request to meeting; and

(b) a declaration that the Department has breached the applicant's right to freedom of speech protected by the New Zealand Bill of Rights Act 1990.

[73] The usual approach on a successful application for judicial review, is to refer the matter back to the decision-maker for reconsideration in light of the Court's judgment.[32]

[74] There are, of course, exceptional cases where a substantive remedy is granted. For example, in *Dunne v Canwest TVworks Ltd*, the Court granted a

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31 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

32 *Television New Zealand Ltd v Broadcasting Standards Authority* HC Wellington CIV-2004-485-1299, 13 December 2004 at [57].

mandatory injunction requiring TV3 to invite the two plaintiffs to participate in its party leaders' debate, in the run-up to a national election.[33] In that case there were clear time constraints, because of the proximity of the proposed televised debate to the election. While the Court observed that making the order would "effectively be directing TV3 how to run its business at least in part" which was "in principle objectionable", the alternative was that the plaintiffs would "potentially suffer significant electoral disadvantage" which was irrecoverable and could affect the capacity to make up the next Parliament. Thus, on balance, those constrained circumstances favoured the making of a mandatory injunction once the Court had determined that the decision to exclude the plaintiffs was arbitrary and failed to take into account relevant factors.

[75] Another case which granted substantive relief was *Fiordland Venison Ltd v Minister of Agriculture and Fisheries.*[34] It involved an application for review of a decision to decline a game packing house licence under the Meat Amendment Act 1975. On appeal, the Court of Appeal held that a responsible Minister, applying the right test, could not have declined the licence. It granted the following relief:[35]

> We would allow the appeal and grant a declaration that, subject to the upgrading of the Te Anau premises in accordance with the plans and specifications submitted, the appellant was entitled to a game packing house licence under the 1975 Regulations. Leave should be reserved to each party to apply to the Supreme Court on any matter arising as to the implementation of the declaration.

[76] While I accept that this case is similar to *Fiordland Venison* in that, on the evidence supplied, there was no rational basis for declining a face-to-face interview between Mr White and Mr Watson, there may be conditions, particularly as to the format of the interviews, and controls on the distribution of any recorded materials, that the Chief Executive may wish to impose when revisiting the decision, which the Court is not in a position to consider.

[77] Accordingly, I am satisfied that it is appropriate simply to quash the Chief Executive's decision to decline permission for Mr White to interview

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33 *Dunne v Canwest TVworks Ltd* [2005] NZAR 577 (HC).
34 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).
35 At 353.

Mr Watson in person. The application for permission to interview Mr Watson is to be reconsidered in light of this decision.

[78] The application for a declaration that the Department of Corrections has breached the applicant's right to freedom of speech protected by the New Zealand Bill of Rights Act 1990 is declined as the Department confirms it is only the mode of communication which is sought to be controlled by the decision.

[79] The applicant is entitled to costs. If agreement cannot be reached, memoranda, not exceeding five pages, can be filed. The applicant's memorandum must be filed within 20 working days, from the date of this decision, the respondent's within a further 10 working days, and any reply within a further five working days.

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