Case No: CO/3189/2001

Neutral Citation Number: [2002] EWHC 602 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINSTRATIVE COURT
AT CARDIFF CROWN COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 22nd March 2002

B e f o r e:

THE HONOURABLE MR JUSTICE ELIAS

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	HIRST	**Claimant**
	- and -	
	SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Miss Heather Rogers
(instructed by Hickman and Rose for the Claimant)
Miss Eleanor Grey
(instructed by the Treasury Solicitor for the Defendant)

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Judgment
As Approved by the Court

Mr Justice Elias:

1. The claimant in this application for judicial review is a serving prisoner. He has been in prison for over 20 years. Since 1989 he has been actively involved in campaigning for prisoners' rights. His activities have attracted some media coverage and over the past 10 years he has had contacts with journalists. He played an important part in the establishment of the Association of Prisoners, a body whose aims are to promote the welfare and further the interest of prisoners. He is now the General Secretary of that organisation (having been elected by the ten founding members). The Association does not, however, have any formal status within the prison environment, and is not recognised by the authorities as representing the interests of prisoners.

2. The claimant submits that he has a right under Article 10 of the European Convention on Human Rights and Fundamental Freedoms to be entitled, in certain circumstances, to speak to the media by telephone on matters of legitimate public interest relating to prisons and prisoners. He accepts that the right would have to be circumscribed in ways I set out below. He submits that he has been denied that right in contravention of Article 10 and seeks appropriate declaratory relief.

3. The circumstances in which he was forbidden to speak to the media by telephone were as follows. Following the founding of the Association of Prisoners, he gave certain interviews on the radio. These included pre-recorded interviews on the Today programme on BBC Radio 4 on 20 February 2001 and an interview to BBC Radio 5 Live on the following day. On that day, 21 February 2001, the Governor of the prison where he was then an inmate, HMP Nottingham, issued the claimant with a warning forbidding him from conducting further telephone interviews. On 21 March 2001, in breach of that warning, the claimant gave a telephone interview to BBC Radio 5 Live about the hearing of an application for judicial review in which a number of individuals, including the claimant, sought to challenge the legality of legislation which denies convicted prisoners the right to vote. That application in fact failed and I will refer to the judgment below. Following that interview, a disciplinary procedure was initiated against the claimant for disobeying the lawful order of the Governor contrary to rule 51 paragraph 22 of the Prison Rules.

4. On 22nd March 2001 the claimant was transferred to HMP Rye Hill. At that prison there is a telephone "PIN" system which allows prisoners to make telephone calls only to an approved list of telephone numbers. Accordingly, it is not possible for the claimant directly to speak to any journalists. The disciplinary proceedings have not been pursued. However, the claimant asked the Director of HMP Rye Hill to confirm that he would be able to make telephone calls to the media on matters of legitimate public interest relating to prisons or prisoners. He submitted that he was legitimately concerned about such matters both personally and in his capacity as General Secretary of the Association. That request was made by the claimant's solicitors to the Director of HMP Rye Hill with a copy to the Secretary of State. The terms of the request

were that contact with the media should be permitted only if certain conditions were met. These were set out in the letter of 15th May in the following terms:

> **"**We propose that in future should Mr Hirst wish to take part in such an interview he will make a request to the Governor providing details of the journalist, radio station and subject matter of the programme. The journalist will also contact the Governor, providing the Governor with an opportunity to establish the journalist's credentials and the ambit of the interview. A pre-recorded interview would then take place at an agreed time thus allowing the prison authorities to listen in and raise concerns prior to broadcast. This will provide the prison authorities with similar opportunities to scrutinise the content of communications with the media as are available when prisoners communicate with the media by post. Mr Hirst would not seek in any telephone interview to include any matter which could not be included in a written communication (we refer you to Standing Order 5 para.34).
>
> We would point out that rights enshrined in the European Convention on Human Rights are intended to be practical and effective. In order for our client to be able to exercise his right to freedom of expression by participating in a radio programme on prison issues, it would be necessary to ensure that any request by him to do so would be dealt with promptly. Broadcasters, who often report upon issues arising at very short notice, operate on strict deadlines and timetables. It is essential, if our client's right is to be effective, that applications by him to the Governor would ordinarily be dealt with on the same day they are made, as is the practice generally in relation to applications to the Governor on any issue".

5. The letter pointed out that the interviews which the claimant had given in the past had in fact been pre-recorded and that the governor had had the opportunity to make any objections to the contents. The letter continued:

> "We believe that the arrangements outlined above would be practical and workable. We would be happy to canvass any reasonable suggestions for their improvement. There is no reason to believe that interview requests would be made on a very frequent basis or that the proposed arrangements would otherwise result in an unduly heavy administrative burden for prison staff. Mr Hirst's position is unusual, in that he has contacts with the media and a role as spokesman through the Association of Prisoners. There will be few other inmates in a similar position, whose views would be sought by reputable journalists. How the arrangements work in practice can be kept under close review."

6. A response from the Treasury Solicitor dated 25th May 2001 rejected the application. It was pointed out that the claimant could exercise his rights by expressing his views in writing, and indicated that in "wholly exceptional circumstances" both live and pre-recorded conversations with the media might

be permitted, but that this request did not fall into that category. In view of this response, the Director of the prison also refused to authorise the telephone interviews by letter dated 1st June 2001.

7. Following further submissions from the claimant's solicitors, the Treasury Solicitor confirmed the original decision in a letter dated 25th June 2001. He considered that no exceptional circumstances had been demonstrated and commented as follows on some of the points made by the claimant's solicitors:

> "The Secretary of State appreciates that broadcasting has a short turn-around period and that your client is anxious to be able still to make a contribution. It is the view of my client that corresponding in writing can enable your client to meet the timetable.
> The time which would necessarily be taken for someone to scrutinise any tapes, make any necessary alterations and for a final version to be agreed would in fact be no shorter than for your client to write down his views and send them for inclusion."

8. The specific challenge was initially against the refusals both by the Secretary of State and the prison governor, as set out in those three letters. However, since the proceedings were commenced the claimant has again been transferred to a different prison and consequently no relief is now sought against the Director at Rye Hill. In any event, the claimant accepts that the refusal by the governor was in accordance with the established policy. What is in issue here, therefore, is the policy of the Secretary of State for the Home Department in connection with the rights of prisoners to make telephone calls to the media.

The relevant legislative provision

9. I set out the relevant provisions relating to communication with the media. Although the case itself concerns telephone communication only, each party has, in different ways, sought to rely upon the rules relating to prison visits and written correspondence. Accordingly it is necessary briefly to set out the relevant regulations relating to those fields also.

10. The starting point for an analysis of the rules is section 47 of the Prison Act 1952 (as amended). Subsection 1 is as follows:

> "The Secretary of State may make rules for the regulation and management of prisons…..and for the classification, treatment, employment, discipline and control of persons required to be detained therein"

That power is exercisable by statutory instrument: section 52. The rules relating to telephone calls, correspondence and visits are contained within various regulations, Prison Standing Orders and Prison Service Orders.

Telephone calls.

11. Telephone calls are regulated by Prison Service Order 4400 chapter 4. Prisoners are given access to telephones although there may be certain limitations on when they can make calls, depending on demand. There are certain rules which the prisoners must respect in their telephone communications. For example they are not permitted to communicate matters which they would not be allowed to communicate by letter. And there are special rules which, for some prisoners, restrict their contact with certain people such as minors and victims.

12. There is no routine monitoring of telephone calls save for certain categories of prisoner, such as those who pose a threat to children or who are convicted of certain sexual offences. Furthermore, there may be circumstances where as a result of information obtained the prison authorities routinely monitor certain other prisoners. But these are the exception. There is, however, a system in place of random monitoring. The approach to random listening is set out in a document entitled "Prison Service Instruction" which contains mandatory instructions to prison staff. Paragraph 36.77 is as follows:

> "Telephone calls by prisoners not subject to routine listening other than calls to their Legal Advisors or the Samaritans may be selected for listening on a random basis provided the Governor is satisfied it is necessary and proportionate in the interests set out in Prison Rule 35(A)(4)…. The percentage to be listened to must be no higher than is at the time thought necessary in these interests. A typical percentage will be no higher than five percent but the proportion may be increased temporarily if this is necessary: for example where there is evidence of widespread abuse of the telephone privilege for the illicit purposes set out in 36.46 above, leading to a serious threat to the good order of the prison"

13. Paragraph 6.10 of Prison Service Order 4400 sets out the current rules relating to telephone communications with the media. It is as follows:

> "Prisoners must not make calls to the media if it is intended, or likely, that the call will be used for publication or broadcast; they may make a written application to do so, but permission will only be granted in exceptional circumstances. Prisoners should normally communicate with the media by written correspondence, subject to the provisions of SO 5B, paragraph 34(9). Before an interview by phone can be allowed, the Governor must be satisfied that the call would be for a legitimate purpose, for example bringing to light a miscarriage of justice, which could not be satisfied in a written communication or a visit. The Governor must be entitled to consider the reason why other forms of

communication are not adequate before reaching his decision on whether a telephone interview with a prisoner can take place."

This particular version of the rule came into effect on the 5 March 2001. It will be seen that there are essentially two conditions which need to be satisfied before the discretion will be exercised in the applicant's favour. First, the phone interview must be for a legitimate purpose; the only example actually given is to enable the prisoner to allege a miscarriage of justice, although the rule does not in terms limit the exercise of the discretion to that situation. Second, the Governor must be satisfied that other forms of communication will not be adequate. Telephone communication is seen as a method of last resort. The claimant objects that the effect of the rule in practice is far too restrictive and causes the breach of his Article 10 rights.

14. The exception which allows access to media interviews by telephone when a miscarriage of justice is alleged was introduced to comply with the judgment of the House of Lords in *R v Home Secretary ex parte Simms* [2000] 2AC 115, to which I refer below. The earlier rule predated that case and made no reference to this exception at all. It simply noted that the right would be granted only in "wholly exceptional circumstances" whereas the current version permits this in "exceptional circumstances". It appears that the Secretary of State may have had the repealed version in mind when refusing the claimant's request because the letter of the 25 May refers to the need for "wholly exceptional circumstances". However, it is common ground that nothing turns on this; the refusal would be maintained under the existing rule. This is because the mere desire to comment on a matter of interest or concern to prisoners is not seen as a legitimate purpose within the meaning of the rule; and in any event the authorities consider that the objective can be achieved by written correspondence. In practice it seems that it is unlikely that permission will be granted unless either the prisoner is illiterate and cannot communicate with the journalist in writing, or he is seeking to establish a miscarriage of justice.

Correspondence

15. This is regulated by Prison Standing Order 5B. As with telephone calls, there is no routine monitoring save in relation to certain categories of prisoner, including Category A prisoners. Again there is random reading of letters, a typical percentage of those read being 5 percent.

16. There are quite detailed provisions setting out matters which a prisoner is not entitled to include in any correspondence. These include material which would obviously be forbidden such as pornographic or other offensive material; escape plans; threatening words; or material which constitutes the carrying on of a business.

17. Standing Order 5B rule 34(9) deals with material intended for publication or use by radio or television (or which, if sent, would be likely to be published or broadcast). Such material cannot be communicated by letter in certain defined

circumstances. These include if it is in return for payment (unless the inmate is unconvicted); if it refers to individual inmates or members of staff so as to identify them; or "if it is about the inmate's own crime or past offences or those of others, except where it consists of serious representations about a conviction or sentence or forms part of serious comment about crime, processes of justice or the penal system."

18. I pause here to note that the effect of this provision is that the material which the claimant would wish to be able to communicate by telephone can be sent to the media by correspondence. Serious comment about matters relating to prisoners would plainly fall within the permissible category. Furthermore, if the claimant or any other prisoner were minded to seek to send information by letter in breach of the restrictions on correspondence, then he or she could do so knowing that typically there would only be a five percent chance that the material would be intercepted.

Visits

19. The Prison Standing Order limits the number of visitors a prisoner may have and also the people who may visit. There are different rules relating to close relatives, minors, legal advisors and others. So far as visits by journalists in their professional capacity are concerned, the rules state in general that they will not be allowed but the Governor has discretion to permit such visits. Following the case of *R v Home Secretary ex parte Simms* the prisoner will in certain circumstances have the right to have personal visits from journalists where the purpose is to enable the prisoner to show that he has been wrongly imprisoned as a result of a miscarriage of justice.

The significance of oral communication

20. Before considering the legal submissions, it is necessary to identify why the claimant submits that it is sometimes important for him to be able to communicate orally with the media by telephone rather than simply communicating in writing. Essentially the submission is that without direct two way contact between the prisoner and the media, serving prisoners will frequently be denied the right to participate in discussion about matters of legitimate concern to prisoners at all.

21. The court has received written statements from journalists representing a variety of respected media organisations. The journalists are Matthew Born of the Daily Telegraph; Jonathan Dimbleby, the well know journalist and broadcaster; Nicholas Wheeler, an editor of ITN Radio, who runs London Broadcasting Company, a radio station providing predominantly news and current affairs; Simon Israel of Channel 4 News; and Vikram Dodd of the Guardian. Between them they make a number of interrelated points about the reasons why direct telephone communication is desirable. News is perishable, and news stories have to be put together within a very short space of time. Concern over certain aspects of prison conditions, for example, will often arise from some specific

event. The journalist must catch the tide or the impact of the story will be lost. (As Ms Rogers points out, the courts have recognised this fact: see for example the comments of Lord Nicholls in *Reynolds v Times Newspapers* [2001] 2 AC 127 at 205 and, in a different context, of Munby J. in *Kelly v BBC* [2001] Fam 59, 90. Indeed, it is in part this fact which causes the courts to be reluctant to impose prior restraints on the press: see *The Guardian v United Kingdom* (1991) EHRR153, 191.) It will frequently be too late for information to be obtained by written communication; the prisoner has to be contacted and there has to be time for the reply. Furthermore, it is important that a journalist be able to check the accuracy of information provided or perhaps to have some further explanation or clarification, and this is typically done by telephone, or occasionally by e-mail or face to face interviews. It is relevant to note that this is said to be important not merely where the medium is broadcasting, but also where it is print. Accordingly, even where information is received in writing from a prisoner, a responsible broadcaster or journalist would need to check very carefully any contentious matter that is raised before being willing to use it in any programme or article, and that would take time. In practice, unless there could be direct communication by telephone, it would be likely to be too late for the material to be included in the programme or the article concerned. Moreover, Simon Israel stated that he would be more likely to cover a particular story if a person were available for interview; simply reading out the contents of a letter does not make for a gripping programme.

22. The effect of the current policy, to quote the words of Jonathan Dimbleby, is that:

> "Prisoners who send letters on controversial issues relating to their circumstances or relevant public policies would therefore be excluded from the bulk of news and current affairs coverage on television and radio due to lack of ready access – until the allegations/comments could be thoroughly assessed."

Given the short time frame which is often available, this observation does not sit happily with that of the Secretary of State in the letter of the 25 June that written correspondence still enables a prisoner to make a contribution to debates of this kind.

The legal submissions

23. The starting point is article 10 of The European Convention. So far as is material, this is as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> 2. The exercise of these freedoms, since it carries with it duties and

> responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

24. As the courts have frequently recognised, freedom of expression is a particularly significant right. The point was put eloquently and succinctly by Lord Steyn in *R v Home Secretary ex parte Simms* [2000] 2AC 115 at 126:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objects. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States* (1919) 250 U.S. 616, 630, per Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power of public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law*, 3rd ed (1966), pp. 1078-1086. It is this last interest which is engaged in the present case. The applicants argue that in their cases the criminal justice system has failed, and that they have been wrongly convicted. They seek with the assistance of journalists, who have the resources to do the necessary investigations, to make public the wrongs which they allegedly suffered".

25. Ms Rogers submits that prisoners like everyone else are entitled to the right to exercise their freedom of speech pursuant to Article 10. The only justified restrictions are those which are in accordance with the terms of Article 10.2. However, any restriction is only in accordance with 10.2 if its purpose is to achieve one of the legitimate aims set out in Article 10.2 and if the restriction is proportional to that aim i.e. the restriction must be no more than is necessary to achieve the objectives identified in Article 10(2).

26. Although Ms Rogers concedes that the restrictions imposed by the Secretary of State are designed to achieve legitimate aims as set out in Article 10.2, she contends they go further than is necessary to achieve those aims. In particular, she says that the qualifications to the exercise of the right, accepted and suggested by the claimant, provide a sufficient protection for those objectives,

and no further limitations on the exercise of the right are necessary or justified.

27. Ms. Rogers also submits that the need for, and the extent of, any restriction must be convincingly justified by the Secretary of State on the basis of evidence: mere assertion is insufficient. In this case she submits that neither condition is satisfied. The policy wrongly puts the onus on the claimant to establish an exceptional case before being allowed to communicate with journalists on matters of legitimate public interest. Moreover, the justification for the policy is based on assertion and lacks any clear evidential justification.

28. Ms Grey, counsel for the Secretary of State, concedes the importance of the principle of freedom of speech; and she does not dispute in this case that Article 10 is engaged. The Secretary of State readily accepts that the policy adopted by him, and implemented by the prison authorities, is a restriction on the exercise of freedom of speech and contravenes Article 10.1. He submits, however, that it is a permissible restriction in accordance with Article 10.2, particularly bearing in mind the status of the claimant as a prisoner. There is no breach of the principle that the onus is on the Secretary of State to justify the interference; the prisoner only has to bring himself within an exception because it is in general justifiable to restrict that freedom. That restriction flows from the prisoner's status as a prisoner, and accordingly it is justifiable to permit such communication only in exceptional cases. Ms Grey also contends that the defendant's policy has been approved by both the Court of Appeal and the European Commission of Human Rights in the case of *Bamber v UK* (Application No 33742/96), a case which I consider more fully below.

The application of Article 10(2)

29. The real issue in this case is whether Article 10.2 justifies the interference with the claimant's right of access to the media by telephone. It is now well established that in order to show that any interference with the right is justifiable, it is necessary for the party seeking to justify the interference to show that the doctrine of proportionality has been complied with. *In R (Daly) v Home Secretary* [2002] UKHL26; [2001]2WLR1622, Lord Steyn described that concept in the following terms:

> "The contours of the proportionality principle are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, fisheries, Lands and Housing* [1999]1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p. 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive, the court should ask itself:
> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental constitutional right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

30. Lord Steyn then described how the concept of proportionality requires a more intensive review than the traditional common law approach would permit. He also emphasised that the intensity of review depends on the context in hand: as he put it: "in law, context is everything."(para. 28).

31. It is therefore important to bear in mind that the concept of proportionality has to be applied in this case against a backcloth of the prison environment. The significance of this was recognised by the European Court of Human Rights itself in the case of *Golder v United Kingdom* [1975] 1 EHRR 524. That was a case where the prison authorities refused to permit a prisoner to write to his solicitor with a view to instituting legal proceedings against a prison officer. The Court unanimously held that this constituted an interference with his Article 8 rights, which confer, inter alia, a right of respect for his correspondence. It rejected an argument that Article 8 was inapplicable to those sentenced to imprisonment; and it also rejected the Government's alternative submission that the conditions of Article 8.2 (which are almost identical to Article 10.2) were satisfied. In that context the court said this:

> "The court accepts, moreover, that the "necessity" for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. "The prevention of disorder or crime" for example may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 does not fail to impinge on the application of Article 8."

Plainly that approach to the application of the proportionality principle applies just as much to Article 10 rights as it does to the Article 8 rights under consideration in *Golder*.

Two potential justifications.

32. Moreover, it seems to me that there are two quite distinct ways in which Article 10.2 comes into play, depending upon the basis of the alleged justification for the restriction. In particular, in my view it is highly relevant to determine whether the restriction is an inherent part of the sentence of imprisonment itself, or whether it is a restriction which is simply the result of the fact that rules have to be made for the good order and discipline of the prisons, together with other related objectives, which may fall within the scope of Article 10.2. I consider that the application of the proportionality principle will differ depending upon which alleged justification is relied upon. It is necessary to consider this issue because the defendant submits that the restriction on the right to communicate by telephone is justified for both reasons: it is part and parcel of the sentence, and it is a restriction which is necessary to secure the good order and discipline of the prisons. The claimant accepts that some restriction may legitimately be justified on the latter basis, but denies that the restriction is part of the sentence of

imprisonment itself. Before considering whether that is correct, I shall consider why I believe that the approach to proportionality will vary depending upon which basis for justification is chosen.

The implications for proportionality of the particular justification for interference.

33. In general, as the analysis of Lord Clyde in the *de Freitas* case makes clear, the onus is on the party seeking to interfere with an Article 10 right to show that the interference is designed to meet a legitimate objective recognised in Article 10.2; that the means adopted are rationally connected to the objective; and that the Convention right is not impaired more than is necessary to achieve the objective. However, where the right is removed as the deliberate and considered response to the need to provide an effective penal policy, there is in truth no room for the court to apply the principle of minimum response. Once it is determined that the appropriate sentence requires the denial of the right to exercise freedom of speech in certain contexts, then there is no other step which can secure that particular objective. If that element of the sentence were not imposed, the sanction would be a different and lesser one. In these circumstances the issue is not whether restricting freedom of speech as part of the penalty is the minimum required to achieve the particular objective sought; that is inherent in what is considered to be the necessary objective. Rather it is whether even if it is the minimum compatible with achieving the desired and legitimate objective, it nevertheless impacts disproportionately on the Convention rights. This is in my view the tenor of the following passage from the judgment of Lord Phillips M. R. in the case of *R (Mellor) v Secretary of State for the Home Department* [2001] 3 WLR 533 (to which I return below):

> "The consequences that the punishment of imprisonment has on the exercise of human rights are justifiable provided that they are not disproportionate to the aim of maintaining a penal system designed both to punish and to deter. When the consequences are disproportionate, special arrangements may be called for to mitigate the normal effect of the deprivation of liberty."(para 58).

34. Other cases adopt a similar approach. In *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139 the claimant was ordered to be deported following his conviction for serious drugs offences. He challenged that decision on the grounds that it would interfere with his right to family life under Article 8, since his wife and various children by two marriages, some of whom had only ever lived in the United Kingdom, would not readily be able to settle in his home country of Guyana or alternatively would have to remain in the United Kingdom and thereby be separated from him. The Secretary of State accepted that the claimant's rights under Article 8 would be infringed, but he submitted that it was justifiable to prevent disorder and crime and in the operation of a firm but fair immigration policy. The Court of Appeal accepted this submission. Dyson LJ, with whose judgment Butler Sloss LJ. and Thorpe LJ agreed, summarised the relevant questions which have to be posed in a case

of this kind as follows (paras. 19-20):

> "I accept the submission of Mr. Howell that, in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?……
> At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"

35. The learned judge concluded that the facts of the case engaged this second question, for the following reasons:

> "It is plain that in general terms the objective of preventing crime and disorder is sufficiently important to justify limiting a fundamental right, and that deportation of those convicted of serious criminal offences (especially drug trafficking offences) is a measure that is rationally connected to that objective. The issue in such a case is not whether there is a less restrictive alternative to deportation as a means to achieve the objective. The sole question is whether deportation has a disproportionate effect on Mr Samaroo's rights under Article 8."

36. I take the court to be accepting here that deportation was the only way in which the authorities could achieve what they considered to be the appropriate sanction. That is not the end of the analysis, but it means that the court cannot look to see if anything short of deportation will do. The decision to deport was a deliberate one, and this was the minimum interference thought to be appropriate. There was no compromise which would permit partial deportation. Accordingly, the only issue for the court was whether the interference was disproportionate.

37. The judge also emphasised that in answering that question it is not for the court to substitute its view for the government as to where the merits lie and how the balance should be struck:

> "…the function of the court in such a case as this is to decide whether the Secretary of State has struck the balance fairly between the conflicting interests of Mr. Samaroo's right in respect for his family life on the one hand and the prevention of crime and disorder on the other. In reaching its decision, the court must recognise and allow to the Secretary of State a discretionary area of judgment."

38. Similarly in *R (Pearson) v Secretary of State for the Home Department* [2001] EWCH Admin 239, the Divisional Court held that the removal from prisoners of

the right to vote did not infringe Article 3 of the First Protocol to the European Convention, which ensures that states will hold free elections which will ensure "the free expression of the opinion of the people" in the choice of legislature. Kennedy LJ again recognised that the courts must in a decision of this kind recognise that some deference should properly be paid to the legislature:

> "As Parliament has the responsibility for deciding what shall be the consequences of conviction by laying down the powers and duties of a sentencing tribunal or other body it necessarily follows that lines have to be drawn, and that on a subsequent examination a case can be made in favour of the line being drawn somewhere else, but in deference to the legislature, courts should not easily be persuaded to condemn what has been done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime."(para. 20).

39. It seems from these authorities that where the state has deliberately chosen to deprive prisoners of their rights as part of their punishment, the courts will not readily interfere with that decision, particularly where it reflects the democratic will, but even then they may still do so where the denial of the right is disproportionate to the penal objective. Whether this is so will depend largely upon the significance of the particular right interfered with.

40. By contrast, for those aspects of freedom of speech which the prisoner is entitled to retain notwithstanding the sentence, it seems to me that in practice the proportionality principle applies in a different way, even although the theoretical framework remains the same. There may still be legitimate reasons for interfering with that freedom, in the sense that they fall within the terms of Article 10.2. But where the law permits such interference to occur, the government must show that the means used to impair the right go no further than is necessary to accomplish those legitimate objectives. The aim of the relevant policy here is not deliberately to deprive the prisoner of his Convention right; it is to recognise that right and only to interfere with it so far as is necessary to achieve a specific objective or objectives. The courts can with more confidence exercise a tighter review of the restriction to ensure that it does not unnecessarily interfere with Convention rights. There is not simply a general striking of a balance between individual rights and the public interest with deference being shown to the views of the state authorities; the starting point is the Convention right, which it is accepted in principle remains in play. The authority must demonstrate a proper basis for interfering with it, and show that nothing short of the particular interference will achieve the avowed objective.

41. The decision of the House of Lords in the *Daly* case is itself an example of this. In that case the applicant was a prisoner who complained about a policy which entitled the prison authorities to examine a prisoner's legally privileged correspondence in his absence. Their Lordships held that whilst this may sometimes be legitimate, such as where a prisoner had in the past abused the

protection given to such correspondence, nevertheless a blanket rule permitting such examination was unlawful. It infringed the claimant's fundamental right to be able to communicate freely with his legal representative. Lord Bingham held that at common law any restriction had to be a "necessary and proper response" to the need to maintain security, order and discipline in prisons. Convention considerations would, as Lord Bingham pointed out, have led to the same result in that case.

Is the limitation on telephone contact with the media a part of the sentence of imprisonment itself?

42. Plainly, some restriction on freedom of speech is an inevitable feature of incarceration. To take an obvious example, the prisoner cannot attend any public meetings or debates outside prison, because that is a necessary consequence of being locked up. Loss of liberty is bound to impinge on the ability to exercise many of the rights which fall within the terms of the European Convention, including the rights under Articles 8,9, 11 and 12 as well as the Article 10 right to freedom of speech.

43. But is freedom of speech restricted in ways going beyond this? In answering that question it is important to recognise that freedom is speech is an amorphous concept. It can be exercised in a whole variety of circumstances, and sometimes it will take on a particular importance because it is required to safeguard some other distinct and separate fundamental common law right over and above the mere right to freedom to speak freely. Indeed, quite independently of any consideration of human rights, the common law will only assume that prisoners are to be denied such fundamental rights if they are taken away either expressly or by necessary implication. The general rule making power found in section 47 of the Prison Act does not permit the removal of such rights: see *Raymond v Honey* [1983] 1 AC 1. In that case a prison governor stopped a communication between a prisoner and his solicitor and, when the prisoner applied to the court seeking leave to commit the governor for contempt of court, he refused to permit that application to be forwarded to the court either. The governor claimed that he had acted lawfully and pursuant to the prison rules. The House of Lords held that in seeking to prevent or impede access to the courts the governor was committing a contempt of court. Section 47 did not permit the interference with so fundamental a right; accordingly, insofar as the rules sought to permit such interference, they were unlawful and could provide no authority for the governor's action.

44. Similarly, *in R v Secretary of State for the Home Department ex parte Leech* [1994]Q.B 198 the Court of Appeal held that section 47 did not permit the introduction of a rule which restricted the free flow of information between a prisoner and his solicitors. Any such restriction was ultra vires the lawmaking power and accordingly the prison authorities could not justify any such interference by relying upon the rules.

45. These cases demonstrate how, even before the passing of the Human Rights Act, the courts were able to protect freedom of speech where it was directed at securing an important right of the citizen. Absent some very clear indication to the contrary, it was not to be inferred that it was lost as part of the sentence of imprisonment itself. The common law would require very clear authority to take away such a right.

46. The advent of the Human Rights Act 1998 has of course increased the scope for arguing that the restrictions are unlawful. Any interference established by the rules must not only be a lawful exercise of the section 47 power, but insofar as the rule itself, or any policy made or adopted pursuant to the rule, infringes freedom of speech, it will only be a proper exercise of power insofar as the authorities can bring it within Article 10(2).

47. Accordingly, although some restrictions on freedom of speech are an inherent part of the sentence itself, others will not fall into that category. Some indication of the dividing line which separates what has and what has not been taken away as part and parcel of the sentence itself is found in the *Simms* case, to which I have already made reference. The House of Lords had to determine whether a prisoner was entitled to have visits from members of the media such as investigative journalists, for the purpose of setting in train a review of his conviction. The prison authorities, following a policy of the Secretary of State, would only permit such visits from journalists if they were prepared to sign an undertaking not to use the information obtained on visits for professional purposes. The alleged justification of the policy was that to allow any interviews would undermine good order and discipline in the prisons. The claimant alleged that his right to freedom of speech entitled him to have access to the journalists.

48. The House of Lords upheld his claim, but on the basis that the particular exercise of free speech sought, namely in order to challenge the conviction itself, rendered the restriction disproportionate. Lord Steyn emphasised the different functions which the protection of free speech serves: (p.127):

> " The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. *Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons*. But the free speech at stake in the present case is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which

free speech might fulfil." (Italics added).

Their Lordships in that case rejected the view which had been expressed by Kennedy LJ in the Court of Appeal that the denial of the right constituted an element of the punishment of imprisonment.

49. However, Lord Steyn clearly considered that some forms of interference with freedom of speech, such as entering political or economic debate, did follow from the sentence of imprisonment. It is not altogether clear from the italicised words, however, whether Lord Steyn was taking the view that such restrictions were the automatic result of the sentence of imprisonment alone, an element of the sentence itself, or whether it occurred because rules are inevitably required to limit that right in the interests of the proper discipline and good order of the prison population. Ms. Rogers submitted that it must have been the latter; and contended that there is no reason why this restriction should extend to participation in ways compatible with imprisonment, such as debating issues over the telephone. Such a liberty is not expressly excluded, nor necessarily implicit in the prison sentence itself, although she accepted that some restrictions would be needed to preserve good order and discipline since this would be capable of falling in Article 10.2.

50. That is in my view a respectable reading of that passage. However, as Ms. Grey pointed out, the construction of those words is not free from authority. The significance of Lord Steyn's observations (and of certain other observations from Lord Hobhouse and Lord Millett in the *Simms* case) were considered by Lord Phillips M.R. in the *Mellor* case. In that case the applicant was convicted of murder and sentenced to life imprisonment. With his wife's support, he applied for permission for access to artificial insemination facilities to start a family. The policy within the prisons is that such a facility will be provided only in exceptional circumstances, and this case was considered not to justify an exception being made. The applicant contended that the decision infringed his rights under Article 8 of the European Convention, which provides for the right to respect for family life, and also his rights under Article 12, which protects the right to marry and have a family according to national laws. The applicant contended that his rights in prison were restricted only insofar as they had been expressly removed or their loss was an inevitable consequence of his detention in custody, relying on both *Raymond v Honey* [1983]1 AC 1 and *Simms* [2000] 2 AC 115. The applicant submitted that the exercise of conjugal rights was not expressly forbidden and could not be said to be denied as an inevitable consequence of detention. He alleged that the reason why the exercise of conjugal rights was denied was purely pragmatic; it was not permitted solely because it would be incompatible with good order and discipline in the prison to permit it. However, the same threat to good order did not arise where artificial insemination was concerned and hence it was not lawful for the Secretary of State to adopt the policy that he did. He relied specifically on the *Simms* case which, he submitted, was based on the premise that the restriction on freedom of speech was only imposed in order to secure the good order and management of

the prisons.

51. The Court of Appeal rejected this view. It held that the denial of conjugal rights was part of the deprivation of liberty which imprisonment was designed to achieve, (a conclusion which perhaps suggests that the concept of "necessary implication" should not be read too rigorously). Lord Phillips M.R., with whose judgment Peter Gibson and Latham L.JJ agreed, accepted that some passages in their Lordships' speeches in *Simms*, including the passage I have set out above from the speech of Lord Steyn, do indeed suggest that freedom of speech in prisons can be restricted only insofar as they were necessary and proportionate in the interest of maintaining good order in the prisons. However, he did not think that the speeches should be so construed when read in context (para 52):

> "On considering the speeches as a whole, however, I have concluded that they recognised that a degree of restriction of the right of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of a prison, but as part of the penal objective of deprivation of liberty. How far freedom of expression could justifiably be restricted was a question of proportionality."

52. Can the rules restricting access to the telephone for dealing with the media be considered part of the sentence of imprisonment? Ms Grey suggested that they can and naturally fall within the description of "debate on the economy or on political issues" which Lord Steyn in *Simms* said would be denied to a prisoner as part of his sentence. I would accept that if they can, then there are strong grounds for concluding that the decision by the authorities to take that step can be justified and would not be a disproportionate to the Article 10 right, given the scope of the discretion afforded to the administrators in making that decision. However, I do not accept the premise that they can. I do not consider that access to the media for the purpose of making known concerns about matters affecting the rights or interests of prisoners as a group falls into the general category of entering the debate on economic or political issues. Nor do I think that there is any other basis on which it can be said to constitute part of the sentence of imprisonment itself. Accordingly, I have reached the view that it is not part and parcel of the sentence of imprisonment itself.

53. I have formed this view for three reasons in particular which I can state briefly. First, it seems to me that a democratic society will not seek wholly to prevent prisoners from expressing their own views directly to the media about grievances or concerns they have about issues affecting them. It may be the only way that such complaints come to light. Furthermore, there is a public interest in ensuring that the voice of prisoners is heard about matters directly affecting them; the public will be better informed about the consequences of government policies if they are able to hear from those directly affected.

54. Second, as the prison rules make clear, it is perfectly appropriate for prisoners to write to the media about these matters. There could be a flurry of

correspondence in which the prisoner is able to spell out in detail each and every grievance that he has. Of course, this does not mean that there may not be very good reasons for treating correspondence and telephone calls differently, because the practical problems of controlling the two forms of media access are different. But in my view it is difficult to see why one form of communication but not the other would be denied to the prisoner because it is deemed to be part and parcel of the sentence of imprisonment itself.

55. Third, although Ms. Grey has sought to rely upon the argument that the restriction is part of the sentence of imprisonment, that is not the basis on which the policy has been supported by the officials concerned, nor was it the basis on which the government successfully justified the predecessor of the rule in the *Bamber* case, which I consider below.

56. It follows, therefore, that in my view if the restriction is to be justified under Article 10(2) it must be on the basis that there are other considerations which make it justifiable to refuse the right for prisoners to communicate information or opinion in this way, even where such communication is subject to the conditions proposed by the claimant.

The justification for the policy.

57. The defendant has justified the current policy on a number of grounds. They are set out in two witness statements from Nicolas Sanderson who is the Head of the Prisoner Administration Group of HM Prison Service; and one each from Dr. Alison Rose-Quirie, who is the Director of HMP Rye Hill, and Gary Sword, who is Head of Operations at that prison. The latter two statements focus on the administrative difficulties involved in acceding to the claimant's request. The defendant submits that taken cumulatively these grounds provide an ample justification for the restriction imposed.

58. I shall then turn to the various matters on which the defendant relies. Although the grounds now relied upon are more extensive than the actual reasons given in correspondence for refusing the request in this case, they are all put forward as justifications for the policy adopted and should be considered as such. (It has not been suggested that it would be ultra vires the rule making power to adopt rules seeking to achieve these various objectives, and I have assumed that section 47 would in principle justify such rules).

59. First, the defendant relies upon the problem of victim distress and public confidence. The defendant asserts that if the prisoner's voice is heard, say, on the radio, then this will cause distress to the victims of the crime which in turn is likely to undermine public confidence in the criminal justice system. They submit that this would be the case even in circumstances where the prisoner was not discussing the specific crime for which he had been imprisoned, but rather

matters of general concern to prisoners. Ms Grey submits that the public would not expect to see a prisoner engaging directly in a debate on television and that there is really no distinction between that and being allowed to participate in a debate of discussion on the radio. This restriction is said to be required to prevent damage to the health or morals of others, and to protect the rights and reputations of third party victims.

60. Second, the defendant relies heavily on the contention that it would not be possible to exercise effective control over communications directly to the media by telephone. There are a number of inter-related aspects to this argument: it is not possible to vet oral communication as one can written correspondence, and even although the claimant accepts that nothing should be said orally that could not be written, it is submitted that it may be difficult for the prisoner on the spur of the moment in the course of an interview to make sure that nothing is said that will infringe the rules as to contents. Moreover, once the words have been spoken, they are within the control of the journalist but outwith that of the authorities. The bird has then flown, and it is not within the power of the prison to tempt it back. In this context, the defendant submits that it is simply not adequate to say that being given in advance the journalist's credentials and the ambit of the interview is an adequate procedural safeguard. There are unfortunately journalists who abuse the privilege that is conferred upon them, and there is no way that the prison authorities can be sure that they will not act contrary to the agreed basis on which the interview was allowed in the first place. The defendant submits that this inability effectively to monitor and regulate the interview may damage a number of the objectives set out in Article 10.2, including the prevention of crime and disorder and the disclosure of information given in confidence.

61. Third, the restriction is needed because of the significant practical problems that will be involved by relaxing the rule. As the claimant admits, if his proposals were to constitute the policy, it would be necessary for the prison governor to made a decision speedily as to whether or not in any particular case the telephone communication should be permitted. It would then be necessary to set up the facilities to monitor the call and there would be a need for an assessment as to whether there has been anything untoward said to which the prison authorities raise objection. It is important that there should be adequate time for the authorities properly to vet the conversation and the timescale involved is likely to be such that, in many cases at least, it would not be possible to give the requisite authorisation in time for the programme to include any reference to the prisoner's views. This in turn could create a sense of grievance in the mind of the prisoner who may on occasion feel that there has been a deliberate slowing down of the process. These may in turn lead to complaints about breaches of the right to freedom of expression. Moreover, scarce staff resources have to be directed to this area to the detriment of other prison activities, which will have a potentially disruptive effect on the prison.

62. Fourth, the discretionary nature of the policy may well lead to concerns by

prisoners who are refused the right to made use of these facilities that they are being treated unfairly or discriminated against in some way. This in turn could lead to potential disruption and disorder in the prisons.

63. Finally, the defendant points out that this is not a case where the effect of the policy is wholly to exclude contact with the media by the prisoners. That will still be possible by written communication and, indeed, by representations made by other groups who act on behalf of prisoners interests. (This of course was one of the reasons given for refusing the claimant's request.) There are various pressure groups which act on behalf of prisoners, as well as a source of ex prisoners who are readily available to appear on radio programmes or give interviews to journalists.

64. Accordingly, says the defendant, when one weighs the degree of the restriction against the potential difficulties that will be created by permitting even this more restricted form of communication claimed by the prisoner in this case, the prison authorities are fully entitled to exercise the discretion to exclude these communications.

65. Moreover, Ms Grey submits that it is perfectly legitimate to have a general rule forbidding the exercise of the right with exceptions, without infringing Article 10. This is because in most surmisable circumstances the restrictions will be permitted by Article 10.2 (particularly bearing in mind the prison context). However, it is recognised that there may exceptionally be cases where the authorities are satisfied that there is some feature about the prisoner's situation which takes him out of the general run of cases.

66. Ms Grey recognises that there is no direct factual evidence which demonstrates that this policy needs to be adopted in order to achieve the objectives sought. But she emphasises that it is simply not possible to obtain such evidence; she says that it is only because the stringent policy has been in place that the problems which the Secretary of State envisages will result from the claimant's suggested policy have not in fact occurred.

67. The Secretary of State submits, furthermore, that these principled objections are supported by clear authority in the case of *Bamber v United Kingdom* (Application. 33742/96). In that case the applicant participated in a phone in programme on Talk Radio by placing a telephone call from prison. He took issue with the suggestion from another contributor that a prisoner should always serve the whole of his sentence without remission. His contribution was picked up by a Member of Parliament who caused a Parliamentary question to be asked about prisoner's contact with the media. This led to the rule which only permitted such contact in wholly exceptional circumstances. The applicant later made a phone call to a journalist in order to discuss his conviction. This call was not, however, made for the purpose of immediate or subsequent transmission, but it may have formed the basis of a newspaper article. He was disciplined for this breach of the rules and sought to challenge the lawfulness of

the order. He was refused permission to take proceedings for judicial review, and his appeal was also dismissed. In that case the principal justifications advanced for the policy were the distress to victims and the problem of controlling telephone communications.

68. In the Court of Appeal (unrep. 15 February 1996), Rose LJ rejected an argument that no sensible distinction could be drawn between telephone calls and correspondence. He considered that the fact that correspondence could be monitored and controlled in advance, whereas telephone calls could not, was a highly material distinction. Although the Convention had not then been incorporated into English law, the Court specifically considered it and held that it was not arguable that it had been infringed.

69. An application was then made to the European Court of Human Rights but was rejected by the Commission as inadmissible. The Commission was not persuaded, however, that the distress to victims would of itself justify what was effectively a blanket ban:

> "The Commission does not consider that the distress which the victim or their families may experience necessarily justifies the scope of the restriction which goes so far as to prevent the applicant from making even serious representations to the media by telephone about conviction, and irrespective of whether the calls would be transmitted."

However, the Commission accepted the evidence of the prison authorities that it was not possible to exercise meaningful control. It also noted that the prisoner could contact the media in writing, and that his lawyers could contact them by telephone on his behalf. The defendant says that all these objections still run with the same force in this case.

The claimant's response.

70. The claimant submits that these considerations are simply insufficient to justify a policy which denies the right to contact by telephone in virtually all circumstances. He alleges in particular that they fail to give adequate weight to the very real limitations which the claimant has accepted should be part of any policy of this area; and furthermore he submits that the matters relied upon are simply asserted as fact and have no satisfactory evidential basis.

71. In relation to the claim that victims will be upset, the claimant says that this is unlikely to be the case in very many situations, although he recognises that there will be circumstances where victim sensitivity would indeed justify a refusal. For example, a prisoner may recently have committed some horrific crime which has attracted media attention and where it would both be potentially damaging to the victim and would outrage the public if that prisoner where entitled to be heard in the media. In such cases it will be necessary for time to heal the wounds. But this is far from being the case in all or even most crimes. Very

often the victim of a crime will never have known the criminal or heard his voice. Furthermore, the prisoner could participate in those circumstances, if necessary, without being specifically identified. In any event, there is no reason to suppose that the anxieties that would be experienced from hearing the voice directly would be significantly greater than if, say, a letter were read out from the particular criminal.

72. Similarly, in relation to the allegation that confidence in the administration of justice would be undermined, the claimant submits that this is mere assertion and is not supported by any evidence. Ms Rogers for the claimant contends that many people would consider it right that if there is a public debate about matters affecting prisoners, it would be wrong to deprive the serving prisoners of any voice in that debate. Moreover, the right to freedom of speech ought not to be restricted because of what would be, she submits, unreasonable and ill-considered opposition to the right of the prisoner to speak directly to the public about prison concerns.

73. The claimant also contends that the alleged lack of effective monitoring and control has been exaggerated. Ms Rogers submits that the proposed conditions will substantially meet the legitimate concerns of the authorities. The principal concern is with the inability to exercise control over the interview once it is given; the words cannot be recalled. However, the prisoner has given an undertaking not to communicate information which he is prevented from sending by letter ("the contents assurance"); and moreover the prison authorities will have the opportunity to vet the journalist involved as well as be informed of the ambit of the interview. Furthermore, no doubt undertakings could be obtained from the journalists themselves requiring them not to publish or broadcast any material which has been obtained in breach of the contents assurance. In the *Simms* case Lord Millett said that it would be perfectly proper for the prison authorities to require such an undertaking, although it would not be proper to expect to have a veto over what was finally published.(p. 145).

74. As to the administrative difficulties, the claimant makes the point that there is already extensive monitoring of telephone calls, some of it being carried out contemporaneously when the call is made. The point was made by Dr. Rose Quirie that in some prisons the authorities would not be able to hear both sides of the conversation between the prisoner and the journalist, but this can be overcome by the simplest of technology. Moreover, the claimant says that the defendant is assuming a much higher number of interviews than are at all likely. Past history does not suggest that there was extensive communication with the media before the current rules were introduced in 1995. In any event, if the numbers did become excessive, this would justify cutting back on cases where permission was given.

75. The claimant responds to the allegation that potential discrimination might create jealousy and disharmony by contending that this again overstates the likely response. The claimant accepts that if prisoners are treated differently in

relation to specific rights directly conferred upon them, such as the number of prison visits or opportunities to obtain privileges within the prison, this will create disharmony. But here, says the claimant, we are talking about a very small number of potential interviews which most prisoners plainly will not be involved in giving. These interviews will only take place if the journalists are interested in obtaining information from the prisoner, and there are going to be relatively fewer occasions when matters concerning prisoners are going to be of direct interest to the media or the public at large. The claimant submits that there will be very little, if any, jealousy about the fact that certain prisoners only will be likely to exercise these rights, particularly since they will be making representations on behalf of prisoners as a group and not simply in relation to their own individual case.

76. Finally, the claimant submits that the *Bamber* case must be construed against its own background. None of the controls suggested by the claimant in this case were proposed as a solution to the concerns of the prison, and the court simply accepted the claim of the authorities, on the evidence available to them, that no effective control over the communication could be exercised.

Conclusions on justification.

77. I recognise and accept that there are good reasons why the Home Office will want to limit direct telephone contact with the media. There are greater burdens imposed on the staff by such contact compared with communication by correspondence; and the risks of irresponsibility by the prisoner and/or the media cannot be wholly excluded. I would certainly not be willing to say that a prisoner should be entitled as a matter of course to have access to the media by telephone whenever the conditions proposed by the claimant are satisfied. It seems to me that the authorities would be justified in requiring that the prisoner should provide a reasonable explanation as to why written correspondence will not suffice in the circumstances. It would also be justified to ask the journalist the same question. To this extent I consider that the prison authorities are justified in making the right to contact the media by telephone one that can be exercised only exceptionally.

78. At the same time, in my judgment the reasons relied upon by the defendant do not justify what is effectively a blanket ban on media interviews in matters of this kind. I agree with the view of the European Court in *Bamber* that the concern about the distress of victims has been exaggerated, essentially for the reasons given by the claimant and which I have outlined in para 71 above. Similarly, I consider that the administrative problems involved in finding an officer to monitor and consider the calls are far less significant than has been suggested. There were no limits on contacting the media at all until 1995, and yet no-one suggests that there were major problems because of the regularity of such interviews. It seems to me that there is every expectation that such contacts will be infrequent; prisoners' rights are not the everyday concern of the media or the public, and journalists will not want to waste valuable time on

fruitless interviews.

79. The strongest justification for the current policy in my view is the concern that there will be insufficient opportunity to monitor and control what is ultimately published. These were the arguments which proved persuasive both before the Court of Appeal and the Commission in the *Bamber* case. The Secretary of State places significant weight on the potential for abuse both by the prisoner and the journalist. As to the former, if a prisoner deliberately wishes to communicate information which is contrary to the rules, that is already something that can be done by correspondence with a very high chance (about 95%) of not being caught prior to being sent. The breach will be discovered only if and when the article or broadcast reveals the fact that the rule has been broken. Indeed, that is equally true for the telephone contacts in those prisons where the PIN system is not in force. There is admittedly the risk of an unintended ill-considered remark which infringes the contents requirement. That would in my judgment justify preventing interviews being put out live. But any such remarks may well be outwith the ambit of the proposed article or broadcast and would be ignored by the journalist. Moreover, if the journalists have also agreed to abide by the assurance not to breach the contents rule, there should be little likelihood of this being a significant problem.

80. I do not consider it justifiable to base a policy of this kind on mistrust of the press. Of course, the prison authorities are wholly entitled to satisfy themselves of the credentials of the journalist involved; indeed, I would expect that this could be done centrally rather than being the task for each prison. But it ought to be assumed that if the press have agreed to abide by certain rules, they will keep to them. Journalists have their own professional reputations to consider, as well as their own professional standards, and they will appreciate that it is likely that any flagrant breach of the rules will result in their being refused access to interviews on future occasions. Moreover, I note that in the *Simms* case it was not suggested that the information about alleged miscarriages of justice should be denied to the media on the grounds that they could not be trusted to use the information obtained only for use within that field.

81. I accept Ms. Grey's submission that it is frequently quite unrealistic to require a government department to provide empirical evidence to support each of its policies whenever they interfere with human rights. A policy is often based on a careful assessment of the anticipated effects of alternative courses of action. In this case the policies are based on the experience and knowledge of the Home Office about the working of prisons and the cast of mind and attitude of prisoners. I accept that it would be absurd to require the government to adopt a policy which it considered to be wholly inappropriate and potentially damaging merely so that its predictions of disaster could be shown to be correct. It cannot be right to require the adoption of harmful policies simply to provide the empirical evidence needed to satisfy a court that the authority was right all along and that any interference with human rights was justified. But a reasoned judgment or assessment based on knowledge and experience is not the same as

mere assertion; and if there is experience from which evidence relevant to the adopted policy can be obtained, it seems to me to be relevant to ask whether it justifies the alleged interference. In this case, for example, there was a period until 1995 when it seems that no restrictions were imposed on media contacts by telephone and yet the potential difficulties now identified, such as frequent interviews and media abuse, do not appear to have occurred. Any policy ought in my view to have regard to this experience.

82. I accept that the *Bamber* case provides some support for the defendant's case, but I do not accept that it determines this application. It was not suggested in that case that the safeguards now proposed to protect the concerns of the prison authorities might be adopted. It seems to me highly relevant to ask whether they continue to justify the assertion that no effective monitoring and control is possible short of an almost complete ban.

83. In my judgment the proposed conditions go a considerable way to meeting the concern of the prison authorities in those relatively few cases when alternative means of communication will not suffice. The journalist will have indicated the scope of the interview; the call can be monitored and comments made; the journalist will have been vetted in advance; the proposed topic will have been identified; and the prisoner and the journalist could both be required to give the contents assurance. These are in my view substantial safeguards.

84. I recognise that there will inevitably be cases when there are genuine concerns about the content of the interview and it is not possible for the prison authorities to form a view about the interview for some time. This seems to me to be a potentially difficult area. Plainly the prison cannot be expected to give the prisoner's interest in media contact the priority that might be required in order to meet the journalist's deadline. However, whilst this may sometimes cause difficulties, there is no reason to suppose that concerns about the interview will arise as a matter of course. If they do, and they cannot be resolved in time, the rules may have to be framed to require the journalists to accept that the information should not be used until there has been a reasonable time to respond. However, it seems to me that this potential problem would be to some extent- and possibly in large part- be reduced if the journalists were willing to accept the contents assurance.

The status of the claimant

85. In my opinion the fact that the claimant is General Secretary of the Association of Prisoners does not give him any special privileges in connection with media contact. The Association has no special standing within the system, and other prisoners might seek to enhance their status in a similar way. Accordingly I accept the defendant's submission that the claimant should be treated no differently to other prisoners. However, it may be that his position is such that he is perceived by the media as being an appropriate spokesman, and may have more requests for interviews as a result. Accordingly, whilst I do not see why

his position should give him any favourable status, nevertheless he ought not to be prejudiced merely because (if it be the case) the media would like to interview him more frequently than other prisoners. Of course, if this were to occur with such regularity as to cause real difficulties for the prison concerned, or if it were to create ill-feeling from jealous fellow prisoners which genuinely threatened the good order and discipline of the prison, this would justify refusing the right to be interviewed. Plainly the situation would have to be kept under review.

The appropriate relief.

86. The claimant seeks an order quashing the refusal to permit him to speak to the media by telephone if the conditions he has suggested are satisfied. I am not willing to give such relief. Its effect would be to require the Secretary of State to adopt the policy proposed by the claimant as the appropriate policy. If the court were to grant such a remedy, it would in effect be dictating the policy to be adopted. It is not the function of the court to frame policy for the government and it would be constitutionally improper for it to seek to do so. Moreover, for reasons I have given, there may be other safeguards, in addition to those proposed by the claimant, which the Home Office would want to impose as part of an effective policy in this area. In particular, in my opinion the prison authorities can properly say that it should only be in exceptional cases that access to the media by telephone should be permitted. The interests under Article 10.2 will in most cases at least justify the refusal where communication in writing will suffice.

87. It would have been preferable if I had been faced with a specific request and refusal relating to a particular matter rather than to have to determine an application which seeks to put in issue alternative policies, of which neither is in my view wholly satisfactory. However, apart from seeking a quashing order, the claimant is also seeking appropriate declarations to the effect that the current rule and/or policy are unlawful. In principle I can properly grant such relief.

88. However, it follows from what I have said that in my view the rule itself is not open to criticism. The prison authorities are fully entitled to make contact by telephone an exceptional form of contact with the media. But the policy made pursuant to that rule is in my view insufficiently flexible, for reasons I have given. It appears to assume that sending the information by letter will always, or at least virtually always, suffice to meet the prisoner's objective. In the light of the comments from the journalists, that seems to me to be an unjustified assumption. It will sometimes be enough, but not always. Accordingly I will make the declaration that the policy which in all circumstances denies the claimant the right to contact the media by telephone whenever his purpose is to comment on matters of legitimate public interest relating to prisons and prisoners is unlawful.