[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

United Kingdom House of Lords Decisions

You are here: BAILII >> Databases >> United Kingdom House of Lords Decisions >> Secretary of State for the Home Department, Ex Parte Simms Secretary of State for the Home Department, Ex Parte O'Brien, R v. [1999] UKHL 33; [2000] 2 AC 115; [1999] 3 All ER 400; [1999] 3 WLR 328 (8th July, 1999)
URL: *https://www.bailii.org/uk/cases/UKHL/1999/33.html*
Cite as: [2000] 2 AC 115, [1999] 3 WLR 328, [1999] 3 All ER 400, [1999] UKHL 33

[New search] [Buy ICLR report: [2000] 2 AC 115] [Buy ICLR report: [1999] 3 WLR 328] [Help]

Secretary of State for the Home Department, Ex Parte Simms Secretary of State for the Home Department, Ex Parte O'Brien, R v. [1999] UKHL 33; [2000] 2 AC 115; [1999] 3 All ER 400; [1999] 3 WLR 328 (8th July, 1999)

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Steyn Lord Hoffmann
Lord Hobhouse of Wood-borough Lord Millett

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(RESPONDENT)

EX PARTE SIMMS (A.P.)
(APPELLANT)

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(RESPONDENT)

EX PARTE O'BRIEN
(APPELLANT)
(CONSOLIDATED APPEALS)

ON 8 JULY 1999

LORD BROWNE-WILKINSON

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons which he gives I would allow both the appeals and make the declarations which he proposes.

LORD STEYN

My Lords,

In the last fifteen years a number of miscarriages of justice have been exposed. I do not have in mind cases where in the ordinary process of appeal a wrong has been corrected. The term is apt where a conviction was at first upheld on appeal but subsequently, after the defendant had perhaps served years in prison, the case was re-opened and the conviction found to be unsafe. The risk of such miscarriages is ever present. On 18 May 1999 Mr. David Calvert-Smith Q.C., the Director of Public Prosecutions, found it necessary to issue a specific warning to prosecutors about the need to guard against such miscarriages taking place. He added that he "was concerned, and have been concerned for some time, that at present there is a significant number of cases in which the prosecution are not so complying (with the duty of disclosure.)" It has been demonstrated on the hearing of the present appeals that in recent years a substantial number of miscarriages of justice have only been identified and corrected as a result of painstaking investigation by journalists. And those investigations have included oral interviews with the prisoners in prison.

The Home Secretary contends that prisoners have no right to have oral interviews with journalists in aid of an attempt to gain access to the Court of Appeal (Criminal Division.) The policy of the Home Secretary is that such interviews would tend to undermine the discipline and control which are unquestionably essential conditions in a prison environment. On behalf of the appellants the consequentialist argument is that if the policy of the Home Secretary is upheld it will be virtually impossible for a journalist to take on a case which he believes to merit investigation.

The case in a nutshell

Two prisoners serving life sentences for murder had their separate applications for leave to appeal against conviction refused by the Court of Appeal (Criminal Division.) The men continued to protest their innocence. In order to obtain the reopening of their cases they wished to have oral interviews with journalists who had taken an interest in their cases. Relying on the policy of the Home Secretary the Governors of the prisons were only prepared to allow the oral interviews to take place if the journalists signed written undertakings not to publish any part of the interviews. The journalists refused to sign the undertakings. The prisoners sought judicial review of the decisions denying them the right to have oral interviews. They rely on the right to free speech not in a general way but restricted to a very specific context: they argue that only if they are allowed to have oral interviews in prison with the journalists will they be able to have the safety of their convictions further investigated and to put forward a case in the media for the reconsideration of their convictions. They seek to enlist the investigative services of journalists as a way to gaining access to justice by way of the reference of their cases to the Court of Appeal (Criminal Division). Since their appeals were dismissed neither prisoner has had access to legal services. Latham J. upheld their argument and held the policy of the Home Secretary to be unlawful. The Court of Appeal allowed an appeal by the Home Secretary and reversed the decision of Latham J. The Court of Appeal in effect ruled that a prisoner has no right to an oral interview (as opposed to correspondence) with a journalist who was willing to investigate his case and, if appropriate, to take up his case through the media: see *Regina v. Secretary of State for the Home Secretary, Ex parte Simms* [1999] Q.B. 349.

The restrictions on the rights of prisoners

A sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus the prisoner's liberty, personal autonomy, as well as his freedom of movement and association are limited. On the other hand, it is well established that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication": see *Raymond v. Honey* [1983] AC 1 at 10H; *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 at 209D. Rightly, Judge L.J. observed in the Court of Appeal in the present case that "the starting point is

to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody": [1999] Q.B. 349 at 367H.

Section 47(l) of the Prison Act 1952 enables the Home Secretary to make rules for, amongst other things, "the regulation and management of prisons . . . and for the . . . treatment, employment, discipline, and control of persons required to be detained therein." The power to make such rules is exercisable by statutory instrument: section 52(1) of the Act of 1952. Pursuant to section 47(l) there are, amongst others, rules which enable a prisoner to correspond with his legal advisers, and to have interviews with legal advisers in prison (paragraph 34 of section A of the Prison Service Standing Order 5.) The rules also make provision for a prisoner to correspond with a journalist: paragraph 34 of section B. But the provisions regulating an oral interview by a journalist (in section A) are in the following more restrictive terms:

> "Visits by journalists or writers
>
> "37. Visits to inmates by journalists or authors in their professional capacity should in general not be allowed and the governor has authority to refuse them without reference to headquarters. If a journalist or author who is a friend or relative wishes to visit an inmate in this capacity and not for professional purposes, the governor should inform the intending visitor that before the visit can take place he or she will be required to give a written undertaking that any material obtained at the interview will not be used for professional purposes and in particular for publication by the intending visitor or anyone else.
>
> "37A. Where, exceptionally, a journalist or author is permitted to visit an inmate in his or her professional capacity, or is allowed general access to the establishment, he or she will be required to give a written undertaking that no inmate will be interviewed except with the express permission in each case of the governor and the inmate concerned, that interviews will be conducted in accordance with such other conditions as the governor considers necessary, and that any material obtained at the interview will not be used for professional purposes except as permitted by the governor. No inmate should be permitted to accept any payment or gratuity in return for an interview or for a radio or television appearance."

Paragraph 37(A) requires the express permission in each case of the governor *and the inmate concerned.* In the cases before the House the two prisoners wished to be interviewed in order to appeal to public opinion through the media. At stake are the rights *of prisoners* to be interviewed by journalists of the prisoners' choice. *The case of Mr. Simms*

On 14 March 1989 Mr. Simms was convicted of murder and sentenced to life imprisonment. On 8 October 1990 the Court of Appeal (Criminal Division) refused Mr. Simms' renewed application for leave to appeal. On 10 July 1991 the Home Secretary, having considered representations from Mr. Simms, declined to refer his case to the Court of Appeal (Criminal Division). In 1990 Mr. Simms wrote to Bob Woffinden, a journalist who specialises in the investigation of possible miscarriages of justice. They started to communicate by letters and visits. In late 1994 the Home Secretary became aware that Mr. Woffinden was visiting Mr. Simms. This led to the Governor of H.M.P. Full Sutton informing Mr. Woffinden that he could no longer visit Mr. Simms unless he signed an undertaking in accordance with paragraph 37 not to publish anything that passed between him and Mr. Simms during the visit. On 28 January 1995 Mr. Woffinden wrote an article about Mr. Simms' case which was published in the Independent Magazine. His theme was that no body was ever found and that the supposed victim may simply have disappeared. On 23 May 1995 the Governor of H.M.P. Full Sutton wrote to Mr. Woffinden and confirmed that he would have to sign the undertaking before a further visit could take place. On 28 June 1996 Mr. Simms commenced judicial review proceedings. Since then Mr. Simms has been moved to H.M.P. Long Lartin. The policy of the Home Secretary about oral interviews between prisoners and journalists has been maintained.

The case of Mr. O'Brien

On 20 July 1988 Mr. O'Brien was convicted of murder and robbery. On 16 March 1990 the Court of Appeal (Criminal Division) refused Mr. O'Brien's renewed application for leave to appeal. The Home Secretary refused his request to refer his case to the Court of Appeal (Criminal Division). In early 1995

Mr. O'Brien first received visits at H.M.P. Long Lartin from Karen Voisey, a journalist working for BBC Wales. She started investigating Mr. O'Brien's convictions. She interviewed O'Brien on eight occasions in 1995. Mr. O'Brien wanted Ms. Voisey to produce a television programme about his case. But by 19 December 1995, when she sought once more to visit Mr. O'Brien, H.M.Prison Service had become aware that Ms. Voisey was a journalist, and so she was required to sign an undertaking in the same terms as that required in the case of Mr. Woffinden. She too refused to sign the undertaking and was turned away. She has not visited him since. Mr. O'Brien and his solicitors challenged the decision. On 26 April 1996 the Governor confirmed that the original decision stands. On the 2 July 1996 Mr. O'Brien commenced judicial review proceedings.

On 19 October 1998 the Criminal Cases Review Commission referred Mr. O'Brien's case to the Court of Appeal. On 21 December 1998 Mr. O'Brien was granted bail pending appeal. At present Mr. O'Brien is not affected by the policy which is the subject of this appeal. If this appeal is unsuccessful, and he is returned to prison, he will once again be subject to its terms.

The proceedings before Latham J.

When the matter came before Latham J. there was before him an affidavit sworn by Audrey Wickington, a Grade 6 Officer in the Prison Service. She said:

> "The arrangements covering representatives of the media visiting prisoners and using the information obtained for professional purposes, such as in each of these cases where the two applicants sought to publicise their claims to be innocent of the offences of which they had been convicted, are designed to prevent gratuitous details of a prisoner's offence or his attitude towards the offence and/or the victim entering the public domain. If such safeguards are not maintained, the scope for abuse would be enormous, and consequently there would be serious risk of distress to victims and their families and general public outrage at the sight of prisoners and representatives of the media collaborating to publish details of any aspect of a prisoner's case."

Latham J. described this statement as the high point of the Home Secretary's case. He held that it did not justify "the blanket prohibition on making use of material obtained in a visit."

The proceeding of the Court of Appeal

Given that Latham J. was unimpressed with the cogency of the grounds contained in the affidavit served on behalf of the Home Secretary, two further affidavits were placed before the Court of Appeal. Robert Thomas, the Chief Press Officer for the H.M. Prison Service, said:

> "If it were to become common practice to allow journalists access to individual prisoners it would not be possible to offer the same sort of protection currently given to prisoners in the form of professional media advice. A prisoner unhappy at the outcome of an interview has few avenues left open to him as the options for complaint are strictly limited by the prisoner's circumstances. Such resentment within a prison can bring staff additional problems."

Audrey Wickington expanded her earlier evidence as follows:

> "Even if the subject of a conversation were restricted to serious representations about conviction or sentence or serious comment about crime, the process of justice or the penal system, the Prison Service could not prevent a journalist using the information provided by the prisoner to write an article which did not represent the prisoner's viewpoint or did not consider at all the rightness of the conviction, dwelling instead on the prisoners' attitude towards his offences and victims. Misrepresentations and distortions of this sort would, in the judgment of the Prison Service, be likely to have a more dramatic impact on members of the public reading the article, particularly the victims of the offence, when the journalists had based his account on a live interview with the prisoner."

Referring to paragraph 37(A) she stated that a governor might exceptionally consider a visit by a journalist to a prisoner, such as in "the case of an illiterate prisoner."

Kennedy L.J. came to the following conclusions in the cases of Mr. Simms and Mr. O'Brien (at 362A-D):

> "In my judgment a convicted prisoner has no right to communicate orally with the media through a journalist. The loss of that "right," if it can properly be so described, is part and parcel a sentence of imprisonment. . . . I would therefore reject the vires argument which found favour with the judge and allow the appeal. Insofar as Mr. Owen sought to contend that the requirement of a written undertaking was and is irrational, disproportionate or otherwise unjustifiable, I would reject that submission, . . ."

In a separate judgment Judge L.J. approached the problem in less absolute terms. He observed (at 118G-H):

> "If he is visiting as a professional journalist, or intending to use the material obtained at interview in a professional capacity, it is difficult to accept that the limitation on the entitlement of the journalist to publish the contents of his communications with the prisoner infringes the prisoner's right of free expression, at any rate in any way which significantly increases the inevitable interference with that right which follows incarceration. As the prisoner's ability to communicate with journalists both orally and in writing is preserved, what in reality is at stake is the relationship between the journalist and those responsible for the secure administration of the prison. The potential for increased problems with security and discipline, staff, other inmates, and after conviction, with victims or their families, all underline the need for control of such visits to be vested in and exercised by the governor. This is what the regulatory framework is intended to achieve and in the circumstances I have concluded that the restriction currently under consideration is not ultra vires."

Judge L.J. also held that the decision to require an undertaking was not irrational. Chadwick L.J. agreed with both judgments.

The principal issues and arguments

Counsel for the Home Secretary said that the current policy is enshrined in paragraphs 37 and 37(A). Counsel argued that properly construed those paragraphs authorise the Home Secretary to impose a complete ban on journalists interviewing prisoners for any purpose. And he argued that the Home Secretary may ban any interviews even if the sole purpose of the prisoner is to gain access to the investigative resources of the media in order to publicise an alleged injustice and to achieve a reference back of his case to the Court of Appeal (Criminal Division.) Counsel for the Home Secretary emphasised that, as he described it, this "blanket ban" is what the Home Secretary is defending. And the Home Secretary contends that to allow any interviews would undermine proper control and discipline in prisons. But counsel observed that in wholly exceptional circumstances the Home Secretary in his unfettered discretion may allow an interview, e.g. in the case of an illiterate prisoner who is unable to correspond with a journalist.

At the outset of the appeals counsel for the appellants made clear that the only right which he claims for the prisoners in these proceedings is the right to an oral interview with a journalist confined to the question whether he has been wrongly convicted. And the purpose of the interviews would be to enlist the investigative resources of the media in righting a wrong. He emphasised that the Home Secretary's powers to refer a case back to the Court of Appeal (Criminal Division) was an integral part of the just functioning of the overall process of criminal justice: *Reg. v. Secretary of State for the Home Department, Ex parte Hickey* [1995] 1 W.L.R. 734, at 743E, *per* Simon Brown L.J. He further argued that the new powers under section 13 of the Criminal Appeal Act 1995 of the Criminal Cases Review Commission to refer a case back to the Court of Appeal (Criminal Division) is also an integral part of a fallible criminal justice system. Counsel for the appellants emphasised that he is invoking the prisoners' rights of free speech in order to gain credible access to the Criminal Cases Review Commission. Unsurprisingly, that usually requires new evidence. And in practice the only way in which a thorough new investigation can be mounted is by investigative journalism backed by the necessary resources. In outline this was the argument on behalf of the appellants.

The Agreed Statement of Facts and Issues states that the issue is whether the provisions of paragraphs 37 and 37(A) are ultra vires. Counsel for the Home Secretary argued that paragraphs 37 and 37(A) authorise the policy of the Home Secretary and he submitted that this policy is lawful. The printed Case of the Appellants seeks a declaration that paragraphs 37 and 37(A) are ultra vires. In much of his oral argument counsel for the appellants assumed that paragraphs 37 and 37(A) do indeed authorise the already described policy of the Home Secretary. On that basis he submitted that those provisions are ultra vires. In both cases, however, the Divisional Court Form 86A sought the quashing of the administrative decisions affecting the prisoners. And counsel for the appellants said that, irrespective of the vires of paragraphs 37 and 37(A), the appellants, case is that the policy of the Home Secretary (and the administrative decisions of the Governors pursuant to that policy) are unlawful.

In this somewhat untidy procedural situation I will consider the issues in the following order: (1) I will first assume that the Home Secretary's interpretation of paragraphs 37 and 37(A) is correct. On this assumption I will consider the lawfulness of his policy. (2) If it is unlawful, I will need to deal with the question whether the Home Secretary's interpretation of paragraphs 37 and 37(A) is correct. The question arises whether those provisions are ultra vires. (3) If paragraphs 37 and 37A are not ultra vires, I will need to consider what other relief is appropriate.

(1) THE LAWFULNESS OF THE HOME SECRETARY'S POLICY

(a) Freedom of expression

The starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) is in the following terms:

> "I. 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."

In *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109, at 283-284, Lord Goff of Chieveley expressed the opinion that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention. In *Derbyshire County Council v. Times Newspapers Ltd.* [1993] AC 534 Lord Keith of Kinkel, speaking for a unanimous House, observed about article 10 (at 550H- 551A):

> "As regards the words 'necessary in a democratic society' in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that 'necessary' requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued."

In that context Lord Keith observed that he reached his conclusion on the issue before the House without any need to rely on the Convention. But he expressed agreement with the observation of Lord Goff of Chieveley in the *Guardian Newspapers* case and added "that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field": at 551G. I would respectfully follow the guidance of Lord Goff of Chieveley and Lord Keith of Kinkel.

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 objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr. Justice

Holmes (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.": *Abraham v. United States* 250 U.S. 616, at 630 (1919), *per* Holmes J. (dissent). 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 by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnett, Constitutional Law*, 3rd ed., (1996), 1078-1086. It is this last interest which is engaged in the present case. The prisoners 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.

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 cases 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.

(b) Miscarriages of justice identified by investigative journalism

My Lords, the members of the Court of Appeal were under the impression, and acted on the basis, that it was not necessary for a prisoner to have an oral interview with a journalist since he can correspond with a journalist, and in that way advance his argument for the thorough investigation and possible eventual reopening of his case. As a result of the appeal to the House there is now available material which the Court of Appeal had no opportunity to consider. First, Mr. Woffinden, the journalist in the Simms case, has provided details of some sixty cases over the last ten years where journalists played a substantial role in identifying miscarriages of justice which led to the quashing of the convictions. In the absence of contrary information I regard this document as relevant material tending to establish in a general way the value of investigative journalism in exposing miscarriages of justice. Secondly, and more importantly, an affidavit by Gareth Peirce, an experienced and distinguished practitioner, was placed before the House. Gareth Peirce has acted in more than twenty references to the Court of Appeal in which convictions were eventually quashed. She advised on the setting up of the Criminal Cases Review Commission and subsequently conducted training exercises for the new Commissioners and caseworkers. She was asked to discuss the importance of the role of the press in undoing wrongful convictions and did so. Despite the length of the quotation it is necessary to set out in full the core passages in her affidavit. She listed following factors as "important and universal":

> "a) There is no legal aid for investigations. (On the rare occasions that the Green Form scheme has allowed for extensions, these amount to little more than several hours work by a solicitor.) b) I am informed by the Criminal Cases Review Commission that more than 90% of applicants are not represented by solicitors. c) The criteria for referring cases to the Court of Appeal are interpreted as requiring new evidence or new and important considerations of substance. d) Any commitment to attempting to undo a wrongful conviction is a substantial one; as a solicitor, I am aware that each such commitment will involve me in enormous personal expenditure of time and money, as well as anxiety and responsibility above even the norm in defending cases. No one would contemplate such a commitment unless they had the clearest possible view at the outset of the appropriateness of their efforts. Such a view can only be properly arrived at by meeting the individuals concerned and discussing their predicament with them. e) There is no difference in the approach of members of the Press to that of solicitors; the commitment of an author to writing a book about a case, of a journalist to writing an insightful article, or a television company to the making of a programme involves a major deployment of resources, budgets and time. Each task demands that those making such a decision believe that their choice is an appropriate one. Such a decision is almost impossible

> if the individual cannot be seen; where it remains impossible, that individual's case is the less likely to be taken up by that section of the Press that might have become interested in the abstract.
> f) Although the Criminal Cases Review Commission was expected to be able to conduct investigations into cases far more pro-actively than the Home Office had been able, it finds itself seriously under resourced and underfunded. The report of its Chairman this year to the House of Commons Home Affairs Committee spoke of incoming cases being required to wait at least two years before they can be assigned to a case worker. The cases with the best opportunity remain those which have arrived at the Commission fully researched and investigated with new evidence compellingly presented. Resources available to the Press, in particular (but not exclusively) the large budgets available to Television programmes, are clearly the most significant chance of discovering new evidence, particularly where expensive expert research requires commissioning. As important, however, is the potential interest of smaller, local newspapers and journals, which can provoke interest in the relevant area and prompt fresh evidence."

Gareth Peirce then described in compelling detail how the above factors have been relevant in five particular cases "as well as in many others of which these are examples" Counsel for the Home Secretary was given leave to challenge this affidavit if it was thought proper to do so. There has been no challenge. I have no hesitation in accepting that the general picture sketched by Gareth Peirce, as well as her discussion of particular cases, is correct. On any view this is powerful evidence.

Two important inferences can and should be drawn. First, until the Home Secretary imposed a blanket ban on oral interviews between prisoners and journalists in or about 1995, such interviews had taken place from time to time and had served to identify and undo a substantial number of miscarriages of justice. There is no evidence that any of these interviews had resulted in any adverse impact on prison discipline. Secondly, the evidence establishes clearly that without oral interviews it is now virtually impossible under the Home Secretary's blanket ban for a journalist to take up the case of a prisoner who alleges a miscarriage of justice. In the process a means of correcting errors in the functioning of the criminal justice system has been lost.

(c) The counter-arguments on behalf of the Home Secretary

For my part I am reasonably confident that once it is accepted that oral interviews with prisoners serve a useful purpose in exposing potential miscarriages of justice the Home Secretary would not wish his present policy to be maintained. But, if I am mistaken in that supposition, my view is that investigative journalism, based on oral interviews with prisoners, fulfil an important corrective role, with wider implications than the undoing of particular miscarriages of justice. Nevertheless, I must directly address the counter arguments advance by the Home Secretary.

Latham J. was unimpressed with the reasons advanced in opposition to the prisoners, limited claim in the first affidavit of Audrey Wickington. In my judgment the judge was right. The two new affidavits make a case that any oral interviews between prisoners and journalist will tend to disrupt discipline and order in prisons. In my view these affidavits do not take sufficient account of the limited nature of the prisoners' claims, viz to have interviews for the purpose of obtaining a thorough investigation of their cases as a first step to possibly gaining access through the Criminal Cases Review Commission to the Court of Appeal (Criminal Division.) The affidavits do not refute the case that until 1995 such interviews enabled a substantial number of miscarriages to be undone. Moreover, they do not establish that interviews confined to such limited purposes caused disruption to prison life. In any event, the affidavits do not establish a case of pressing need which might prevail over the prisoners, attempt to gain access to justice: see decision of the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198, the correctness of which was expressly accepted by counsel for the Home Secretary.

Counsel for the Home Secretary relied on the decision of the United States Supreme Court in *Pell v. Procunier* 94 S.C. 2800 (1974). The case involved a ban by prison authorities of face to face interviews between journalists and inmates. The background was a relatively small number of inmates who as a result of press attention became virtual "public figures" within prison society and gained a disproportionate notoriety and influence among their fellow inmates. The evidence showed that the interviews caused severe disciplinary problems. By a majority of 5:4 the Supreme Court held the ban to

be constitutional. The majority enunciated an approach of a "measure of judicial deference owed to corrections officials." This approach was followed in *Turner v. Safley* 107 S. Ct. 2254 (1987) where the Supreme Court upheld restrictions on correspondence between inmates. In *Pell v. Procunier* the Supreme Court was faced with a very particular and intolerable situation in the Californian prison service where there had been virtually unlimited access by journalists to inmates. Nobody suggests anything of the kind in the present case. While the inmates in *Pell v. Procunier* no doubt wished to air their general grievances, there is nothing in the report to indicate that the prisoners wanted interviews with journalists for the specific purpose of obtaining access to an appeal process to challenge their convictions. And, in any event, the approach of judicial deference to the views of prison authorities enunciated in *Pell v. Procunier* does not accord with the approach under English law. It is at variance with the principle that only a pressing social need can defeat freedom of expression as explained in *Derbyshire* (at 550H-551A), *Leech* (at 212 E-F), and *Silver v. United Kingdom* (1980) 3 E.H.R.R. 475, at 514-515 (para. 372-375) (the Commission) and (1983) 5 EHRR 347, at 377 (para. 99(e)) (the Court). It is also inconsistent with the principle that the more substantial the interference with fundamental rights the more the court will require by way of justification before it can be satisfied that the interference is reasonable in a public law sense: *Reg. v. Ministry of Defence, Ex parte Smith* [1996] QB 517, at 554 E-F. In my view *Pell v. Procunier* does not assist. *(d) Conclusion*

On the assumption that paragraphs 37 and 37(A) should be construed as the Home Secretary contends, I have no doubt that these provisions are exorbitant in width insofar as they would undermine the fundamental rights invoked by the prisoners in the present proceedings and are therefore ultra vires.

(2) THE INTERPRETATION OF PARAGRAPHS 37 AND 37(A)

It is now necessary to examine the correctness of the interpretation of paragraphs 37 and 37(A), involving a blanket ban on interviews, as advanced by the Home Secretary. Literally construed there is force in the extensive construction put forward. But one cannot lose sight that there is at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner. In these circumstances even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle as Sir Rupert Cross explained in successive editions of his classic work: *Statutory Interpretation*, 3rd ed. (1995) 165-166. This is called "the principle of legality": *Halsbury's Laws of England*, 4th ed. reissue, vol. 8(2), (1996), p. 13, para. 6. Ample illustrations of the application of this principle are given in the speech of Lord Browne-Wilkinson, and in my speech, in *Reg. v. Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539, at 573G-575D and 587C-590A. Applying this principle I would hold that paragraphs 37 and 37(A) leave untouched the fundamental and basic rights asserted by the prisoners in the present case.

The only relevant issue in the present proceedings is whether paragraphs 37 and 37(A) are ultra vires because they are in conflict with the fundamental and basic rights claimed by the prisoners. The principle of legality justifies the conclusion that paragraphs 37 and 37(A) have not been demonstrated to be ultra vires in the cases under consideration.

(3) THE DISPOSAL OF THE APPEAL

My Lords, my judgment does not involve tearing up the rule book governing prisons. On the contrary I have taken full account of the essential public interest in maintaining order and discipline in prisons. But, I am satisfied that consistently with order and discipline in prisons it is administratively workable to allow prisoners to be interviewed for the narrow purposes here at stake notably if a proper foundation is laid in correspondence for the requested interview or interviews. One has to recognise that oral interviews with journalists are not in the same category as visits by relatives and friends and require more careful control and regulation. That is achievable. This view is supported by the favourable judgment of past experience. Moreover, in reality an oral interview is simply a necessary and practical extension of the right of a prisoner to correspond to journalists about his conviction: compare *Silver v. United Kingdom* 3 E.H.R.R. 475 (the Commission) and 5 EHRR 347 (the Court); and *Livingstone and Owen, Prison Law*, 2nd ed., para. 7.30-7.33 (pp. 228-232).

The criminal justice system has been shown to be fallible. Yet the effect of the judgment of the Court of Appeal is to outlaw the safety valve of effective investigative journalism. In my judgment the conclusions and reasoning of the Court of Appeal were wrong.

Declarations should be granted in both cases to the effect that the Home Secretary's current policy is unlawful, and that the Governors' administrative decisions pursuant to that policy were also unlawful. I would allow both appeals.

LORD HOFFMANN

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with it and for the reasons which he gives I would allow the appeals and make the orders which he proposes. I add only a few words of my own about the importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament.

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law: see *Derbyshire County Council v. Times Newspapers Ltd.* [1993] AC 534, 551. That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the Minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility.

What this case decides is that the principle of legality applies to subordinate legislation as much as to acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

The issue raised by this appeal has been stated by the parties to be -

> "whether the provisions of paragraphs 37 and 37A [of Standing Order 5A] are ultra vires s. 47 of the Prison Act 1952."

The Appellants' Printed Case asks for a declaration that those paragraphs are ultra vires. The argument has however ranged over wider issues and questions also the lawfulness of the present policy of the

Home Department apparently wholly to exclude professional journalists from visiting prisoners unless the journalist is prepared to sign an undertaking "not to use any material obtained during the visit for professional purposes, in particular, for publication by the journalist or anyone else." I use the word "apparently" because it does not always seem to have been the policy of the Department. For instance, it seems that Mr Woffinden, a well known journalist specialising in investigating possible cases of the miscarriage of justice was allowed to visit Mr Simms at various prisons for a number of years; Mr Woffinden subsequently published an article about his case in "The Independent." His visits were only stopped after a specific representation to the Home Office by an MP. Nor is it fully clear what are the parameters of the policy. The Prison Rules and the Standing Orders certainly do not necessitate the conclusion that a total ban is being imposed; in part the evidence leads to the same conclusion. This illustrates that it is the policy of the Department rather than the Standing Orders themselves that are under attack.

The ultra vires question arises under the enabling legislation. This is first s. 47(1) of the Prison Act 1952:

> "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."

Under this power, the Secretary of State has made the Prison Rules 1964 (and has later amended those Rules). There are specific Rules which deal with visits by Members of Parliament and Prison Visitors and others to which it is not necessary to refer. Rules 33 to 37A deal with Letters and Visits. Rule 33 provides:

> "(1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons, impose restrictions either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> (2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State or as a privilege under rule 4 of these Rules.
>
> (3) Except as provided by these Rules, every letter or communication to or from a prisoner may be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length.
>
> (4) Every visit to a prisoner shall take place within the sight of an officer, unless the Secretary of State otherwise directs.
>
> (5) Except as provided by these Rules, every visit to a prisoner shall take place within the hearing of an officer, unless the Secretary of State otherwise directs.
>
> (6) The Secretary of State may give directions, generally or in relation to any visit or class of visits, concerning the days and times when prisoners may be visited."

Rule 34 deals with "Personal Letters and Visits." It makes separate provision for convicted and unconvicted prisoners. Paragraph (8) of the Rule provides:

> "A prisoner shall not be entitled under this Rule to receive a visit from . . . any person other than a relative or a friend, except with the leave of the Secretary of State."

Rules 35 to 37A deal with special situations, including access to legal advisers and courts. The Respondent therefore has to justify the Standing Order under these empowering provisions including any implicit limitations to which they are subject. An alternative view is that the Standing Order itself must be read as being subject to such implicit restrictions and the decisions taken under the Standing Order must comply with those restrictions, otherwise they will be unlawful. The whole of this part of the Rules is subject to Rule 2(1) which provides:

> "Order and discipline shall be maintained with firmness, but with no more restriction than is required for safe custody and well ordered community life."

The 1964 Rules have now been replaced by the Prison Rules 1999 which are in the presently relevant respects similar to the amended 1964 Rules. The question of the vires of Standing Order 5A paragraphs 37 and 37A, has to be considered in relation to the powers given by the 1952 Act and the 1964 Rules. On their face these enabling powers are sufficiently wide.

The Facts:

Turning to the factual context in which the question of journalists' visits to prisoners has been raised, it is convenient to take the Simms case as illustrative. Mr Simms was convicted of murder on 14 March 1989 after a trial before a judge and jury. Although the body of the murdered woman was never found (and has still not been found), the evidence against Mr Simms was very strong. As is often the case, the unavailability of evidence from the alleged victim means that there are unanswered questions in reconstructing what precisely did happen, but likewise the inferences arising from the prosecution evidence were never rebutted by the defence--or, at least, such must have been the view of the jury. Mr Simms has throughout protested his total innocence of any involvement in the woman's death or disappearance. His appeal against his conviction failed but he was trying to find new evidence, including forensic evidence, which would enable him to make out a case that his conviction was unsafe. In 1990, he approached Mr Woffinden. This set in train a regular succession of written communications between them and visits by Mr Woffinden to Mr Simms in the prisons where from time to time Mr Simms was held.

A friendship grew up between them and it seems that Mr Simms to some extent became dependent upon Mr Woffinden's interest and visits. Matters came to a head because the mother of the deceased, who understandably had been conducting a campaign of her own to try and locate her daughter's body, objected to the press coverage given to Mr Simms. In the second half of 1994 the matter was taken up with the Home Department by her MP and Mr Woffinden was requested to sign the standard form of undertaking which I have already quoted. He declined and no further visits by him to Mr Simms have taken place. In January 1995, "The Independent" published Mr Woffinden's article about Mr Simms's case. It recognised the strength of the case against Mr Simms at the trial but suggested that the unanswered questions should cast doubt upon his conviction.

The application for judicial review of the continuing requirement that Mr Simms could only receive visits from Mr Woffinden if he signed the undertaking was issued some 18 months later in June 1996. Affidavits in support were sworn by both Mr Simms and Mr Woffinden. These spoke of their friendship and the effect that the discontinuance of the visits was having upon Mr Simms's morale. Mr Simms confirmed that he had not had the benefit of any further legal aid after the failure of his appeal and that he was dependent upon the help and resources of the media in carrying forward his inquiries to the stage where they would justify the Home Department (now the Criminal Cases Review Commission) referring his case back to the Court of Appeal. Mr Woffinden spoke of how in his view his dual roles of friend and professional journalist had become inseparable and of the wide-ranging nature of the conversations between them.

> "There seemed, also, an ethical dimension to this. On our visits, Ian would not just discuss his own case, but those of others with whom he was imprisoned. In this way, I first learned of a number of astonishing miscarriages. (He became a very reliable assessor of other cases, able to distinguish between bona fide victims of a fallible judicial system; and those whose assertions of injustice were not to be trusted).
>
> Sometimes, he would describe how inmates were assaulted, or otherwise deprived of their legal rights, by prison officers. Was I to be like some Catholic priest, knowing of such matters yet being unable to communicate them to anyone outside the prison?" (Affidavit dated 31 January 1996, paras. 23 and 24)

He says that "accordingly, I felt unable to sign an undertaking not to publicise anything that passed between us."

The affidavits sworn in support of Mr Simms's application exhibited correspondence exchanged with the Prison Service. The first letter was that of Mr Woffinden dated 8 February 1995 (that is to say after the publication of the article in The Independent). In it he referred to some difficulties which he had recently encountered "in trying to visit a friend of mine, Ian Simms" His letter included--

> "I would further like to stress two other points: that although I have written an article about his case, I have been visiting him for some time, and therefore think of him primarily as a friend. (There are, at present, no plans to make a television programme about the case.)
>
> Also, in making this request, I am seeking no special considerations whatsoever. I am merely asking to be allowed to pay him normal, routine visits in line with the standard visiting arrangements that prevail throughout the prison system."

The response he got was that, if he wished to visit Mr Simms "as a friend", then this would be permitted once a written undertaking had been provided. In May Mr Woffinden, referring to paragraph 37, wrote to the governor requesting him to authorise a visit to "my friend" on humanitarian grounds to enable him to cope better with his imprisonment. The governor responded saying: "I have no problem in allowing you to visit Ian Simms, as a friend, provided you sign the disclaimer" (as per paragraph 37). There the matter rested save for a formal request by Mr Simms's solicitor in a letter before action which received the same reply as before.

This narrative has a number of relevant features. There is no evidence that Mr Woffinden had abused his position. But there is evidence in the quotations which I have made from paragraphs 23 and 24 of his affidavit that there was scope for such abuse. Mr Woffinden was obtaining in a wholly unsupervised fashion, and without any authorisation, information as a journalist which did not relate to Mr Simms but to other inmates. Further, the imparting of such material to a professional journalist in such a way goes beyond the rights which are asserted on behalf of the Appellants in this case or would be permitted in correspondence even with a legal adviser. (*Ex parte Leech* [1994] QB 198.) It appears from the evidence that the cessation of the visits did not inhibit or prevent the publication of Mr Simms's case in the media nor, having written the article, did Mr Woffinden need further visits to Mr Simms for the purpose of furthering his case (or obtaining a reference back). As regards the needs of friendship, which was the sole basis on which Mr Woffinden was seeking to visit Mr Simms in 1995 and thereafter, it appears that Mr Woffinden had such strong personal objections to signing the undertaking that he preferred, and chose, to discontinue his visits to his friend rather than sign any such document. It is a salient feature of this narrative that at no time was any application made by Mr Simms or any other person under paragraph 37A nor on the basis that an interview by a professional journalist was required for the purpose of furthering Mr Simm's interest in getting his conviction set aside or for any other purpose.

The affidavit in support of Mr O'Brien's application does not provide much detail. It seems that there were some 8 visits from the journalist concerned, Miss Voisey, again without incident before the Department intervened. What was the ambit of the conversations beyond Mr O'Brien trying with only limited success to interest Miss Voisey in his case, is not stated. There is no affidavit from Miss Voisey. No relationship of friendship is put forward nor is any need made out for further interviews between them for the purpose of elucidating Mr O'Brien's case. She was making routine visits to him on the basis that she was a friend. It was whilst attending to make another such routine visit that she was asked to sign the standard undertaking. She refused and appears to have taken no further interest in visiting him. When the matter was later taken up in correspondence by Mr O'Brien's solicitor with the governor, the solicitor did not provide any basis for saying that Mr O'Brien needed to have yet another interview by a journalist nor why any outstanding matter could not satisfactorily be pursued in correspondence. It seems however from what Mr O'Brien has said in his affidavit that he was alleging that his correspondence was being interfered with. That would be a separate and independent complaint and would be covered by such cases as *Leech*. It has however not been pursued in these judicial review proceedings nor has it been substantiated. The governor replied to the solicitor:

> "There is no intention of depriving inmate O'Brien of the opportunity of trying to establish his innocence, and Karen Voisey is more than welcome to assist him in doing such, with the proviso that when she visits him, the requirements of Standing Order 5 apply."

The solicitors did not take the matter further before issuing proceedings. No application was made for a visit under paragraph 37A. No attempt was made to make out a case which would show why a further face to face interview was needed. His solicitors chose instead simply to challenge the vires of the Prison Rules and Standing Orders. Mr O'Brien's case has now been referred back to the Court of Appeal by the Review Commission and he has been released on Bail.

In neither case therefore is any further journalistic need alleged or demonstrated for the purpose of prosecuting the legitimate interests of the prisoner in establishing his innocence. Whatever interviews were necessary for that purpose had already been conducted by the journalist with the prisoner. The point was well taken on behalf of the Appellants that a face to face interview with the man concerned will probably be an essential part of the professional journalist's assessment whether to support the prisoner's case. A reputable journalist is not going to take up the case of a convicted prisoner unless he is persuaded that the man's belief in his innocence (whether mistaken or not) is genuine. In this regard your Lordships were assisted by the affidavits of both Mr Woffinden and Miss Peirce a well known solicitor practising in this field. But, I repeat, the time had passed when this consideration was relevant to these two Appellants. No application was made for a visit under paragraph 37A.

Before Latham J.:

When these cases were before Latham J. in the Divisional Court, he expressly upheld the need to regulate access by professional journalists acting as such to prisons and prisoners. To quote:

> "There is no doubt that restrictions on visits are necessary for the proper regulation and management of prisons, and for the treatment, discipline and control of inmates. It seems to me to be entirely proper that the primary restriction should be that the only visitors should be family and friends. This accords with the general and beneficial policy to ensure that, so far as possible, an inmate retains his family and social connections. Beyond those categories there has to be some justification, it seems to me, for a visit, in order to ensure that access to inmates is not exploited for purposes which could be inimical to proper management of and discipline within prisons." ()

> "I consider that a restriction preventing an inmate from communicating orally with the media in a visit unless the representative of the media gives an undertaking not to use the material obtained at that visit is a restriction on the right of free speech. . . . The test is whether or not the restriction is necessary in order to achieve the statutory objectives. In the present context, these objectives include the need to keep visits within sensible bounds for the ordinary management of the prison, and the discipline and control of inmates. This clearly entitles rules to be made which preclude access to the media, in any form, merely for the purposes of purveying general complaints, tittle tattle or other material which may be mischievous or offensive. In particular, as was recognised in *Bamber*, proper discipline and control includes consideration of the effect of inmates' activities on others. I am therefore quite satisfied that Rule 33(1) is lawful in including 'the interests of any persons' as a material consideration when deciding what restrictions are appropriate on communications between inmates and others. It follows, in my view, that the prohibition on communicating with the media by letter save where the inmate is making serious representations about his or her conviction or sentence. or is otherwise part of a serious comment about crime, the processes of justice or the penal system, meets the *Leech* test of being the minimum interference necessary to achieve the statutory objectives." ()

Latham J. then discussed the various methods of controlling oral communications open to the prison authorities and concluded that they could be satisfactorily adapted to interviews:

> "The blanket prohibition on making use of material obtained in a visit is not, on the evidence before me, therefore justified as the minimum interference necessary with the right of free speech to meet the statutory objectives." (p. 23)

This is the judgment and reasoning upon which the Appellants rely before your Lordships. The judge's conclusion is not that the Secretary of State is not entitled to regulate the access of the media to penal establishments. He affirms that such regulation and control is a necessary part of running such an establishment and that it is a necessary corollary that the prisoners' rights to communicate with, and the

receipt of visits from, professional journalists must likewise be controlled and regulated. It is a feature of the reasoning of Latham J. that he drew an analogy with the need to control the right of communication with lawyers recognised in the *Leech* case. In that context the right to communicate was recognised to be open to abuse; even more so would be an uncontrolled right to communicate with the media. This was also recognised in *Reg. v. Secretary of State for the Home Department, Ex Parte Bamber* (unreported), 15 February 1996, C.A., where it was held that the right of a prisoner to provide a recorded message for a radio station could properly be curtailed.

Another strand in the reasoning of Latham J. (derived from other cases) is the assessment of the alternative means of communication open to the prisoner and the other means of preventing abuse open to the Prison Authorities short of a blanket ban. This is essentially a question of fact taking into account what is practical and what would be adequate, both from the point of view of the prisoner and that of the Authorities. Thus it has to be recognised that, on occasions, written or telephone conversations may not suffice for a prisoner to convince a journalist of his genuine belief in his innocence. Similarly, the need specially to supervise visits by professional journalists must mean that such visits cannot be as easily granted or be as frequent as visits by friends and relatives; and, as Latham J. said, the grant of such a visit has to be justified. In the case of *Reg. v. Secretary of State for the Home Department, Ex parte O'Dhuibir* (unreported), 27 February 1997, C.A., the insistence on the use of glass screens and no physical contact was in exceptional circumstances upheld even for visits by friends and relatives.

The United States and Strasbourg:

Two cases from other jurisdictions can be referred to in this context. In the United States of America, the right of free speech is an entrenched constitutional right. There has accordingly been a view, respectably supported, that it is unconstitutional to restrict in any way the rights of prisoners to communicate with the press or the rights of the press to have access to penal establishments and prisoners. However the Supreme Court has, by majorities, repeatedly upheld the power of prison authorities to restrict or even, on occasions, exclude access by the media. An extreme example of this was *Pell v. Procunier* 417 U.S. 817 where the Supreme Court upheld a complete ban on such visits even to remand prisoners. The principle was accepted that such a prohibition could be justified as a part of a prison regime. In reaching its decision the Supreme Court considered the factors which should weigh with those with the responsibility for running such establishments and the alternative means of communication available. There was in that case evidence that uncontrolled media access and intrusion had led to a serious disturbance. There was also evidence that the legitimate interests of those concerned could be adequately met by other means of communication. The argument that the authorities must prove that there was literally no alternative to a complete ban was rejected; it is not proper in such a matter for the court to substitute its own judgment for those with the responsibility and expertise in the matter unless it can be shown that they have disregarded the relevant constitutional rights. (See also *Block v. Rutherford* 468 U.S. 576, *Turner v. Safley* 482 U.S. 78 and *Procunier v. Martinez* 416 U.S. 396.)

The European Court of Human Rights has considered prisoners' rights on a number of occasions. Articles 5, 8, 10 and 11 each contain relevant provisions in this context. In the case *Silver v. The United Kingdom* 3 E.H.R.R. 475 (the Commission), 5 EHRR 347 (the Court), the subject matter was the censorship of prisoners' correspondence. The censorship of prisoners' correspondence was ancillary to prison rules restricting the contents of correspondence. The Commission, therefore, and the Court had to consider what restraints upon the content of correspondence were permissible. The main review is contained in the Opinion of the Commission. At p. 509, para. 344, and following the Commission dealt with the prohibition of letters containing material intended for publication. It recognised that uncontrolled communications could have adverse consequences for prison order and discipline and that it was therefore necessary to carry out a balancing exercise but it concluded that a blanket prohibition was not necessary. By contrast, the Commission took the view that communications making representations about the prisoner's trial, conviction or sentence whether to the Home Secretary or others should in principle not be prevented. (pp. 512-513, paras. 360-363) Although there was a statutory right to have recourse to the Home Secretary and it was he who had the statutory power and responsibility to refer cases back to the Court of Appeal, it was not justifiable to confine such communications to him. As regards letters attempting to stimulate public agitation or petition, the Commission again recognised the needs of good order and discipline and the fact that public agitation rather than recourse to legal remedies might undermine the rule of law, but it also accepted, at p. 515, para. 373, that it was conceivable that -

> "to avoid or expose injustice, matters relating, for example, to a prisoner's trial, conviction or sentence, or to prison conditions, in general or in a particular case should be brought to the public's attention if necessary by way of petition-raising."

Its opinion was therefore that a blanket prohibition upon such communications was an over broad restriction. In that case the Commission considered that the applicant's

> "attempts to clear his name were a legitimate and reasonable exercise of his rights, which had not been shown to have posed any threat to prison good order." (p. 515, para. 375)

When the case went to the Court, the United Kingdom accepted the substance of these conclusions of the Commission. (pp. 377-378, para. 99) Further, the Court upheld as justified (on security grounds) the authorities' interception of a letter which referred to other category A prisoners.

The approach adopted by the E.C.H.R. in this and other cases (in particular *Campbell v. United Kingdom* (1992) 15 E.H.R.R. 137) was followed by the Court of Appeal in *Ex parte Leech* [1994] QB 198, where the question raised was the routine censorship of communications to legal advisers. Such communications are of course entitled to a higher order of protection than communications to the press but, even so, the Court of Appeal recognised that some measure of control was still necessary to ensure that such communications were bona fide. The then existing Standing Orders were too widely expressed--"extravagantly wide"--and went beyond what was necessary or justifiable. At pp. 217-218, the Court, having cited from the Canadian case *Solosky v. The Queen* (1979) 105 D.L.R. (3d) 745, adopted a formula which, whilst acknowledging the right and duty of the prison authorities to supervise and prevent the abuse of such channels of communication, set parameters which should ensure that the censorship did not go beyond what was reasonably necessary. The Prison Rules and Standing Orders now follow this guidance.

Standing Order 5:

Communications and visits are dealt with in Standing Order 5: Section A "Visits," Section B "Correspondence." These follow a logical scheme and make separate provision for different situations. Thus in relation to visits there are paragraphs dealing separately with close relatives, other social visits, minors, legal advisers, priests and ministers, and police officers as well as for professional journalists. Standing Order 5 has the following general introduction:

> "It is one of the roles of the Prison service to ensure that the socially harmful effects of an inmate's removal from normal life are as far as possible minimised and that contacts with the outside world are maintained. Outside contacts are therefore encouraged, especially between an inmate and his or her family and friends. At the same time, the Prison Service has an overriding duty to hold inmates in lawful custody in well ordered establishments; and to have regard to the prevention of crime and similar considerations; and some regulation of inmates' communications is therefore necessary."

Paragraphs 37 and 37A read:

> "37. Visits to inmates by journalists or authors in their professional capacity should in general not be allowed and the governor has authority to refuse them without reference to headquarters. If a journalist or author who is a friend or relative wishes to visit an inmate in this capacity and not for professional purposes, the governor should inform the intending visitor that before the visit can take place he or she will be required to give a written undertaking that any material obtained at the interview will not be used for professional purposes and in particular for publication by the intending visitor or anyone else.
>
> 37A. Where, exceptionally, a journalist or author is permitted to visit an inmate in his or her professional capacity, or is allowed general access to the establishment, he or she will be required to give a written undertaking that no inmate will be interviewed except with the express permission in each case of the governor and the inmate concerned, that interviews will be conducted in accordance with such other conditions as the governor considers necessary, and that any material obtained at the interview will not be used for professional purposes except as permitted by the

> governor. No inmate should be permitted to accept any payment or gratuity in return for an interview or for a radio or television appearance."

These paragraphs contain nothing which is inconsistent with the law stated in the decided cases or with the judgment of Latham J. The opening words of paragraph 37 should be construed subject to Rule 2(1). They reflect no more than what has been said by Latham J. that visits to prisoners by professional journalists need to be justified. They are not in the same category as social visits by relatives and friends. The second sentence which contains the reference to the undertaking which Mr Woffinden and Miss Voisey were asked to sign only applies to professional journalists who wish to visit the prisoner not in the capacity of journalist but socially as a relative or friend. The undertaking is in my judgment a perfectly justifiable means for distinguishing the different types of visitor. It was in this context, for the purpose of visiting socially as a friend, that Mr Woffinden was requested by the governor to sign the undertaking and refused to do so. Latham J. recognises the need to establish the capacity in which the person is visiting and that special arrangements need to be made where the visit is to be as a professional journalist.

Visits by professional journalists acting as such are the subject of paragraph 37A. That paragraph leaves it to the governor to lay down the conditions which will govern the visit, including, if necessary, asking for a paragraph 37A undertaking. In view of the great variety of situations which may have to be covered it is appropriate, and desirable, that the governor be given this breadth of discretion. No question has been raised in the present cases under paragraph 37A since no request for a visit was ever made under that paragraph.

The paragraphs themselves are not objectionable nor do they raise questions of vires. It is what is done purportedly under the Prison Rules and the Standing Orders and other provisions requiring the governor's consent before someone other than a relative or friend may visit a prisoner which may do so. The Rules and Standing Orders do not impose a blanket prohibition on visits by journalists; indeed they contemplate that such visits will take place. It is the policy of the Home Department that, contrary to its own Rules and Standing Orders, would seek to impose that prohibition. It is the policy that is being called into question.

In the two cases the subject matter of these appeals, nothing objectionable has in fact been disclosed in relation to the treatment of these Appellants. The need and justification for further visits by the journalists concerned as journalists had been exhausted. No need for further professional visits was asserted, let alone demonstrated, at the time that the governor had to make the decisions which it is sought to review. The need to apply paragraph 37A did not arise. The request for further visits by Mr Woffinden to Mr Simms was socially as a friend and that had the appropriate corollary that he should sign the undertaking. The decisions of the governors concerned were the right ones having regard to the applications to which they responded. The decisions themselves disclose no illegality. To quash the decisions and require the governors to reconsider them would inevitably lead to the same decisions being made unless new facts are relied upon by the Appellants in support of their applications. But if new or additional facts are to be relied upon, the correct course for the Appellants to pursue would be to make fresh applications. I pass over the fact that for Mr O'Brien, who is on bail, the question has become academic. Indeed it was not clear to me that the Appellants were still asking for that relief.

It follows that in my judgment these applications for judicial review, as formulated, should have failed and, in so far as they attacked the vires of paragraphs 37 and 37A, should not result in declarations that those paragraphs were ultra vires. It also follows that if that was all there was to it the appeals should be dismissed.

The Department's Policy:

But it is not satisfactory to leave the matter there because the Department have in the course of these proceedings put forward and have been attempting in argument and by affidavit to justify and uphold a policy of the blanket exclusion of journalists. That was the submission of Mr Parker QC for the Respondent. Two further affidavits were sworn on behalf of the Respondent when these cases were before the Court of Appeal. That of Mr Thomas speaks of the need to make special arrangements and take special safeguards when journalists are conducting interviews with prisoners. He stresses that this is only possible because such visits are so few; he says it would not be possible if the allowance of such interviews became common practice. This is an affidavit which confirms the need for regulation and

control. It does not justify a blanket ban; indeed, like the Standing Orders, it proceeds on the basis that, where justified, such visits will be permitted. The affidavit of Miss Wickington on the other hand, whilst again stressing and amplifying the differences between ordinary visits and visits by professional journalists, concludes by saying that the type of exceptional circumstances in which visits by journalists should be permitted would be where the prisoner was illiterate. Mr Parker's submission was that visits by journalists should only be allowed in the case of prisoners incapable even with assistance of communicating in writing.

In my judgment, this extreme policy is both unreasonable and disproportionate and cannot be justified as a permissible restraint upon the rights of the prisoner. (*Raymond v. Honey* [1983] 1 AC 1.) In certain situations a face to face visit by a journalist is appropriate as a necessary supplement to the other means of communication. The evidence shows that a prisoner has a legitimate interest in seeking to obtain a reference back of his case to the Court of Appeal. He does not have the benefit of legal aid for this purpose. In practical terms the reference back will normally have to be on the basis of fresh evidence not previously available. Someone has to unearth that evidence if it exists. A solicitor without funds will be most unlikely to incur the considerable cost involved in carrying out such an investigation. The same will normally apply to the prisoner's relations. In this context the media have a role to play. They have the funds and have an interest in applying them to the investigation of meritorious cases. As Miss Peirce has testified, many successful referrals have only come about because of the help of journalists. I accept, subject to the necessary qualifications, the comparison between the contribution that can be made by lawyers and journalists in this connection. Just as where a lawyer is acting for a prisoner an interview may be necessary, so with a responsible professional journalist a stage may be reached where an interview becomes necessary and other means of communication will not suffice.

Therefore one arrives at a similar situation to that discussed in *Silver* and *Leech*. The prisoner should be allowed, subject to suitable supervision and safeguards, to communicate with others in seeking assistance in obtaining the reopening of his case. This is the interest and right which the Appellants assert in the present cases. It is a proper subject matter for communication, provided it is not abused. The question therefore becomes one of what forms of communication should be permitted. Within appropriate limits, written communications are permitted as are telephone communications: this is not controversial. These are the means of communication to which the prisoner should first have recourse. If he then wants to have a face to face meeting with the journalist, he must make out a case for it. He will have to address why he needs an interview with the journalist, including explaining why other means of communication will not suffice and the proposed subject matter of the interview. Unless he can adequately show the need for the interview, he has not made out his case for being allowed a visit from a professional journalist. The existing means of communication will have sufficed to meet his entitlement to communicate. The refusal of the visit will not infringe his rights.

It is on this limited but important aspect that I part company with Judge L.J. with whose judgment I substantially agree. The argument before your Lordships and the additional affidavit and other material with which we were supplied show that it is not a sufficient response simply to say that written and telephone communications will in all cases suffice to satisfy the rights of the prisoner. There remains a category of situations where the denial of a face to face interview can amount to an unjustifiable denial of the right of the prisoner to communicate and his legitimate interest to pursue his attempts to obtain a review of his conviction or sentence. The category is exceptional. It will not be the extensive and unregulated right which those standing behind the Appellants appear to visualise. It will not without more justify series of visits by journalists. It will not give prisoners the same facility of access to professional journalists acting as such as they have to relatives or friends. Similarly the requests for such visits and their authorisation will have to take account of the practicalities. A visit by a professional journalist to a prisoner in prison is not the same as a visit by a friend or relative. Special arrangements will often be required. These will inevitably place constraints upon the granting of such visits.

The considerations which I have referred to are covered by the discretion given to the governor in the Prison Rules and the Standing Orders. I agree with Judge L.J. when he says (at p. 372):

> "The potential for increased problems with security and discipline, staff, other inmates and, after conviction, with victims or their families, all underline the need for control of such visits to be vested in and exercised by the governor. This is what the regulatory framework is intended to

achieve and in the circumstances I have concluded that the restriction currently under consideration is not ultra vires."

I would also agree with the concluding words of Judge L.J. Respect must be had for those who have the responsibility of running penal establishments. If basic rights are being asserted, the relevant criterion to apply in evaluating any conduct alleged to interfere with those rights is that adopted by the Court of Appeal in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] QB 517, 554. The court must be satisfied that the relevant decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker: the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is not unreasonable.

For these reasons I would dismiss these appeals in so far as they seek a declaration that paragraphs 37 and 37A are ultra vires. But I would allow the appeals to the extent of granting a declaration that the blanket policy of refusing visits by professional journalists contended for by the Respondent in these proceedings is unlawful. Thus far I am in full agreement with the order proposed by your Lordships. However I understand that your Lordships would go further and quash the impugned decisions of the respective governors. So be it. For the reasons which I have already given that is not the order I would make but I will not oppose the order which your Lordships propose. That question is now academic.

LORD MILLETT

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Steyn and Lord Hobhouse of Woodborough. I too have concluded that the Prison Rules and Standing Orders, and in particular paragraphs 37 and 37A of the Standing Orders, are lawful and intra vires, but that they do not justify the manner in which they are being applied in practice. I can give my reasons quite shortly.

As my noble and learned friend Lord Hobhouse of Woodborough has pointed out, the first sentence of paragraph 37 is in general terms and by way of introduction to both paragraphs 37 and 37A. It should be approached as if it appeared on its own in a separate introductory paragraph. It states the general principle that professional visits by journalists and authors should not be permitted. It is an inevitable and intended consequence of a custodial sentence that the prisoner should be deprived of the right to be visited by anyone he likes when and as often as he wants. Visits by close members of the prisoner<.'>s family are severely curtailed. But a total ban on visits, even by journalists, could not be justified. For the reasons given by my noble and learned friend Lord Steyn, 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. The words "in general", however, leave it open to the Governor, despite the general prohibition, to permit a visit by a journalist where it would be appropriate to do so. There is nothing objectionable in requiring a proper case to be made for allowing the visit or in making it clear that this will seldom be possible. Cases calling for the intervention of an investigative journalist, though unhappily not few in number, must concern only a tiny proportion of the prison population and arise with relative infrequency.

The remainder of Article 37 deals with visits from journalists and authors who claim to visit a prisoner in a non-professional capacity as a friend or relative. There is no reason why such a visitor should be treated any differently from any other friend or relative who is not a journalist or author or be subjected to such arrangements for supervision and control as would be appropriate if he were visiting the prisoner in a professional capacity. But if the visitor asks the Governor to dispense with such arrangements on the ground that his visit is a purely social one, it is entirely reasonable that the Governor should exact an undertaking that he will not use any material obtained in the course of his visit for professional purposes.

What if the visitor refuses to give such an undertaking? In the case of Mr. Woffinden both parties treated this as the end of the matter. No undertaking, no visit. But this is not what the Standing Orders contemplate. In the absence of an undertaking, the Governor is entitled to refuse to treat the proposed visit as a social one. But he is not entitled to turn the visitor away without further consideration. He must

treat him as having requested permission for a professional interview. Such a case is governed by paragraph 37A.

This paragraph requires the visitor to give an undertaking in a different form. It enables the Governor to lay down the conditions on which the interview will take place and on which material obtained in the course of the interview may be published. I do not read this as authorising the Governor to impose a requirement that the visitor should submit his work to censorship before publication. I would regard such a requirement as unlawful. In practice it would have the effect of barring the visit, for no respectable journalist or author would be prepared to submit to it. I read the paragraph as authorising the Governor to impose in advance general conditions limiting the scope of the material that the visitor is free to submit for publication. Thus he could (and almost certainly would) exact an undertaking that the journalist should publish no material which the prisoner would not have been permitted to include in correspondence with him.

Paragraph 37A envisages the situation where the Governor permits a professional visit by a journalist or author, and enables him to lay down appropriate conditions to govern the visit. This is intra vires and unobjectionable. The opening sentence of paragraph 37 has already made it clear that such a situation will be the exception and not the rule. A special case must always be made to justify the visit. The word "exceptionally" in paragraph 37A merely means that a strong case must be made. I can see nothing objectionable in this.

Miss Voisey did not claim to be a friend or relative of the prisoner. She asked permission to interview the prisoner in a professional capacity. Despite this the Governor demanded that she sign an undertaking in the same terms as that required of Mr. Woffinden. This was inappropriate. It would defeat the whole purpose of the proposed visit and amounted to a refusal of her request.

Where the visiting journalist seeks a professional interview, or refuses to give the undertaking described in paragraph 37, it is still open to the visitor to satisfy the Governor that it would be proper to grant permission for the visit. If he is satisfied that the visitor is a responsible journalist investigating a possible miscarriage of justice, that his investigations cannot reasonably be completed or taken further without a personal interview, and that he is willing to comply with appropriate arrangements for the supervision and control of the interview and the scope of the material to be submitted for publication, then permission should normally be granted.

This is not the approach which was followed in the cases under appeal. Both journalists treated the Governor's insistence on the undertaking as amounting to a refusal of the visit, and did not attempt to make out a case for allowing it. But it would have made no difference if they had. It was the policy of the Home Office to refuse all such requests by professional journalists, and the Governors did not change their minds when the basis of the requests was explained in correspondence.

Before your Lordships the Secretary of State has claimed the right to impose an indiscriminate ban on all professional visits by journalists or authors no matter how strong a case is made for a particular visit. I agree with my noble and learned friend Lord Steyn that he has no such right, that paragraph 37A of Standing Orders does not confer one, and that it would be unlawful if it did. Following the unlawful policy of the Secretary of State, the Governors peremptorily refused permission in each of the cases under appeal without considering the merits of the request or inviting representations from the journalists. I would allow the appeal and make the Order proposed by my noble and learned friend Lord Steyn.

© 1999 Crown Copyright

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *https://www.bailii.org/uk/cases/UKHL/1999/33.html*