Neutral Citation Number: [2023] EWHC 1407 (Admin)

Case No: CO/3063/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

THE KING **(on the application of Mark Alexander)**	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
- and -	
ROBIN EVELEIGH	**Interested Party**

- -

Greg Callus acting *pro bono*, instructed directly by the **Claimant**
John Jolliffe (instructed by the **Government Legal Department**) for the **Defendant**
The **Interested Party** attended remotely but made no submissions

Hearing date: 23 May 2023

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Approved Judgment

Mr Justice Andrew Baker:

Introduction

1. The claimant seeks a judicial review of a refusal of consent for him to be interviewed by telephone by the interested party, an independent investigative journalist. Consent was required because the claimant is a serving prisoner following his conviction in 2010 on a charge of murdering his father. The refusal was therefore a decision made by the Governor of HMP Coldingley in Surrey ('the Governor'), where the claimant is serving his life sentence, the minimum term under which was set at 16 years by the sentencing judge.

2. The defendant Secretary of State is responsible for that decision and the proper defendant to any judicial review claim in respect of it. Permission to apply for judicial review was granted in January 2023 by the Court of Appeal (Bean LJ), on paper, in an application brought by the claimant for permission to appeal against a refusal of permission in this court.

3. Mr Callus accepted a direct instruction to represent the claimant in March 2023, and has done so *pro bono* in the finest traditions of the English Bar. He brought to what had been well articulated, but somewhat diffuse and extensive, submissions prepared by the claimant, both a focus, limiting the argument to a few points that mattered, and a depth of analysis, underlying and informing the few points taken, that are hallmarks of the skilled, experienced practitioner. I am very grateful for his assistance, the value of which – whatever decision I might reach – was rightly acknowledged by Mr Jolliffe, for whose assistance equally I am very grateful.

4. It is inevitable and proper that one consequence of imprisonment on the basis of a criminal conviction is that the prisoner's freedom of speech is curtailed, but prisoners are not simply deprived of all right of free speech, nor lawfully could they be. As Lord Steyn said in the leading case of *Simms*, "*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.*" (*Reg. v Secretary of State for the Home Department, ex parte Simms and O'Brien* [2000] 2 AC 115 at 125G).

5. Article 10 ECHR, as given effect under English law by the Human Rights Act 1998, provides that the basic right to freedom of expression:

   (i) "*shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers* ..." (Article 10.1), and

   (ii) may be subject to *inter alia* conditions or restrictions prescribed by law that 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*" (Article 10.2). The fundamental basis for the legitimacy of curtailing freedom

of expression is that the exercise of such freedom "*carries with it duties and responsibilities*" (*ibid*).

6. It was common ground that along with *Simms*, the key authorities considering Article 10 in relation to the curtailment of the ability of serving prisoners to communicate with the media are *Hirst* and *Casciani*, that is to say: *R (Hirst) v Home Secretary* [2002] EWHC 602 (Admin), [2002] 1 WLR 2929; and *R (BBC and Casciani) v Justice Secretary* [2012] EWHC 13 (Admin), [2013] 1 WLR 964). I note in passing that in *Simms* and *Hirst*, the defendant was the Home Secretary since prisons and prisoners' rights were a responsibility of the Home Office until May 2007 when that responsibility was taken over by the then newly formed Ministry of Justice.

7. Counsel's submissions considered those authorities, and a few others, in some detail; but as will become apparent, I have concluded that this claim succeeds on a basis that does not require those submissions to be examined.

8. The grounds for judicial review pursued by the claimant, as focused by Mr Callus, are that consent for the proposed telephone interview by the interested party was:

   (i) unlawfully refused because the Governor misconstrued or misapplied the policy set out in Prison Service Instruction ('PSI') 37/2010, in that:

      (a) he treated the policy as requiring there to be an urgent need to communicate such that written communication would not be effective, whereas the criterion stated in PSI 37/2010 is that a telephone conversation must be "*the most suitable method of communication*" and urgency is but an example;

      (b) he applied the wrong test and/or came to an irrational conclusion as regards the criterion stated in PSI 37/2010 that "*distress to victims and/or outrage to public sensibilities will not result from the broadcast*", i.e. (in this case) from the broadcasting of a recording of the proposed telephone interview;

   (ii) unlawfully refused because, if the refusal was in accordance with the policy set out in PSI 37/2010, then that policy is unlawful in instructing prison governors, in effect, to operate a blanket ban on telephone contact with the broadcast media, or at all events to refuse consent in circumstances that would infringe a prisoner's Article 10 rights.

9. Mr Callus did not withdraw entirely reliance that the claimant had placed on ECHR Articles 6 and 8 as well. However, he did not develop any argument on those additional Articles at any length, and in my judgment they do not add anything to the claim in this case.

Legal Framework

10. Section 47(1) of the Prisons Act 1952 provides that "*The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions, secure training centres or secure colleges, and for the classification,*

treatment, employment, discipline and control of persons required to be detained therein."

11. The Prison/Rules 1999/728 were made under s.47(1). Rule 8(1) provides for the establishment at every prison of a system of privileges. Rule 34(1) then provides that except with the leave of the Secretary of State or as a privilege granted under rule 8, a prisoner "*shall not be permitted to communicate with any person outside the prison, or such person with him*". Thus, contact with the outside world is a privilege operating by way of exception to a general rule that an ancillary incident of incarceration is the absence of such contact. It was not suggested that that basic structure is unlawful.

12. Rule 34(2) of the 1999 Rules provides *inter alia* that the Secretary of State may impose any restriction or condition upon the communications to be permitted between a prisoner and other persons if he considers that the restriction or condition to be imposed: "*(a) does not interfere with the convention [i.e. ECHR] rights of any person; or (b) (i) is necessary on grounds specified in [rule 34(3)]; (ii) reliance on the ground is compatible with the convention right to be interfered with; and (iii) the restriction or condition is proportionate to what is sought to be achieved.*" Rule 34(3), setting out the grounds referred to in rule 34(2)(b)(ii), lists the following:

"*(a) the interests of national security;*

(b) the prevention, detection, investigation or prosecution of crime;

(c) the interests of public safety;

(d) securing or maintaining prison security or good order and discipline in prison;

(e) the protection of health or morals;

(f) the protection of the reputation of others;

(g) maintaining the authority and impartiality of the judiciary; and

(h) the protection of the rights and freedoms of any person."

13. PSI 37/2010 (Prisoners' Access to the Media) was issued by what was then the National Offender Management Service (now HM Prisons and Probation Service ('HMPPS')) on 2 July 2010, and took effect from 12 July 2010. It set an expiry date for itself of 1 July 2014, but it was common ground before me that it continues in force. I was not shown whether its expiry date was expressly extended, or it has been reissued from time to time, or it has simply been treated as continuing to apply in default of having been updated or replaced.

14. PSI 37/2010 was issued for action by Prison Governors and Directors of Contracted Prisons. The Executive Summary in the instruction letter under which it was issued states that the PSI "*sets out the exceptional circumstances under which prisoners are allowed access to the media through visits or by telephone as well as the instructions regarding written correspondence … .*" Paragraph 1.2 of the PSI states that prisoners can communicate with the media by written correspondence, by telephone, or through visits, and states in overview the policy for each of those methods of communication.

15. In relation to written correspondence, paragraph 1.2 states that "*most prisoners will be able to contact the media through letters only. Prisoners do not need permission from the Governor to send or receive letters from the media but there are restrictions on what can be sent out, as outlined in paragraph 2.2 below.*" For telephone contact, paragraph 1.2 states as follows (in which the font change is in the original):

"*if a prisoner wishes to contact the media by telephone and the call is intended or likely to be published or broadcast by radio or television or posted on the Internet the prisoner must first apply in writing to the Governor for permission. The Governor must decide whether to permit the application in liaison with Press Office.* This will only be allowed in exceptional circumstances where the prisoner intends to make serious representations about matters of legitimate public interest affecting prisoners, including where appropriate an alleged miscarriage of justice in the prisoners' own case, and where the other criteria in Section 3 are met".

16. Section 3 then provides, so far as material, as follows (with font changes, again, as in the original, but with numbering added to paragraph 3.2, for my ease of reference):

"**Introduction**

3.1 This guidance sets out the exceptional circumstances under which prisoners should be allowed access to the media by telephone where it is intended or likely to be published or broadcast.

Consideration of requests

3.2 *If a prisoner wishes to contact the media by telephone and the call is intended or likely to be published or broadcast by radio or telephone or posted on the Internet the prisoner must first apply in writing to the Governor for permission. The Governor must decide whether to permit the application in liaison with Press Office.* This will only be allowed where the following criteria are met:

- *[i] a telephone conversation is the most suitable method of communication; for example where the prisoner needs to provide comment as a matter of urgency, due to the immediacy of the subject or the media's need to report it within a timescale that could not be met by written correspondence;*

- *[ii] the sole purpose of the conversation is to comment on matters of legitimate public interest affecting prisons or prisoners, including where appropriate an alleged miscarriage of justice in the prisoner's own case;*

- *[iii] distress to victims and/or outrage to public sensibilities will not result from the broadcast. This is likely to occur if, for example, the prisoner's crimes or conduct are recent, notorious or horrific. In such circumstances permission may be refused. If reasonable guarantees can be provided by the broadcaster that listeners will not be able to identify the prisoner – including by name, voice, or by any description of his or her crime – then this may provide grounds for permitting a telephone call which would otherwise fall to be refused;*

- *[iv] permitting the telephone call will not pose a threat to security, or to good order or discipline, and can be arranged without undue disruption to existing staff duties. Particular regard should be given to the likelihood of inciting ill-feeling among other prisoners; and*

- *[v] there is no reason to doubt that the journalist, broadcaster or prisoner will respect and abide by any reasonable conditions required of them, and that they will do everything practicable to keep the discussion within prison regulations.*

…

3.5 *Prisoner requests to contact the media by telephone must be made to the Governor as a written application, explaining the circumstances and why such an approach is necessary and cannot be satisfied by written correspondence.*

3.6 *Requests must be assessed against the criteria set out in paragraph 3.2 above.*

…

Content

3.11 *The conversation must be monitored by an appropriate member of staff as it takes place.*

…

3.14 *All requests to broadcast the conversation live must be refused.* Broadcasters should be asked to provide assurances that the interview will be pre-recorded and that NOMS will be offered a reasonable opportunity to examine the content and request the removal of any breaches of the terms of this policy."

Initial Observations

17. There is some awkwardness of drafting there. Firstly, paragraph 3.2 appears to require all five criteria to be satisfied – [i] to [v] as I have numbered them – as a condition of any consent for telephone contact with the media. That is the plain sense of "*[contact by telephone] will only be allowed where the following criteria are met: [i] …; [ii] …; [iii] …; [iv] …; and [v] …*"; and it is also what paragraph 1.2 seems to say (see paragraph 14 above). However, as Mr Callus submitted, paragraph 3.2[iii] reads as if distress to victims or public outrage is a factor to be taken into account in a balancing exercise over the grant of consent rather than as necessitating a refusal; and I am concerned that a policy that ruled out communication by telephone for possible broadcast whenever at least some distress might be caused to a victim might be difficult to justify under ECHR Article 10.2. It will not be necessary to decide on this occasion whether that concern is well founded.

18. Secondly, there is some confusion in the drafting concerning paragraph 3.2[i]. The stated criterion is that telephone contact must be "*the most suitable method of communication*". In the context of the basic construct that any contact with the outside world is a privilege and that only three methods of communication with the media might be allowed – writing, telephone contact, prison visit – that appears to mean, but to mean only, that telephone contact must be, for some reason, more suitable than either written correspondence or a prison visit. That seems a low hurdle, potentially quite easily surmounted. Paragraph 3.5 however assumes that paragraph 3.2[i] sets a sterner test, requiring an explanation of why telephone contact is "*necessary and [the request to contact the media] cannot be satisfied by written correspondence.*" Mr Jolliffe submitted that the PSI is to be interpreted as requiring that limiting contact to written correspondence is unsuitable, in the given case, for the purpose that it is

proposed will satisfy paragraph 3.2[ii] in that case. (There must be such a purpose if there is to be any grant of permission under the policy.)

19. I see the attraction of that as a means of resolving the drafting tension between paragraph 3.2[ii] and paragraph 3.5. It proposes a meaning sitting somewhere between the two, on what might be conceived as a scale of strictness, but it is not a meaning naturally suggested by the language of either provision. As with my first concern, it will not be necessary for this judgment to seek to resolve that difficulty over the proper interpretation of the PSI.

Facts

20. The claimant was born in 1987 and was 21 when (on the prosecution case against him) his father died in September 2009. He was brought up by his father and he was still living with him as a young adult, i.e. his father's home was still the claimant's permanent residence. He was an undergraduate student at that time. The claimant's father's body was found buried in his back garden, encased in layers of mortar and underneath a thick concrete slab. There is said to have been no forensic evidence linking the claimant to his father's death, so that the prosecution case was founded upon circumstantial evidence.

21. As I have just said, the claimant grew up with his father. His mother left his father when the claimant was 4 years old, and he lost contact with her when he was about 11. She re-established contact with him when he was on remand awaiting trial over his father's death. She is now, along with her own mother, the claimant's grandmother, a supporter of his, in his claim that he was wrongly convicted. She was not regarded in the criminal proceedings as a victim in respect of the claimant's father's killing. No victim impact evidence was given in the Crown Court for sentencing. The claimant's mother was interviewed by the police as a possible witness, and provided a statement, but it was considered to contain nothing of relevance and the claimant was unaware of it at the time of his trial.

22. An application to the Court of Appeal for leave to appeal against conviction was refused on the papers, and again upon oral renewal in June 2011. In 2015, an application to the Criminal Cases Review Commission for the claimant's case to be referred to the Court of Appeal was refused by the Commission.

23. The claimant has always protested his innocence, and continues to do so. Neither he nor the police, nor anyone else so far as is indicated by any evidence I was shown, has ever identified any other suspect. The only claim made so far that the claimant was wrongly convicted, so far as I can see, is his own claim to that effect. That does not remove his Article 10 right to communicate his claim of innocence, or have it communicated. Rather, it puts into context what he has said about the proposal that the interested party be allowed to conduct a telephone interview with the claimant about his case, and (it might be said) it makes it all the more important to examine with care the justifiability of curtailing that Article 10 right that there may be no clamour in support of any idea that he was not his father's killer except any clamour he is in a position, directly or indirectly, to generate himself. It will be understood that nothing in this judgment is intended to indicate any view, one way or other, as to the credibility of the claimant's claim of innocence. That is not an issue for this court in

this judicial review claim and is not something I am in any position to assess on the evidence presented for it.

24. By letter to the Governor dated 21 November 2020, the claimant said that his family had agreed to participate "*in a multi-part podcast for BBC radio, re-examining my case*", and that they (i.e. his family) would like to know whether he would be available "*to answer questions about claims that I was wrongly convicted*". The letter identified a series producer it was said that the interested party was assisting. It said that the production company 6Foot6 "*would like to seek permission to record and broadcast conversations with me over the phone*". It asked the Governor to authorise an interview and gave contact details for the interested party (an email address and a mobile phone number) and for 6Foot6 Productions (a correspondence address), either of whom it said the Governor could contact "*whenever you need their input*".

25. On 4 April 2021, the claimant submitted a formal complaint on Prison Form Comp 2 about the lack of any response to the November request. Following a discussion with the claimant about that complaint, the Governor wrote to him by a letter dated 13 April 2021 indicating that he was "*willing to support your application locally, based on the knowledge I have of your case, the discussions we have held and the information you have provided*", but stating that he could not progress that for the claimant without the approval of the HMPPS Press Office. The Governor's witness evidence in this claim refers in more general terms to the MoJ Press Office, so it may be there is no separate or specific HMPPS Press Office, but that does not matter for my purposes, so I shall refer just to 'the Press Office' below. The 13 April letter asked the claimant, apparently at the instance of the Press Office, for an addendum to his request setting out how it met a criterion stated in paragraph 4.5 of PSI 37/2010, which concerns face-to-face contact with the media via prison visit and was not relevant to the request made, which was for permission for a telephone interview.

26. The claimant responded by a letter to the Governor dated 19 April 2021. It identified a desire to investigate a "*complex network of aliases*" that it was said the claimant's father had used relating to mortgage, insurance and credit frauds not included within the police investigation into his father's death. The claimant's suggestion was that the sustained public exposure that something like the proposed podcast series could achieve for his case was needed to create a chance of members of the public coming forward with information that "*will help us reach the right people and bring my father's killers to justice.*" He suggested, further, that his personal contribution to the podcast would be in the public interest as it would promote debate about the criteria for allowing appeals in criminal cases and whether recommendations such as those of the report of the Westminster Commission on Miscarriages of Justice, "*In the Interests of Justice*" (March 2021), should be implemented.

27. By letter dated 4 June 2021, the Governor refused the claimant's request, stating that he had liaised with the Press Office (he actually said the "*Media/Press Team*") and that "*this request cannot be supported, as the application does not meet the criteria set out in paragraph ii) or iii) within PSI 37/2010.*" The reference to provisions of the PSI does not make sense in the context of a request for a telephone interview to be permitted. There is no paragraph ii) or paragraph iii) to which the Governor might have been referring in Section 3 of the PSI; and the witness statement evidence from the Governor for these proceedings focused on other aspects and did not explain what he had in mind.

28. The Governor's letter asking for additional support for the request had misdirected attention to paragraph 4.5 of the PSI. It is conceivable, therefore, that the Governor was referring to sub-paragraphs (ii) and (iii) of paragraph 4.11, which provide that in deciding whether paragraph 4.5 of the PSI is satisfied, consideration would be given to "*(ii) whether the journalist has demonstrated serious intent to investigate the alleged miscarriage of justice or other matter of sufficiently strong public interest and some research has been undertaken. …; and (iii) where a prisoner has a website dedicated to their alleged miscarriage of justice or the matter of strong public interest that they wish to raise, operated on their behalf, whether this provides adequate public coverage and attention, and negates the need for the resources of the journalist.*"

29. Be that as it may, the June 2021 refusal looks to have been a bad decision made on misdirected grounds. In September 2021, the claimant issued this judicial review claim to challenge it. On 4 November 2021, the day after Summary Grounds of Defence had been filed on behalf of the defendant, the claimant made a fresh request to the Governor for permission to give a telephone interview to the interested party. That relied *inter alia* on evidence that the claimant had submitted with his claim before the court that had not been part of the request and refusal process before the Governor, so of course that evidence had not been taken into account when the request was refused in June 2021.

30. The new request stated that the claimant, with his family, had sought the assistance of an investigative journalist (i.e. the interested party) "*to follow new lines of enquiry and seek out fresh evidence on my behalf.*" Specifically, it was said, there was an interest in looking for any evidence that the claimant's father was still alive after 5 September 2009, any evidence (going beyond general speculation) capable of identifying a credible alternative suspect or motive, or any evidence of the claimant's father, as it was put, "*inculcating me in the principle of extreme privacy*", whereby to cast doubt on the prosecution position against the claimant that his failure to raise any alarm about his father's absence had been suspicious.

31. The claimant said that the interested party intended to create a podcast series "*to shed light on the circumstances of my conviction and whether my family and I have suffered a serious miscarriage of justice. In participating in this series, we hope that awareness can be raised about my father's murder in 2009, and that members of the public will be encouraged to come forward with new information.*" As regards the mode of participation by the claimant, the fresh request proposed that a telephone interview was necessary because in the interested party's professional journalistic opinion: (a) it was the most appropriate and effective means of communicating the claimant's defence (as he asserts it) to the public and ensuring that sufficient interest is generated; (b) it would enable the interested party, and the public to whom the claimant is wanting to appeal for more information, to make a critical assessment of his claim of innocence; and (c) unless the podcast would include the claimant speaking for himself, it was very unlikely to be commissioned, meaning it would not be made.

32. The claimant enclosed a supportive witness statement from the interested party, as well as evidence from his mother and grandmother pleading for the request to be granted so that the podcast could be made. He also enclosed some evidence said to support the point previously made, which was still relied on, that the claimant's father

used aliases in his dealings with others that the claimant wishes could be investigated further.

33. The letter closed with a specific claim of urgency, on the basis that every day that passed is, on the claimant's case, a day longer he spends in prison for a crime he did not commit, another day during which his father's killers remain at large, and a further day of suffering for the claimant's family.

34. The Governor responded by letter to the claimant, copied to the Press Office, dated 9 December 2021 ('the Refusal Letter'), communicating his decision to refuse the fresh request. As I explain below, the Refusal Letter is now the only subject matter of this judicial review claim. The initial request a year earlier, with the Governor's refusal of that request in June 2021, is just part of the background against which the fresh request was made that generated the Refusal Letter now challenged.

35. The Refusal Letter:

    (i) stated that the claimant's fresh request had been considered in line with PSI 37/2010 and that the Governor had taken account of the request itself and all the material provided in support, which was identified;

    (ii) quoted paragraph 1.2 of the PSI, as regards written correspondence and telephone contact, and quoted paragraph 3.2 of the PSI in full;

    (iii) stated, in each case with an explanation, the Governor's conclusions, in these terms, namely:

        (a) "*I do not consider that a telephone conversation is the most suitable method of communication*" – thus the fresh request was treated as not satisfying criterion [i] under paragraph 3.2; and

        (b) "*I consider there is a risk that the interview might cause distress [to victims], and that an interview with a man convicted of murdering his father creates a risk of outrage to public sensibilities*" – suggesting that the request was being treated as not satisfying criterion [iii] under paragraph 3.2;

    (iv) stated, therefore, the Governor's decision, as follows: "*for these reasons I have refused your application. I am sorry that this is not the result that you wished. However, the policy is explicit that applications of this kind should only be granted exceptionally, and I do not consider that your application cannot be satisfactorily dealt with by correspondence.*"

36. The explanations of the Governor's conclusions concerning criteria [i] and [iii] under paragraph 3.2 of PSI 37/2010, and Mr Callus's criticisms of them on behalf of the claimant, are central to Ground (i), below.

37. The claimant wrote to the Governor by letter dated 12 January 2022 complaining about the Refusal Letter. The fresh request, the Refusal Letter, and the fact that the claimant remained dissatisfied, were before Freedman J when, on 17 January 2022, he considered the question of permission to apply for judicial review on the papers. By

his Order of that date, Freedman J referred the question of permission to an oral hearing and gave directions allowing any challenge to the Refusal Letter to be brought forward, and considered, at that hearing, rather than having to be made the subject of a separate Claim Form.

38. Under that procedural machinery, the claimant did seek to challenge the Refusal Letter, by a Second Statement of Facts and Grounds dated 28 January 2022. The hearing directed by Freedman J came before Thornton J, DBE, on 23 March 2022. She refused permission, and an Order dated 24 March 2022 giving effect to that ruling was drawn up by the court.

39. In refusing permission, Thornton J, DBE, recorded that the original refusal in June 2021 had been superseded by the Refusal Letter, so that any claim based on the original refusal was academic. She said she had raised that with both parties at the hearing and it was agreed. The claimant appealed against the refusal of permission, but limited his appeal to a challenge to the refusal of permission to apply for a judicial review of the Refusal Letter.

40. The claimant's appeal came before Bean LJ on the papers to consider permission to appeal. On the basis that the issues raised as to the lawfulness of PSI 37/2010 were "*not entirely straightforward*", by Order dated 28 December 2022, Bean LJ granted permission to apply for judicial review. That Order remitted the substantive application to this court, leading ultimately to the hearing before me.

41. In those circumstances, in my judgment the only permission the claimant has, but which is sufficient for his purpose since Thornton J, DBE, was correct to regard the original decision as having been superseded, is permission to seek a judicial review of the Refusal Letter. He did not appeal against the refusal of permission to seek a judicial review of the June 2021 decision, and so no question of permission for such a judicial review was before Bean LJ. Although his Order does not say so in terms, the permission granted by Bean LJ can only have been a permission for the pursuit of the claimant's challenge to the Refusal Letter.

42. Although Bean LJ was persuaded to grant permission by the possible intricacy of the argument over the lawfulness of PSI 37/2010 as policy, he did not limit the claimant to the pursuit of Ground (ii) (as I have numbered it) raising that argument. For the reasons I set out below, in the event I have concluded that the claimant's claim is straightforwardly well founded upon Ground (i), that the policy challenge does not arise for determination, and that the appropriate remedy is the quashing of the Refusal Letter, but nothing more.

Ground (i)

43. The Governor's reasons for concluding that criterion [i] under paragraph 3.2 of PSI 37/2010 was not satisfied were as follows:

"*I do not think that [this] is urgent or immediate such that written correspondence would not be adequate. You have tried to argue in your letter that communicating in the ordinary way by correspondence is unsuitable because [the interested party] thinks an interview would be more appropriate; because he thinks that an interview would enable him to ask you questions that would enable the public to assess your*

claim of innocence; and that an interview conducted by correspondence would mean he was unlikely to receive a commission.

I have taken account of those arguments. They do not show urgency as required under 3.2 above. The fact that [the interested party] thinks a telephone interview would be appropriate does not make it urgent, and it is not a compelling reason to depart from the policy.

Regarding the second point, [the interested party] could also put questions to you in writing, and that would enable the public to assess your claim critically as you wish. Your third point that [the interested party] thinks an interview conducted by letter is less likely to receive a commission is not relevant under the policy. The Prison Service has to have regard to its own policies, and not to irrelevant considerations such as the chance that a particular form of communication will be more attractive to a commissioning editor."

44. In my judgment, the Governor thereby directed himself that paragraph 3.2 of PSI 37/2010, by criterion [i], made urgency a pre-requisite of permission for telephone contact with the media, and he refused the claimant's request on that basis. I do not accept Mr Jolliffe's submission that there is but a certain focus on urgency because the claimant made a specific claim of urgency at the end of the letter by which he made his request. There was much more to the claimant's request than the specific argument he put forward that it should be considered as urgent.

45. Paragraph 3.2 of PSI 37/2010 does not make urgency a pre-requisite. Urgency is cited merely as one instance where a telephone conversation might be the most suitable method of communication. Misdirecting himself that urgency was required wrongly narrowed the Governor's focus upon whether the claimant needed to speak to the interested party over the telephone, rather than correspond with him in writing, in order to communicate with him. That means the Governor failed to consider at all on its merits the request actually made, the basis of which was that:

(i) something like the proposed podcast series was going to be required for the claimant's claim of innocence to be capable of attracting sufficient attention to draw out, from the general public, new evidence or lines for enquiry, if there is or are any to be drawn out; and

(ii) the professional journalistic opinion the claimant had been given, by the interested party and his proposed producer, was that a telephone interview was essential to the prospect of the proposed podcast series being commissioned, but for which it would not come to be made.

46. Confirming that misdirection, and in its own right an error of approach on the face of the Refusal Letter, the Governor said in terms that the expert opinion provided to him, that a telephone interview was essential for the proposed podcast series, was "*not relevant under the policy [i.e. the PSI]*". Now it may be the Governor was not bound to accept the expert opinion proffered in support of the claimant's request, at all events if he had some proper basis for coming to a different view. But on no view could that opinion be described as irrelevant. It was a central element of the claim that telephone contact would be more suitable than written correspondence, if the

communication by the claimant of what he has to say is to become disseminated widely enough to be of potential value.

47. Turning to criterion [iii] under paragraph 3.2 of PSI 37/2010, the Governor reasoned as follows:

"*In considering your application, I have separately considered whether an interview might cause distress to victims and/or outrage to public sensibilities. The policy states that this is likely to occur if, for example, the prisoner's crimes or conduct are recent, notorious or horrific. I have taken account of the fact that your mother and grandmother support this interview. They do not have a monopoly on distress to victims. I consider there is a risk that the interview might cause distress, and that an interview with a man convicted of murdering his father creates a risk of outrage to public sensibilities.*"

48. Mr Callus criticised the formulation of the conclusion, *viz.* that there is "*a risk*" that the interview "*might*" cause distress, and that the interview would create "*a risk of outrage*". It was said that was insufficient for a decision that criterion [iii] was not satisfied. However, on the language of criterion [iii], it is not satisfied unless a conclusion is reached that distress or outrage *will not* result. Criterion [iii] therefore required the Governor to assess, and decide, whether, bearing in mind the purpose of the proposed interview and the conditions under which it would be conducted and any parts of it broadcast, distress to victims and/or outrage to public sensibilities would not result. Read sensibly, rather than looking to find error, the Refusal Letter communicated the Governor's conclusion that he was not satisfied that distress or outrage would not result. At that level of analysis, therefore, I do not accept the submission that the Refusal Letter betrays a misdirection as to the terms (i.e. as to the meaning and effect) of the PSI as policy.

49. However, I agree with Mr Callus's alternative submission that the Refusal Letter evidences an irrational conclusion that criterion [iii] was not satisfied:

(i) firstly, because in the circumstances of this unusual case, no victim of the claimant's father's killing, other than the claimant's father himself, has ever been identified. Criterion [iii] does not have in mind victims of crime in some generic or abstract sense, but identifiable direct or indirect victims of the particular crime about which the prisoner, here the claimant, wishes to be free to communicate through telephone contact with the media;

(ii) secondly, because it is not a view any reasonable decision-maker could take that the public would be outraged, without more, by the fact that a man convicted of murdering his father was allowed to speak about the case from prison, under appropriately controlled conditions, as part of his claim to have been wrongly convicted, rather than only write about it. The Governor appears to have taken the view that no matter what the content or purpose of the interview, it would be a public outrage for the media to be allowed to talk to someone convicted of murdering their father while he was still in custody following that conviction. That is not a rational view.

50. I would add this on the second of those points, as something that was liable to have engendered in the claimant a real sense of unfairness about the Refusal Letter, namely

that it is not apparent on what basis the Governor changed his opinion about public outrage from his willingness in principle (in April 2021) to support the claimant's request. In my view that can only mean it had not occurred to the Governor originally that the bare fact of a man convicted of killing his father giving a telephone interview about his claim of innocence would or might be considered an outrage.

51. For those reasons, the Refusal Letter cannot stand and will be quashed.

52. Mr Callus submitted that the question whether, in the factual circumstances of a given case, a refusal of permission to communicate with the media by telephone infringes Article 10 ECHR is a binary question with only one correct answer. It is not, he said, an exercise of discretion by a public law body or a matter on which there can be, in concept, different, reasonable and equally lawful views. On that basis, he contended that if I was persuaded to quash the Refusal Letter, I should proceed to determine for myself whether consent for the proposed telephone interview by the interested party had to be given, make a final declaration upon that and (if it was in the claimant's favour) issue a mandatory order requiring consent to be given.

53. However, and as Mr Callus fairly acknowledged, there is nuance in the proposition that the court must be the ultimate arbiter of the balance between the Article 10 ECHR rights that are engaged and the public interests said to justify interference with them. Thus, the court "*must test the adequacy of the factual basis claimed for the decision: is it sufficiently robust having regard to the interference with Convention rights which is involved?*" (*R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, *per* Lord Sumption, JSC, at [34]); but the court does not make the substantive decision in the place of the public law body, and may attach particular weight to the decision-maker's expert judgment of the situation before them (*ibid*). Although, therefore, Mr Callus is correct that assessing the proportionality of an interference with fundamental human rights such as those under Article 10 ECHR is not a matter of discretion, a public law decision-maker's properly directed views are rightly to be taken into account, and may carry considerable weight, even if they can only ever be one of the various factors to be considered (*Casciani* at [53]).

54. The difficulty with Mr Callus's invitation that I now assess proportionality for myself, therefore, is that:

    (i) the Governor's views were not properly directed, and I consider it clear from the evidence that in the relevant respect, i.e. as regards the meaning of the PSI and therefore the approach he should take that drove the decision he then made, he was misdirected by the Press Office;

    (ii) as a result, (a) I do not have the benefit of his properly directed views, *and* (b) there is no reason to consider that he might be unable to address the claimant's request for permission afresh, taking direction as to the meaning of the PSI from this judgment, or might be compromised in doing so by the misdirected conclusions he came to when initially refusing the request in June 2021 and in the Refusal Letter in December 2021;

    (iii) furthermore, I do not consider that these proceedings, as currently constituted, afforded the court a proper opportunity to investigate *de novo* the question of

proportionality. If I were otherwise minded to direct such an investigation, it would be on the basis that there had to be fresh statements of case as for a Part 7 Claim, and case management after that to assess the factual evidence that ought to be assembled for a second substantive hearing that, I envisage, would need to be much more than the 3½-hour argument that was listed.

55. The question of remedy in judicial review proceedings *is* discretionary, and for those reasons I do not consider it just or convenient to pursue the possibility of declaratory or mandatory relief. The justice of this case is served, in my view, by the quashing of the Refusal Letter and the consequent requirement upon the Governor to consider afresh the claimant's request for consent to be given for the proposed telephone interviewed by the interested party.

Ground (ii)

56. In the circumstances, it is not necessary to consider Ground (ii) at any length. As I read the PSI, it does not purport to impose a blanket ban or to give guidance that ought to lead, if it is followed properly, to refusals of permission that will infringe Article 10 ECHR rights. The evidence did not establish that the PSI had operated *de facto* as a blanket ban either.

57. On the latter point, the evidence as to the operation of the policy in practice was not of conspicuous quality, but it seems clear enough that only a tiny number of requests for telephone contact with the media are made. It is not possible, therefore, to draw the conclusion that a *de facto* ban is in place from the fact that no example of a successful request was shown to the court.

58. On instructions pursuant to his duty of candour, giving information that I made clear would need to be formalised by proper witness evidence whatever the outcome of this claim, Mr Jolliffe informed the court that in the case of Roger Khan, serving a 30-year determinate sentence for attempted murder after a trial in 2011, the defendant had been minded to grant a request made in 2014 for an interview by the *Daily Mail*. The request was for an interview at a prison visit, alternatively by telephone, but the request was withdrawn before any final decision had been made and communicated. Whilst that is not an example of a successful request, therefore, it strongly suggests that indeed there is not *de facto* a ban.

Conclusion

59. The Refusal Letter was a misdirected and irrational decision to refuse the claimant's request to be allowed to give a telephone interview to the interested party. It will be quashed, but I decline to grant further relief beyond that. The Governor will need to consider the claimant's request afresh.