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Judge rules governor needs to reconsider request by Life prisoner to be phone interviewed by investigative journalist podcaster in England and Wales High Court judicial review- 16th June 2023

The High Court Judge determined that the refusal by the prison governor should be quashed. The Article 10 freedom of expression issue was not fully determined.

The case law reference is Alexander, R (On the Application Of) v Eveleigh [2023] EWHC 1407 (Admin) (16 June 2023) and available at:

<https://www.bailii.org/ew/cases/EWHC/Admin/2023/1407.html>

Also available on UK judiciary website at: <https://www.judiciary.uk/wp-content/uploads/2023/06/Alexander-v-Secretary-of-State-for-Justice-judgment-160623.pdf>

Mr Justice Andrew Baker introduced the background and legal issues in the case in paragraphs 1 to 9:

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 Judgment Approved by the court for handing down. *Alexander v Secretary of State for Justice* 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.'

The key paragraph in the judge's ruling is at 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 interview by the interested party.'

At paragraph 59, he concluded:

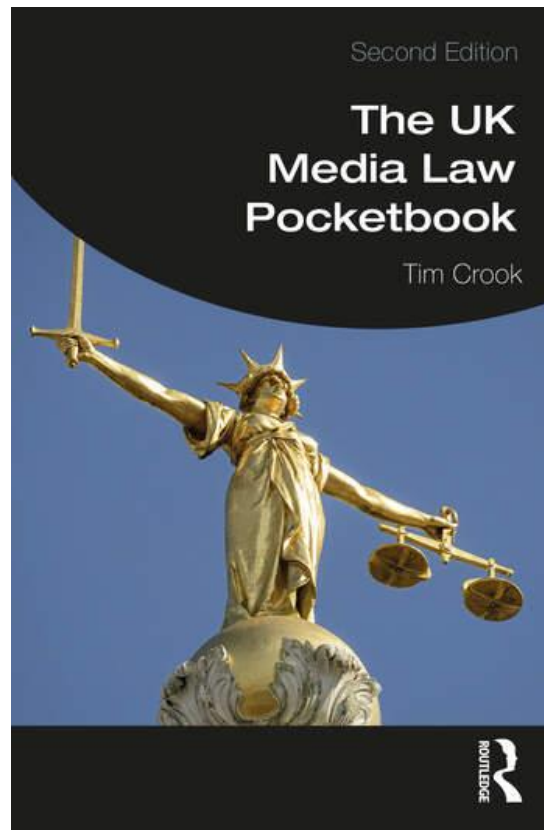
'The Refusal Letter was a misdirected and irrational decision to refuse the claimant's request to be allowed to give a telephone interview to the interested party. It will be quashed, but I decline to grant further relief beyond that. The Governor will need to consider the claimant's request afresh.'

This is how the journalism trade and mainstream media has been reporting the case:

Press Gazette: 'Man jailed for murder wins legal challenge over ban on speaking to media' at: https://pressgazette.co.uk/media_law/mark-alexander-journalist-podcast/

Independent: 'Murderer claiming wrongful conviction wins legal challenge over jail interview. Mark Alexander was found guilty of killing his father in September 2010.' See: <https://www.independent.co.uk/news/uk/crime/government-high-court-moj-surrey-ministry-of-justice-b2358898.html>

The Judge limited his ruling to the rationality and reasonableness of the specific decision by the governor in the circumstances of this case and not wider Article 10 freedom of expression Human Rights issues about the right of prisoners to be sound record or video interviewed by journalists. Hence the Ministry of Justice saying afterwards: 'the court did not find the policy on prisoner access to the media to be unlawful.'



The second edition of *The UK Media Law Pocketbook* presents updated and extended practical guidance on everyday legal issues for working journalists and media professionals. This book covers traditional print and broadcast as well as digital multimedia, such as blogging and instant messaging, with clear explanations of new legal cases, legislation and regulation, and new chapters on freedom of information and social media law. Links to seven new online chapters allow readers to access all the most up-to-date laws and guidance around data protection, covering inquests, courts-martial, public inquiries, family courts, local government, and the media law of the Channel Islands and the Isle of Man. Tim Crook critically explores emerging global issues and proposals for reform with concise summaries of recent cases illustrating media law in action, as well as tips on pitfalls to avoid.

The UK Media Law Pocketbook is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit <https://ukmedialawpocketbook.com>.

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