Case No: CO/5832/2003

Neutral Citation No: [2003] EWHC 2846 (Admin)
IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 27th November 2003

Before :

LORD JUSTICE KENNEDY
and
MR JUSTICE ROYCE

- -

Between :

R (on the application of 'A')	Claimants
- v -	
Home Secretary	Respondent

- -
- -

Tim Owen QC and Hugh Southey (instructed by Birnberg Peirce & Partners) for the Claimants
Ian Burnett QC and Jonathan Swift (instructed by Treasury Solicitors) for the Respondent
Eleanor Grey (instructed by Capsticks) for an Interested Party (West London Mental Health Trust)

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Judgment

Lord Justice Kennedy:

1. This is an application by detainees for judicial review of the decision of the Secretary of State to permit them to be interviewed by journalists but only if the interviews are conducted within earshot of officials and are tape recorded. The claimants challenge the monitoring conditions which the Secretary of State has imposed, contending that they contravene Article 10 of the European Convention on Human Rights.

Background.

2. Each of the six claimants is the subject of a certificate issued by the Home Secretary under section 21 of the Anti-Terrorism Crime and Security Act 2001 on the basis that the Secretary of State suspects that he is a terrorist, and believes that his presence in the United Kingdom is a risk to national security. As a consequence of certification each claimant has been detained pursuant to the powers in the Immigration Act 1971 as modified by the 2001 Act. Five of the claimants are held in prisons, four at Belmarsh and one at Woodhill. The sixth has since July 2002 been detained at Broadmoor Hospital. They have all exercised their right to appeal to the Special Immigration Appeals Commission, and in each case the appeal has recently been dismissed.

3. During the autumn of last year journalists working for two national newspapers, the Guardian and the Observer, and for the BBC expressed an interest in interviewing the claimants, but permission was refused. There may have been some misunderstanding as to why at that stage permission was being sought, but for present purposes, and in the light of subsequent developments, the 2002 negotiations are of no importance.

4. On 19th December 2002 the six claimants commenced these proceedings for judicial review, the decision under challenge being "a decision to prevent journalists interviewing the claimants". The BBC and the Guardian were named as interested parties. Acknowledgments of service were filed together with statements from three journalists, and on 5th February 2003 permission to apply for judicial review was granted by Mackay J. The Secretary of State then reconsidered the position, and decided to permit the interviews by the BBC and the Guardian on terms which are set out in his letter to the BBC of 20th June 2003, part of which reads –

> "The interviews may take place provided they are recorded by the HM Prison Service and conducted within the earshot of officials at all times, and provided that they remain within the scope indicated in paragraph 20 of J. Manel's witness statement of 12 March 2003 and paragraph 21 of Chris Elliott's witness statement of 13 March 2003. The BBC has already accepted that the interviews may be monitored; see letter from John Manel to Mr Turner of 17 September 2002, under 'conditions of interview'. These conditions are accepted in paragraph 19 of Danny Shaw's witness statement dated 4 March 2003. The Guardian has also accepted that the interviews may be monitored, albeit by tape recording; see paragraph 20 of Chris Elliott's statement dated 13 March 2003.

> No recording equipment may be brought into the prison by those involved in carrying out the interviews. This is in accordance with normal practice for journalistic interviews conducted in prison."

As is clear from that extract, the journalists had already indicated a willingness to accept the monitoring conditions which the Secretary of State imposed and, as Mr Ian Burnett QC for the Secretary of State told us, it was at that stage believed that the action would come to an end. It did so in so far as it concerned the representatives of the media. But the claimants themselves were not happy with the conditions, and it is those conditions which we are now considering. As one of the claimants is a patient the West London Mental Health NHS Trust, which is responsible for Broadmoor Hospital, has sought leave to be joined as an Interested Party and we have granted that leave.

Tha Claimants objections to monitoring.

5. In the witness statement of 5 August 2003 the claimants' solicitor, Gareth Pierce, sets out at paragraph 23 onwards their reasons for objecting to the proposed monitoring. They have, she says, been detained without any police interview or any involvement of the Crown Prosecution Service. They believe that their circumstances have been misinterpreted and that if what they say to journalists is recorded that too would be misinterpreted and used against them and others, including their families. They are asylum seekers from repressive regimes which are "in many cases allies of Britain". They are worried that information given to journalists in confidence in relation to those regimes would, if recorded, be transmitted to their regimes and endanger their friends and families.

6. If they discussed the detention itself in the presence of a prison officer or a member of the Home Office Staff they fear repercussions from those who would hear about their complaints. They have already, it is said, been subjected to verbal and physical abuse by prison officers, and they do not want officers or other prisoners to know the details of the government's reasons for detaining them. They believe that not all of the information they give to journalists will be published, and their concerns relate to the Secretary of State having knowledge of material which, for responsible reasons, journalists choose not to publish.

7. Finally, it is asserted on behalf of the claimants that in the past some of those convicted of terrorism have given face to face interviews to the press at which there were no monitoring conditions. No particulars are given, and Mr Burnett told us that if that has ever happened it should not have done.

8. A substantial part of the statement of Ms Pierce is devoted to the importance of media interviews but I can deal with that very quickly because it is only the imposition of conditions which remains in dispute before us. In substance the claimants want to explain why they have been detained in a way which will counterbalance the material emanating from the Secretary of State, and to explain the effects of detention upon them, and upon their families. This may be of assistance to them individually in further appellate litigation undertaken on their behalf, and it may also assist the public to challenge the concept of a national emergency which justifies the detention of suspected terrorists.

Why the Secretary of State wants monitoring.

9. The position of the Secretary of State is set out in Mr Whalley's statement of 12 September 2003. He deals first with the implementation of the 2001 Act in response to terrorism, and points out that each of the claimants can bring their detention here to an end at any time by choosing to leave the United Kingdom. The regularity of their detention is not in issue in this court, and Mr Whalley points out that the Secretary of State has agreed that they can be interviewed on all of the topics raised by the journalists as topics in relation to which they would like to interview. The topics are open-ended, and the Secretary of State accepts that there must be an element of flexibility inherent in any interview, but monitoring is required to safeguard –

> (1) Good order and discipline at the prisons where the claimants are held, and –
>
> (2) The national security of the United Kingdom.

Monitoring is not unusual in relation to prisoners. Rule 34(6) of the Prison Rules provides that unless the Secretary of State directs otherwise "every visit to a prisoner shall take place within the hearing of an officer or authorised employee". The provision does not apply to visits by lawyers or members of the Criminal Cases Review Commission etc, but otherwise it is applied.

10. In prison each of the claimants is classified as a category A prisoner, so his correspondence (other than with lawyers) is read, and he can only make outgoing telephone calls to approved numbers. Those restrictions apply to all category A prisoners, and paragraph 29 of Prison Service Standing Order 5A provides that if it appears necessary in the interests of prison security, national security or other stated grounds visits may be tape recorded, so that they can be reviewed later. The Secretary of State considers that to be necessary in the case of the claimants because he suspects that each of them is a terrorist, whose presence in the United Kingdom is a risk to national security. Obviously if anything were to emerge from monitoring relevant national security the Secretary of State would react to it, but that should not inhibit the claimants because in the proceedings before SIAC they have each denied any involvement in terrorism or any other illegal activity. If they are consistent they are therefore unlikely to say anything that can be used against them or any one else. As to confidentiality, if they give information directly to journalists they cannot control what is published. Their own treatment in prison is independently monitored by Lord Carlile pursuant to section 28 of the 2001 Act. If they have complaints they can address them to him, and in response to his first report a special detention facility has been established at Woodhill for those detained under the 2001 Act. So far none of the claimants have chosen to move into that facility. Against that background it is submitted by Mr Whalley that there is no sensible basis for the suggestion that any claimant may suffer an adverse repercussion to what he says in interview if the interview is monitored. Furthermore, although there have been complaints of abuse in the past they have all been investigated, and so far none of them have been substantiated. When Mr Whalley made his statement one investigation was incomplete. As to any risks from other prisoners, their only source of information would be what they read in the media, being part of what the claimants chose to disclose to the journalists who interview them.

Article 10.

11. So far as material Article 10 provides –

> "1. Everyone has the right to freedom of expression. This right shall includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …
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> 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, or the prevention of disorder or crime…. for the protection of the reputation or rights of others …."

Some reliance was at one time also placed on Article 14 (the non-discrimination provision) and on Article 6, but before us it was accepted by Mr Tim Owen QC on behalf of the claimants that for present purposes those Articles add nothing to Article 10.

The Claimants submissions.

12. Mr Owen submits that monitoring is on the face of it a contravention of Article 10.1, and that is conceded. What the Secretary of State contends is that this case falls within Article 10.2, or Article 10 read as a whole, and that there is no element of discrimination contravening Article 14.

13. Mr Owen submits that if there is monitoring there will inevitably be inhibition of free speech, and that will substantially interfere with any proposed interview. The claimants are, he points out, not persons convicted of any crime or even persons detained awaiting trial, so the rules which apply to category A prisoners who have been convicted or who are awaiting trial are not self-evidently relevant. Although no point is taken in these proceedings as to the propriety of holding the claimants in accommodation designed for category A prisoners, and applying to them Prison Rules, over-rigid monitoring is not required. The reasons advanced, namely safeguarding good order and discipline, and safeguarding national security, are invoked ritualistically. Because of the unique status of the claimants and the importance of the right safeguarded by Article 10.1 the court should be slow to find that the case falls within the ambit of Article 10.2. It is accepted that special considerations apply when a convicted prisoner is interviewed by the media, for reasons given by Lord Steyn on R v Home Secretary ex parte Simms [2000] 2 AC 115, and that it cannot be said that the Detention Centre Rules 2001 (SI 238), which provide the regime for immigration detainees held in detention centres, are applicable to the claimants. But Mr Owen contends that those more relaxed rules provide a better guide to the restrictions which are in fact required, because they reflect the lack of any penal objective.

14. Turning to authorities, Mr Owen invited our attention to four cases, which I approach in chronological order. In R v Home Secretary ex parte Leech [1994] QB 198 the Court of Appeal was concerned with the interception of correspondence between a prisoner and his

lawyer and at 216 Steyn LJ agreed with the Australian High Court as to the chilling effect of censorship. It was found to create a substantial impediment to the exercise of the basic right of access to the courts.

15. In Simms (supra) the House of Lords considered the right of convicted prisoners to have access to journalists who, they hoped, might assist them to challenge their convictions. At 120H Lord Steyn agreed with Judge LJ that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody. At 125 to 127 Lord Steyn developed that proposition by reference to Article 10, and the value of free speech, not all types of speech having equal value. In the instant case it had high value because the convicted prisoners wanted to challenge the safety of their convictions, and investigative journalism based on oral interviews could help. At 129 the argument that oral interviews would tend to disrupt order and discipline in prisons was rejected on the basis that it took insufficient account of the limited nature of the applicants' claims. Mr Owen submits that in this court the same argument could meet with the same response, but the analogy seems to me to be less than perfect. At 131 Lord Steyn said –

> "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."

Mr Burnett also relies on that passage. He submits that the Secretary of State has acted in accordance with it in this case.

16. Mr Owen's next authority was R (Daly) v Home Secretary [2001] 2 AC 532, which was concerned with cell searches and privileged correspondence. The House of Lords held that a prisoner was entitled to be present when his correspondence was examined to ensure that it was not improperly read.

17. The final authority relied upon by Mr Owen was R (Hirst) v Home Secretary [2002] 1 WLR (Part 2) 2929 where a prisoner who campaigned for prisoners' rights had been refused authority to make recorded telephone calls to the media. The calls would have been permitted if related to an alleged miscarriage of justice (pursuant to Simms) and letters would have been allowed, but for the claimant it was contended that two way contact was required otherwise "serving prisoners would frequently be denied the right to participate in discussion about matters of legitimate concern to prisoners at all." For the claimant it was contended that the restriction on telephone calls was disproportionate to the legitimate aims set out in Article 10.2. Elias J pointed out that proportionality had to be considered in the context of the objectives sought to be achieved. If rights were curtailed as part of a punishment the courts would be slow to find that the curtailment was disproportionate, but where the curtailment is to achieve a specific objective the courts can exercise a tighter review of the restriction to ensure that it does not unnecessarily interfere with Convention rights. At 2943E Paragraph 40 the judge continued –

> "There is not simply a general striking of a balance between individual rights and the public interest with deference being shown to the views of the state authority; the starting point is the Convention right, which it is accepted in principle remains in play. The authority must demonstrate a proper basis for interfering with it, and show that nothing short of the particular interference will achieve the avowed objective."

Mr Owen points out that in the present case although the claimants are lawfully held in prison there is no penal objective, so he submits that the Secretary of State must demonstrate a proper basis for interfering with the right to give an interview without being monitored. For the Secretary of State it is pointed out that no lesser and equally effective form of monitoring has been proposed by anyone.

18. As Mr Owen submits, it is not suggested by Mr Whalley that there is any specific reason to believe that these claimants will say anything to threaten good order and discipline or national security. Nor is it suggested that the interviewing journalists will consciously or unconsciously assist terrorism. It is not even suggested that the journalists may be used, without their knowledge, to distribute sensitive material. So over all it is contended that the grounds for monitoring which have been relied upon have not been substantiated.

Submissions for the Secretary of State.

19. For the Secretary of State Mr Burnett points out that in all the cases on which Mr Owen relied some restriction of visits and some monitoring is accepted as necessary, not simply as a punishment but in order to maintain good order, discipline and security. That was accepted by Latham J (as he then was) at first instance in Simms in a passage cited by Lord Hobhouse at 137, and Lord Hobhouse also pointed out at 140B that communications with legal advisers are entitled to a higher order of protection than communications with the press, as to which the prison governor normally has a discretion. Usually written or telephone contact will suffice, but at 143G Lord Hobhouse recognised that –

> "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 applicants appear to visualise."

Lord Hobhouse went on to mention the need for special arrangements, and Lord Millett adopted a similar cautious approach saying at 146B that if the governor –

> "Is satisfied that the visitor is a responsible journalist investigating a possible miscarriage of justice, that his investigations cannot be 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."

20. In Hirst the claimant himself suggested contemporaneous monitoring, so the judge felt able to ask himself in paragraph 82 whether in that situation no effective monitoring and control was possible short of an almost complete ban.

21. As Mr Burnett points out, the controls proposed are not unusual. They are in substance common place (see Prisons Rule 34(6)) and it is not suggested that the additional use of a tape recorder makes a critical difference. To achieve the ends sought out to be achieved – to safeguard the prison and national security – no less intrusive measures would suffice, and it is difficult for the claimants to contend that what is proposed is irrational when it has been accepted by the media. To suggest that interviews with these claimants should not be monitored at all would be, Mr Burnett submits, extreme. They are being held as category A prisoners in high security prisons, and if they are justifiably suspected of being terrorists whose presence in this country is a threat to national security (and SIAC has agreed with the Secretary of State as to that) then, as Lord Carlile has accepted, there is a clear need for them to be held in conditions of high security. It is clear from the statement of Mr Whalley that their position has been considered without being fettered by any pre-existing policy. Rule 34(6) has not simply been taken as a template. The requirement of a tape recording goes beyond Rule 34.

22. As to the dangers which the Secretary of State seeks to guard against, the potential impact on good order and discipline is not easy to particularise, but it is easy enough to envisage, and the same can be said of the risk to national security. For their fellow category A prisoners it is the need to preserve good order and discipline which justifies Rule 34(6), and there is no obvious reason why that should not also be the position in relation to them. In addition, if they are suspected terrorists it is really self evident that what they say needs to be monitored by someone with knowledge of the individual claimant who can consider the possible impact on security of publication.

23. Article 10.1 gives a right to impart information which is qualified by Article 10.2, and the conditions imposed by the Secretary of State are, Mr Burnett submits, for legitimate purposes within the scope of Article 10.2. As he points out, courts have always shown a degree of deference to the executive when the decision under consideration concerns national security. In Home Secretary v Rehman [2003] 1 AC 153 the Secretary of State had ordered the deportation of a Pakistani national whom he considered to be a threat to national security. At 183 A Lord Slynn said –

> "I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation in itself is capable of fostering such security 'by inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states.' There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim that a preventative or precautionary

> action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom."

Lord Steyn agreed and said at 185E –

> "Even democracies are entitled to protect themselves, *and* the executive is the best judge of the need for international co-operation to combat terrorism and counter terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security."

At 192 B paragraph 50 Lord Hoffmann said –

> "There is no difficulty about what 'national security' means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

He developed that theme over the next few paragraphs of his judgment, and in a postscript at page 195 paragraph 62 he wrote that the terrible events of 11th September 2001 "are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security."

24. In R (Pro-Life) v BBC [2003] 2 WLR 1403 the matter in issue in the House of Lords was the right of a political party to include in an election broadcast video footage of an actual abortion, which the BBC refused to transmit. The refusal was said to contravene Article 10. At page 1422, paragraphs 74 to 77, Lord Hoffmann pointed out that deference may not be the best word to describe the relationship between the courts and the executive. There is no element of servility, or gracious concession –

> "In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law, and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power."

In the particular case Parliament was held to be entitled to reflect the public's desire to maintain standards of taste and decency, even if to do so did to some extent infringe the liberty of others. That does illustrate the repeated need to balance the interests of one individual or group and the interests of the community, as noted by Lord Bingham in Brown

v Stott [2003] 1 AC 681, and there are many cases in which the European Court of Justice has given a wide margin of appreciation to national authorities in relation to their assessments of the requirements of national security. The deferential approach of domestic courts to the exercise of discretion by the executive is consistent with the European approach.

25. Returning to the facts of this case, Mr Burnett submitted that this was not simply a blanket decision to refuse live interviews, even if it may have appeared to have been so prior to 20th June 2003. The interference with freedom of communication is marginal, and in reality there can never be a situation in which a claimant is alone with an interviewer because on arrival at a prison the journalist and his or her shorthand writer will be met by a press officer, who will accompany them thereafter. In some cases an interpreter will also be required, and the solicitor for the claimants may want to be present, so the interviewee is unlikely to be significantly inhibited because in addition to the press officer there is an official within earshot and the interview is being tape-recorded. In Hirst at paragraph 81, Elias J recognised that in a potentially dangerous situation a government is entitled to take precautions. Precautions must be measured and proportionate but, Mr Burnett submits, that is the position here, given that what may be said is part of the concern. If any precautions are to be taken they could not be less intrusive than those proposed. The restrictions are necessary in a democratic society for the reasons envisaged in Article 10.2 when balancing the right of the individual claimant to impart information against the legitimate concerns of the Secretary of State.

The sixth claimant.

26. It was common ground before us that if the sixth claimant wants to be interviewed, and a journalist wants to interview him, then it is for the NHS Trust to decide on his application. A licence is required to enter the hospital, but of course a licence would be granted if it was decided to facilitate an interview. As Dr Hollyman, the chief executive of the Trust, explains in her witness statement, the decision falls to be made by the Responsible Medical Officer, who considers first whether the proposed contact presents any risk to the patient's mental well being. If it does not, then there are other considerations, namely the effect on other patients and on good order and security in the hospital, as well as national security. The hospital has no blanket ban on interviews with journalists, but in practice such interviews are rare, and all visits are monitored, at least to some extent. It is said that the Secretary of State does have power under the NHS Act 1977 to direct the Trust only to permit interviews subject to specified monitoring, but to date no such directions have been given, so for present purposes that power can be ignored. In my judgment such directions do not need to be given because, as Ms Grey for the Trust submitted, if the monitoring conditions are acceptable in law in relation to the claimants who are detained in prison there is no discernable basis for saying that they should not be regarded as acceptable when applied to a patient in Broadmoor. And as the Trust will defer to the Secretary of State on matters involving national security it will in practice, and apart from therapeutic considerations, require –

> (1) Prior agreement as to the scope of any interview:
>
> (2) That an interview takes place within earshot of an official, and that a tape recording is made by the prison service or the Secretary of State, and-

(3) That no journalist brings any sound recording equipment to record an interview, but may take or arrange for the taking of a short hand note.

Mr Burnett submits that even if the RMO were prepared to countenance an unmonitored interview he or she cannot be the final arbiter when issues arise in relation to national security. I agree. Thus the Trust can impose conditions which the RMO may consider to be unnecessary.

Conclusion.

27. In my judgment this application fails for the reasons given by Mr Burnett on behalf of the Secretary of State. I accept that it is important not to regard the claimants as convicted prisoners, or even prisoners remanded in custody awaiting trial for criminal offences, and to have careful regard to their rights under Article 10. But they are justifiably suspected of being terrorists whose continued presence in the United Kingdom is a threat to national security, and it is accepted that they are properly detained in accommodation for category A prisoners. The maintenance of good order and discipline within prisons is normally held to require a degree of monitoring when prisoners in such accommodation are interviewed, and the additional dimension of national security seems to me to be ample justification for the extra measure proposed, namely tape-recording. No lesser measures would give the authorities the assurances they seek and which, in the interests of national security, they need. If the claimants choose not to be interviewed because any interview will be monitored and cause some degree of inhibition that is a matter for them, but in my judgment the restrictions imposed fall well within the scope of Article 10.2. The Secretary of State had to strike a balance, and the balance struck in the letter of 20th June 2003 seems to me to be one with which the courts should not attempt to interfere. If the same measures are applied to a patient in Broadmoor I would regard that too as unobjectionable.

28. Accordingly I would dismiss this application.

Mr Justice Royce:

29. I agree that the application should be dismissed.

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