Case No: CO/209/2003

Neutral Citation [2003] EWHC 3160 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 19 December, 2003

Before :

THE HONOURABLE MR JUSTICE MAURICE KAY

- -

The Queen on the application of :

DENNIS ANDREW NILSEN	Claimant
- and -	
(1) THE GOVERNOR OF HMP FULL SUTTON	Defendants
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	

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Miss Alison Foster QC (instructed by Tuckers Solicitors) for the Claimant
Mr Steven Kovats (instructed by Treasury Solicitor) for the Defendants

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Judgment

Mr Justice Maurice Kay :

1. Dennis Andrew Nilsen is a serving prisoner of notoriety. He is serving six life sentences for the murders of six men. The sentences were imposed on 4 November 1983. They are the subject of a whole life tariff. The offences were as grave and depraved as it is possible to imagine. To his credit, he takes no issue with the convictions or the tariff. In about 1992 he started to write an autobiography. In the summer of 1996 he handed what he had written – a lengthy typescript – to his then solicitor who was visiting him at HMP Whitemoor. It seems that several copies of that typescript now exist in the outside world but it has not been published. There is a dispute about the precise events of 1996, to which I shall return.

2. On 7 March 2001, Mr. Nilsen's present solicitor sent a copy of the manuscript to him at Whitemoor, describing it as privileged correspondence but disclosing its nature to the prison Governor. The governor returned it to the solicitor on the ground that it was not legal correspondence. In subsequent communications the stance of the Governor was that the material was obviously intended for eventual publication and, in the circumstances, it would be necessary for it to be examined by the prison authorities to see whether it complied with the rules as to material intended for publication. In due course, Mr. Nilsen was transferred to HMP Full Sutton where the dispute continued. He then commenced judicial review proceedings against the Governor of Full Sutton and the Home Secretary. On 19 March 2002 Crane J held that, if the material were to be sent to Mr. Nilsen at Full Sutton, the prison authorities would have the right to examine it to see whether it would be in accordance with the rules for it to be passed to him. Thereafter, it was examined by the authorities and by a letter dated 23 October 2002 the Governor communicated a decision refusing to pass the material to Mr. Nilsen. The decision was based on the conclusion that the manuscript was intended for eventual publication and that such publication would be contrary to paragraph 34(9)(c) of Standing Order 5B.

3. Before detailing the contents of the decision letter, it is appropriate to refer to the terms of the Standing Order and the statutory context in which it arises.

<u>The statutory context</u>

4. The responsibility of the Home Secretary for prisons is founded upon sections 1 and 4 of the Prison Act 1952 which provide:

> "1. All powers and jurisdiction in relation to prisons and prisoners which before the commencement of the Prison Act 1877 were exercisable by any authority shall, subject to the provisions of this Act, be exercisable by the Secretary of State.
>
> 4.(1) The Secretary of State shall have the general superintendance of prisons and shall make the contracts and do the other acts necessary for the maintenance of prisons and the maintenance of prisoners."

Section 47(1) then provides:

> "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."

For present purposes, the relevant rules are the Prison Rules 1999 as amended by the Prison (Amendment) (No. 2) Rules 2000, the material parts of which provide:

"34(1). Without prejudice to sections 6 and 19 of the Prison Act 1952 [visits by boards of visitors and magistrates] and except as provided by these Rules, a prisoner shall not be permitted to communicate with any person outside the prison, or such person with him, except with the leave of the Secretary of State or as a privilege under rule 8.

(2) Notwithstanding paragraph (1) above, and except as otherwise provided in these Rules, the Secretary of State may impose any restriction or condition, either generally or in a particular case, 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 rights of any person; or

(b)(i) is necessary on grounds specified in paragraph (3) below;

(ii) reliance on the grounds 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.

(3) The grounds referred to in paragraph (2) above are –

(a) the interests of national security;

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

(c) the interests of public safety;

(d) the protection of health or morals;

(e) the protection of the reputation of others;

(f) maintaining the authority and impartiality of the judiciary; or

(g) the protection of the rights and freedoms of any person…..

(8) In this Rule…

(c) references to Convention rights are to the Convention rights within the meaning of the Human Rights Act 1998."

5. In essence, and for present purposes, this means that imposed restrictions and conditions must not fall foul of Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Among the imposed restrictions and conditions are those set out in Standing Order 5, section B of which is concerned with correspondence. Paragraph 34 is headed "restrictions on general correspondence". It provides:

> "General correspondence……may not contain the following:
>
> …….
>
> (9) Material which is intended for publication or for use by radio or television (or which, if sent, would be likely to be published or broadcast) if it….
>
> (c) is about the inmate's crime or past offences or those of others, except where it consists of serious representations about conviction or sentence or forms part of serious comment about crime, the processes of justice or the penal system…."

The decision letter

6. The Governor's letter of 23 October 2002 to Mr. Nilsen's solicitors simply attached a document "received from our headquarters". As that document contains the decision and reasoning challenged in the present application for judicial review, it is necessary to set out its main contents in full:

> "The Prison Service has now read the manuscript…..It has decided not to allow the manuscript to be passed to Mr. Nilsen and because of this I am returning the manuscript to you.
>
> The Prison Service considers that the manuscript is material intended for publication, that it is about Mr. Nilsen's offences and that it does not consist of serious representations about a conviction or sentence and does not form part of serious comment about crime, the processes of justice or the penal system. Mr. Nilsen is not permitted to send such material out of prison: Standing Order 5 section B paragraph 34(9)(c); Standing Order 4, paragraph 40. Because the manuscript has been out of prison for a number of years, it is likely that copies have been made by third parties. However, to date Mr. Nilsen has not caused the manuscript to be published and has indicated that he wishes to do further work on it. The Secretary of State has no reason to believe that any such further work would alter the character of the manuscript.
>
> The only way in which the Secretary of State can in practice realistically seek to prevent Mr. Nilsen from publishing such material is by withholding the manuscript from Mr. Nilsen pursuant to rules 34 and/or 70 of the Prison Rules….and/or paragraph 40 of Standing Order 5B.

The reasons why the Secretary of State has concluded that publication of the manuscript, or of a revised version of it, would be contrary to paragraph 34((9)(c)…..are as follows.

The manuscript is about Mr. Nilsen. But it is also about his offences: the offences themselves, how Mr. Nilsen came to commit them, and how he is now being punished for them. The offences are an integral part of the manuscript.

The manuscript does not consist of serious representations about conviction or sentence or form part of serious comment about crime, the processes of justice or the penal system. Rather it is a platform for Mr. Nilsen to seek to justify his conduct and denigrate people he dislikes. The Secretary of State believes that his decision is in accordance with Article 10 of the European Convention on Human Rights. He accepts that withholding the manuscript is an interference with Mr. Nilsen's freedom of expression. But he considers that this is justified in the circumstances.

The withholding of the manuscript is prescribed by law, for the reasons set out above.

The withholding of the manuscript pursues a legitimate aim, namely the protection of morals, the protection of the reputation or the rights of others and the protection of information received in confidence. The manuscript contains several lurid and pornographic passages. It contains highly personal details of a number of Mr. Nilsen's offences. It seeks to portray Mr. Nilsen as a morally and intellectually superior being who justifiably holds others in contempt. Its publication would be likely to cause great distress to Mr. Nilsen's surviving victims and to the families of all his victims, and would be likely to cause a justifiable sense of outrage among the general public.

The withholding of the manuscript is a proportionate response in the circumstances. There is a pressing social need to avoid the harm described above. No lesser measure will avoid that harm. Mr. Nilsen is free to send out writings that comply with the terms of the Prison Rules and Standing Orders.

In reaching his decision, the Secretary of State has borne in mind that Mr. Nilsen is serving a whole life tariff. The Secretary of State's present view is that for as long as Mr. Nilsen remains in prison, preventing the publication of the material in the manuscript is justified, no matter how long that may be."

The material

7. The material which is the subject of this dispute was produced by Mr. Nilsen in prison between 1992 and 1996. It amounts to about 400 closely typed pages. It is described as an autobiography. Broadly, it falls into three parts. The first is concerned with aspects of his life before he committed the offences of which he was convicted in 1983. This part contains

explicit details of sexual encounters with various men. The second part is concerned with the offences themselves and includes considerable detail of the killings and the ways in which the bodies of the victims were abused, dismembered and disposed of. The third part – which is the longest – is essentially a diary of prison experiences with reflections on the criminal justice system.

8. This material does not represent Mr. Nilsen's first expression of his thoughts and feelings. In 1985 the author Brian Masters published a book called Killing for Company which was about Mr. Nilsen and his offences and drew extensively on the subject's own words which he had committed to writing whilst on remand.

The grounds of challenge

9. On behalf of Mr. Nilsen, Miss Alison Foster QC seeks to challenge the decision of 23 October 2002 on three grounds. First, she submits that paragraph 34(9)(c) of Standing Order 5B is unlawful because of Article 10 of the ECHR. Secondly, and more narrowly, it is said that paragraph 34(9)(c) cannot lawfully apply to autobiographical writings. Thirdly, even if there is no inherent unlawfulness, the application of paragraph 34(9)(c) in the circumstances of the present case is disproportionate or irrational.

Article 10

10. Article 10 lies at the heart of all Miss Foster's submissions. Before addressing the three grounds of challenge, it is appropriate to set out its text and some general propositions which are common ground. Article 10 provides:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since its 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."

11. Thus Article 10 confers a qualified rather than an absolute right. It gives rise to the following uncontroversial proposition. (1) Freedom of expression is intrinsically important and is valued for its own sake: R v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 126. per Lord Steyn (which was decided before the Human Rights Act 1998 came into force). (2) It applies to "everyone". (3) It is applicable "not only to

information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that plunalism, tolerance and broadmindedness without which there is no 'democratic society'." See Nilsen v. Norway (1999) 30 EHRR 878, para 43. (4) The exceptions must be construed strictly and the need for any restrictions must be established "convincingly": ibid. With all this in mind, I now turn to the grounds of challenge.

Ground 1: Article 10 and paragraph 34(9)(c)

12. The foundations of this ground of challenge are to be found in the principle of domestic law succinctly expressed by Lord Wilberforce in Raymond v. Honey [1983] 1 AC 1, 10 – " a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication" - and the Convention requirement that a restriction on freedom of expression must be "prescribed by law" and "necessary in a democratic society". In this latter context, Miss Foster correctly observes that "necessary" is not synonymous with "useful, reasonable or desirable". It connotes a pressing social need: Handyside v. United Kingdom (1976) 1 EHRR 737, para 48. It is axiomatic that any restriction must pursue one of the legitimate aims specified in Article 10(2) and must do so in a manner that is proportionate.

13. The case for Mr. Nilsen is then put on the basis of a number of interrelated propositions. First, paragraph 34(9)(c) lacks a prescribed legal basis because Parliament has not expressly conferred upon the Prison Service or a prison governor any power to regulate matters beyond the prison walls. Nor is such a power one that arises by necessary implication. Secondly, any such implied power is limited to matters related to good order and discipline in the prison and prison security. Thirdly, the prevention of harm to the families of victims and the prevention of public outrage are not matters for a prison governor. They can be left to the general criminal law, the laws of libel, confidentiality and the like.

14. To these propositions, Mr. Steven Kovats, on behalf of the Governor and the Secretary of State responds as follows. First, there is a chain of statutory authority running through sections 1, 4 and 47 of the Prison Act and Rule 37 of the Prison Rules upon which Standing Order 5B in general and paragraph 34(9)(c) in particular are constructed. That satisfies the requirement of legal prescription. He relies on Refah Partisi v. Turkey (2003) 37 EHRR I in which the Strasbourg Court observed (at para 57):

> "…..the expression 'prescribed by law' requires first that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the evolving views of society. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in

> question, to give the individual adequate protection against arbitrary interference. The court also accepts that the level of precision required by domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the status of those to whom it is addressed."

In my judgment, it is abundantly clear that section 47 enabled the Secretary of State to promulgate Rule 34 which confers upon him a discretion to impose "any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons", provided that he considers that it is Convention compliant. Paragraph 34(9)(c) is the result of such an exercise of discretion.

15. Secondly, Mr. Kovats takes issue with the submission that the scope for implication is as narrow as Miss Foster suggests. He relies on a line of authority which is equally relevant to Miss Foster's third proposition. It is convenient to deal with those authorities now. I shall be selective.

16. I can best deal with the speeches in Simms (above) by means of an extensive quotation from the judgment of Lord Phillips of Worth Maltravers MR in R (Mellor) v. Secretary of State for the Home Department [2001] EWCA Civ 472 [2002] QB 13 (at paras 52 to 56):

> "Passages in the speech of Lord Steyn….and Lord Hobhouse of Woodborough….in ex parte Simms lend some support to [the] submission that it is only lawful to restrict a prisoner's freedom of expression to the extent that this is both necessary and proportionate in the interests of maintaining order and discipline in prison. On considering the speeches as a whole, however, I have concluded that they recognised that a degree of restriction of a right of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of the prison, but as part of the penal objective of deprivation of liberty. How far freedom of expression could justifiably be restricted was a question of proportionality. In ex parte Simms it was disproportionate to prevent interviews with journalists that were directed to gaining access to justice.
>
> Lord Steyn said, at page 127:
>
> > 'The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects a prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the

> present case is qualitatively of a very different order. The prisoners are in prison because they are presumed to be 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.'

I consider that this passage supports the [Secretary of State]. Lord Steyn's example of justifiable interference with freedom of speech attributed the justification both to the punitive objective of deprivation of liberty and to the need of discipline and control in prisons.

In his short concurring speech, Lord Hoffmann said, at page 132:

> '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 could curtail not merely the prisoner's right of free expression but its use in a way which could provide him with access to justice.'

This suggests to me that Lord Hoffmann contemplated as justifiable a degree of deprivation of the right of free expression as part of the punitive regime.

That Lord Millett was of this opinion is plain from the following passage of his speech at pages 144 to 145:

> '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 of 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 approach under the Strasbourg jurisprudence and under English domestic law is the same. The consequences that the punishment of imprisonment has on the exercise of human rights are justifiable provided they are not disproportionate to the aim of maintaining a penal system designed both to punish and to deter. When the consequences are disproportionate, special arrangements may be called for to mitigate the normal effect of deprivation of liberty.' "

In my judgment, that analysis and exposition is of considerable importance in the context of the present case. It shows that, contrary to Miss Foster's submission, the regulatory powers are not confined to good order and discipline within the prison or prison security. The principles in Mellor fell to be applied by Elias J in R (Hirst) v. Secretary of State for the Home Department [2002] EWHC 602 (Admin) [2002] 1 WLR 2929. There, the policy which in all circumstances denied a prisoner the right to contact the media by telephone whenever his purpose was to comment on matters of legitimate public interest relating to prisons and prisoners was unlawful. However, that was the result of a proportionality exercise applied to a very different form and content of communication. If further authority were required to support the proposition that the regulatory power may extend beyond the prison walls, it can be seen in the Strasbourg admissibility decision of Bamber v The United Kingdom (Application 33742/96) where the Commission stated (page 7 of transcript):

> "…….The restriction in question pursued proportionately a legitimate aim under the terms of Article 10 para 2….in that it sought to control communications with the media with a view to the prevention of disorder, and the protection of morals and/or the rights of freedoms of others."

Moreover in Secretary of State for the Home Department v. Central Broadcasting Limited [1993] EMLR 253 (which also concerned the affairs of Mr. Nilsen) Aldous J said at first instance (at page 266):

> "The broadcasting of an interview with Dennis Nilsen carries with it to all the dangers which the Home Office policy is designed to guard against, namely the possibility of causing distress, enhancing notoriety and encouraging sensationalist journalism. It is, of course, a wholly different matter for such material to be used in support of research by professionals into the detection of criminals…..I….accept that the policy as a general policy is right."

Subsequently dismissing an appeal, the Master of the Rolls, Sir Thomas Bingham, nevertheless made light of the factor of distress to relatives of those who suffered at the hands of Mr. Nilsen. He observed (at page 271) "…All that anyone has to do is to switch off the programme.".

However, that *obiter* comment is not reflected in the more recent *obiter* observation of Lord Scott of Foscote (dissenting) in R (Pro Life Alliance v. British Broadcasting Association [2003] UKHL 23 [2003] 2 WLR 1403 at para 91 where he opined that "the rights of others" within the meaning of Article 10(2)

> "need not be to limited to strictly legal rights the breach of which might sound in damages and is well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the privacy of their homes had switched on the television set and been confronted by gratuitously offensive material."

17. Having considered these and other authorities I conclude that paragraph 34 (9) (c) contains restrictions which are prescribed by law and necessary in a democratic society. Once it is accepted that it is permissible for the Secretary of State to concern himself with consequential effects outside the prison and not just in relation to such matters as prison security, in my judgment it follows that he may restrict a prisoner's freedom of expression in pursuance of the legitimate aim of amongst other things, the prevention of disorder or crime, the protection of morals and the protections of rights and freedoms of others. Moreover, this case is an object lesson in why private feelings and public outrage may be matters of highly relevant concern.

18. I next turn to the question of the proportionality of paragraph 34(9)(c). The question is whether the imposed restrictions are no more than is necessary to accomplish the legitimate aim. I refer again to the passages in Simms and Mellor, above. The balance struck by paragraph 34(9)(c) is to acknowledge the prisoner's freedom of expression in relation to serious representations about conviction or sentence and serious comments about crime, the processes of justice or the penal system, but to restrict his freedom of expression in relation to other matters. When one considers the permissible considerations, from the punitive consequences of imprisonment to the impact on other persons of publication, I am satisfied that the Secretary of State did not act disproportionately in promulgating paragraph 34(9)(c).

19. In my judgment, that provision is consistent with Article 10. I shall have to return to the question of proportionality in the context of the particular circumstances of this case when considering the third ground of challenge.

Ground 2: autobiographical or personal material

20. This ground of challenge is to the effect that, even if Standing Order 5B and in particular paragraph 34(9)(c) are in general lawful, they cannot impose restrictions on writings of an autobiographical or personal nature. Miss Foster puts it in this way in her skeleton argument:

> "The concept of self-expression of the individual through description of a person's life events is at the heart of Article 10. The wording of the Article recognizes that the communication of information is as important as the communication of ideas. Standing Order 5B, however, prohibits any relation of the facts of the inmate's offending life save in the context of representations or general comment about criminology or penal matters."

Mr. Kovats makes three submissions in answer to this. First, Article 10 does not grant preferential status to autobiographical writing and, in principle, there is no reason why it should. Secondly, it is possible to imagine cases in which a prisoner might seek to refer to his offences otherwise than in the contexts expressly permitted by paragraph 34(9)(c) but where it might be disproportionate to prevent him. For example, he may refer to them in a restrained and wholly repentant way. That would raise very different considerations. Thirdly, and along the same lines, the real issue is one of rationality and proportionality in the circumstances of a particular case and, in the present case, the prohibition is rational and

proportionate for the reasons addressed earlier in relation to Ground 1 and later in relation to Ground 3.

21. In my judgment, Mr. Kovats is substantially correct. Article 10 does not confer special status on autobiographical writings, whatever their nature and context. The solution to this case is to be found in the application of general principles to its specific circumstances. This can be considered more appropriately by proceeding to the third ground of challenge.

Ground 3: rationality/proportionality in the particular circumstances of this case

22. In approaching this third ground of challenge, Miss Foster and Mr. Kovats emphasise differential circumstances. Miss Foster draws attention to the following matters. First, the approach of the Secretary of State is conditioned by a desire to control or prohibit publication, as is apparent from the evidence of George Houghton, a senior manager at Prison Service headquarters. However, as there are known to be several copies of the same material outside the prison, the Secretary of State is powerless to prevent the publication of it in its present form with the encouragement of Mr. Nilsen. As was stated in the summary grounds of opposition annexed to the Acknowledgment of Service:

> "Once a manuscript complete or incomplete has been sent outside the prison walls, the Prison Service has no further control over it."

It is common ground that the Secretary of State would be unable to restrain publication by way of injunctive relief in such circumstances. Accordingly, the Secretary of State cannot achieve what he wants by the decision to impound the manuscript. Secondly, to a large extent the material which the Secretary of State seeks to suppress is already in the public domain in the form of Brian Masters' Killing for Company. The book was written with the cooperation of Mr. Nilsen and contains a significant amount of material in his direct speech. It includes lurid details of the offences. In the intervening years the media have repeated quantities of this material. It has been in the public domain for about twenty years. Thirdly, the fact that Mr. Nilsen wishes to work on his manuscript prior to publication and has not previously encouraged publication in its present form is consistent with his intending to put it into a less offensive form, acknowledging the Secretary of State's current objections. It would be possible for the authorities to prevent dissemination outside the prison after alterations if they had valid grounds to do so at a later stage. Fourthly, what is in issue is the return to a prisoner of material which he created in prison rather than the introduction of new material with which he has had no previous connection. The prison authorities were aware of the material in the prison for years without objection.

23. The principal factual matters relied upon by Mr. Kovats include the following. First, the proper inference to be drawn from the fact that Mr. Nilsen wishes to revise his manuscript prior to publication is that he is not happy with it in its present form. This is also apparent from the fact that he has not triggered its publication before now. The desire of the Secretary of State to control the present situation is therefore not futile. Secondly, there is an important difference between a book written by a third party such as Brian Masters and a book written by Mr. Nilsen himself, even when the third party's book was written with the cooperation of Mr. Nilsen and includes lengthy passages of his direct speech. It is specifically stated in Killing for Company that Mr. Nilsen had no control over the text.

Indeed, it seems that one of his motives in wanting to publish his own account is to take issue with parts of Brian Masters' book. Thirdly, the present problem has only arisen because the disputed manuscript was taken out of prison without the knowledge or consent of the authorities. Mr. Nilsen is seeking to take advantage of that, whether or not he can properly be said to have "smuggled" it out. This emphasises the need to exercise control now, while the opportunity exists, rather than leaving it to later when it may be a case of seeking to lock the stable door after the horse has bolted. Fourthly, publication would provoke distress and outrage on the part of the families of victims and the wider public.

24. It is now necessary to explore the legal context in which these rival factual contentions have to be assessed. Miss Foster refers to both rationality and proportionality as criteria which the Secretary of State cannot satisfy. The question for the court, it seems to me, is whether the decision which is sought to be challenged is one which no reasonable decision-maker, applying paragraph 34(9)(c) and properly directing himself in accordance with Article 10, could have come. I take this formulation from the speech of Lord Scott of Foscote in R (Pro-Life Alliance) v. British Broadcasting Corporation [2003] UKHL 23 at para 100. Although Lord Scott dissented in relation to the outcome, it is not suggested that his formulation of the question was inappropriate. Because we are in the territory of Convention rights, it is insufficient to approach the issue simply on a Wednesbury or super – Wednesbury basis. It is necessary to assess proportionality in the manner described by Lord Steyn in R (Daly) v. Secretary of State for the Home Department [2001] UKHL 26, at paras 27-28 when comparing traditional grounds of review and proportionality:

> "…..the intensity of review is somewhat greater under the proportionality approach…..First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision – maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and consideration. Thirdly, even the heightened scrutiny test developed in R v. Ministry of Defence, ex parte Smith [1996] QB 517,544, is not necessarily appropriate to the protection of human rights…..In other words, the intensity of review…is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

The "legitimate aim" relied upon by Mr. Kovats is the prevention of publication which is objectionable on one or more of the grounds set out in Article 10(2), in particular

> "the prevention of disorder or crime,….the protection of health or morals,…..the protection of the reputation or rights of others,…..preventing the disclosure of information received in confidence."

In the course of submissions there was much debate about deference and proportionality. In this context it is necessary to keep in mind that the Prison Act 1952, section 1, vests all relevant powers and jurisdiction in relation to prisons and prisoners in the Secretary of

State; that by section 47(1) he has been granted the power to make rules for the regulation and management of prisons and for the treatment , discipline and control of prisoners; and that by the amended Prison Rules he may impose "any restriction or conditions, either generally or in a particular case, upon the communications to be permitted between a prisoner and the other persons", subject to consideration of Convention rights and proportionality. Paragraph 34(9)(c) of Standing Order 5 owes its existence to that statutory context. It is, in effect, an embargo on material which is intended for publication unless it falls within the exceptions expressed in (c).

25. It is now appropriate to return to the decision itself. It can be paraphrased in this way: the Secretary of State concluded that (1) the material does not fall within the permitted exceptions to paragraph 34(9)(c) in that it does not consist of serious representations about conviction or sentence or serious comment about crime, the processes of justice or the penal system; and (2) to prohibit its communication to Mr. Nilsen is proportionate. The decision letter, which I set out at in length at paragraph 6, above, unquestionably carried out a proportionality assessment. It is in the Secretary of State that Parliament has vested the decision-making power. The question for me to decide is whether he exercised it wrongly. In my judgment, it has not been established that he did. I am entirely satisfied that his decision satisfies the demands of proportionality and the test of rationality. In my judgment, the points made by Miss Foster and summarised in paragraph 22, above, are fully answered by Mr. Kovats' submissions which I summarised in paragraph 23. The Secretary of State is entitled, and in my view right, to take the view that, notwithstanding the risk of publication of material which is already in hands outside his control, it is nor futile to prevent Mr. Nilsen from doing what he wishes to do – that is, publish his material in a revised form. The history of the original movement of the material out of prison, putting it at its lowest, justifies the Secretary of State's view that there is a significant risk that, if the material is entrusted to Mr. Nilsen, it may later leave the prison in a revised form without the knowledge or consent of the prison authorities. I am wholly unpersuaded that what is already in the public domain, in particular in Killing for Company, is such as to render any further restriction pointless. There is an appreciable difference between the publication of material which is all the prisoner's own work and the publication of his account by another person over whom the prisoner had no control. The difference is highlighted by the fact that Mr. Nilsen intends to dispute significant parts of Mr. Masters' work.

26. I have already explained, when dealing with ground 1, that, in my judgment, the Secretary of State is entitled to have regard to the likely effect of publication on members of the public, including survivors and the families of victims of Mr. Nilsen's serial offences. I am unimpressed by the suggestion that anyone can choose not to read whatever may be published.

27. Before leaving this aspect of the case, I make it clear that I have not read the entirety of Mr. Nilsen's material. To do so would take 2-3 days. However, from what I have seen of it and from what I have learned from the witness statements of Steven Taylor (filed on behalf of Mr. Nilsen) and Professor Martin Wasik (filed on behalf of the Secretary of State), I am satisfied that the Secretary of State reached unimpeachable conclusions about it – both as regards proportionality and as regards its falling outside the "serious representations" and "serious comment" exceptions in paragraph 34(9)(c).

28. Finally, I should add that although the majority of Miss Foster's submissions on proportionality were made in the context of Article 10, she also sought to rely on Article 1 of the First Protocol – the right to peaceful enjoyment of one's possessions. That, too, is a qualified right, defeasible on proportionality and public interest grounds. The arguments on behalf of Mr. Nilsen which failed to relation to Article 10 produce no more favourable on analysis in relation to Article 1 of the First Protocol.

Conclusion

29. For all the reasons set out in this judgment, this application for judicial review fails. If counsel are able to agree the wording of an order to give effect to this judgment, no one need attend when it is handed down.

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MR JUSTICE MAURICE KAY: In the case of Nilsen, the application for judicial review is refused for reasons contained in judgment that is handed down today. I understand there is no attendance. Counsel have agreed a form of order which will be submitted later today.