IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-000138
[2019] NZHC 2472

UNDER	The Judicial Review Procedure Act 2016 and the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	An application for Judicial Review
BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	23 September 2019
Counsel:	Applicant in Person (via AVL) G M Taylor for the Respondent
Judgment:	30 September 2019

JUDGMENT OF DOOGUE J

Background

[1] Phillip Smith was sentenced to life imprisonment on 6 August 1996 for murder, sexual offending, aggravated burglary and kidnapping offences. Mr Smith became eligible for parole on 30 March 2009. He appeared before the New Zealand Parole Board on 31 March 2009 and parole was declined. His most recent appearance before the Parole Board was on 17 May 2019 where parole was again declined. While on temporary release from prison in November 2014, Mr Smith escaped to South America and is currently pursuing legal challenges relating to his repatriation and the convictions that followed for escaping and breaching the Passports Act 1992.

[2] Harrison Christian is a journalist with Fairfax Media (Fairfax). On 6 November 2017, Mr Christian sought the approval of the Chief Executive of the Department of Corrections (Corrections) to interview Mr Smith in relation to the conditions of his detention.[1] In particular, he wanted to interview Mr Smith about his "legal claim that his human rights are being breached by keeping him in the high security wing of the prison".

[3] On 24 May 2018, Corrections declined Mr Christian's interview request. On 11 July 2018, Mr Smith filed an application for judicial review of Correction's decision. On 4 October 2018, the proceedings settled on the basis that Corrections would reconsider the decision.

[4] When Mr Christian's request was reconsidered in late 2018, the scope of the requested interview had expanded further, and included:[2]

(a) Mr Smith's offending, focusing on remorse and acceptance of responsibility;

(b) Mr Smith's escape to South America in November 2014, including the reasons for his decision to escape and a particular focus on his acknowledgement of wrongfulness and consequences it had for others;

(c) Mr Smith's treatment by Corrections following his 2014 escape to South America, with a particular focus on decisions which had been held to be unlawful by the Courts or by the Office of the Ombudsman, with a theme of forgiveness for that decision making further balanced by recognising positive things Corrections has done and is doing;

(d) Mr Smith's views on the importance of human rights considerations in the management of offenders and the normalisation of prisons as a more effective means of meeting the objectives of successfully rehabilitating

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1 The decision is required to be made by the Chief Executive of the Department of Corrections or his delegates. For convenience in this judgment I have referred simply to Corrections.

2 These topics were proposed by Mr Smith in his submissions to Corrections dated 15 October 2018.

and reintegrating offenders and the paramount consideration of public safety;

(e) the investigation being conducted by the United Nations, the highest appellate courts of the Republic of Brazil and the New Zealand Court of Appeal, into the alleged unlawful conduct of the New Zealand and Brazilian authorities in November 2014 and the implications of those investigations (miscarriage of justice allegations in relation to his convictions for escape and breaches of the Passports Act 1992); and

(f) Mr Smith's present circumstances, parole and plans moving forward.

[5] Importantly, Mr Christian also requested that a photographer from Fairfax be present at the interview and that the interview be recorded by written notes, a recording device and camera(s) for photographs and video content. It was proposed that any interview would be run in Fairfax newspapers and on the Stuff website. It was also proposed that any article would include written quotes attributed to Mr Smith, photographs of him and video clips.

[6] Mr Christian's request was again declined by Corrections on 21 February 2019 ("the 21 February 2019 decision") and Mr Smith seeks judicial review of that decision. Mr Richard Waggott, the Deputy Chief Executive of Corrections, was the relevant decision maker in this case and his decision is contained in a letter to Mr Christian, dated 21 February 2019. Mr Waggott first set out the relevant law followed by how his decision was reached in light of the relevant considerations. He stated:

> *Relevant Considerations*
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> I am satisfied that Mr Smith understands the nature and purpose of your proposed interview, including the photographic and video elements. I am also satisfied that Mr Smith understands the possible consequences of his being published and/or broadcasted on the Stuff website.
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> With respect to the need to protect the interests of people other than the prisoner concerned, the victims of Mr Smith's offending had been contacted for their views after you made your request. The responses we received reflect strong opposition to your request. I have placed great weight on the victim's views, and the need to protect their interests.

> With respect to the need to maintain the security and order of the prison, I consider that the security and order at Rimutaka Prison would not be greatly affected by the interview. However, there is a concern that the interview and subsequent publication will raise Mr Smith's profile, as prisoners have access to newspapers, television news and may be provided with printed articles from the internet. Additional media attention in these circumstances, particularly given the content of what Mr Smith will talk about, potentially increases the risk to Mr Smith's personal safety (and hence the risk of disorderly behaviour in the prison).
>
> In my view, these considerations point against the granting of your request. I have considered the relevant right under s 14 of NZBORA, and while this is important I consider it is outweighed by the factors noted in the preceding paragraphs.
>
> *Conditions*
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> I have considered therefore whether conditions could be imposed that would ameliorate the concerns outlined in this letter. In my view, the answer to that question is no. The condition I have considered is one that would require any article following the interview to be totally anonymised so that Mr Smith's victims cannot identify him as the subject of or contributor to the publication. This condition would also prohibit photos or videos of Mr Smith
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> However, I do not think the condition of anonymity would be effective, as Mr Smith's victims would be likely to be able to identify Mr Smith from the article even if anonymised, as they are aware of the interview request.
>
> Further, the risk with the condition is that the Department cannot control what might ultimately be published as a result of the interview. Moreover, the condition relating to the content of what can be reported also means that the purpose of the interview and topics covered would be very different from the one that you initially proposed, and the expanded list of topics provided by Mr Smith (which you supported) which is centred on his experience and personal views.

[7] Mr Smith says that in coming to the 21 February 2019 decision, Corrections failed to take into account relevant mandatory considerations. He also says that the 21 February 2019 decision was both an unreasonable and disproportionate limitation on his right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).[3]

The statutory power at issue

[8] Mr Waggott's decision was made pursuant to regs 108 and 109 of the Corrections Regulations 2005 (the Regulations). Regulation 108 relevantly provides:

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[3] Section 14 states that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

108 Restrictions on interviews and recordings

(1) Without first obtaining the written approval of both the chief executive and the prisoner concerned, no person may—

(a) interview a prisoner, for the purpose of—

(i) obtaining information and publishing or broadcasting it; or

(ii) publishing or broadcasting a transcript or description of the interview; or

(b) make a sound recording of a prisoner, or an interview with a prisoner, for the purpose of—

(i) broadcasting it; or

(ii) publishing a transcript of it; or

(c) make or take a film, photograph, videotape, or other visual recording of a prisoner, for the purpose of publishing or broadcasting it.

...

[9] Determinations under reg 108 are made with reference to reg 109, which provides:

109 Approvals

(1) The chief executive must, in deciding whether to give approval under regulation 108, have regard to the need to—

(a) protect the interests of people other than the prisoner concerned; and

(b) maintain the security and order of the prison concerned.

(2) The chief executive must not give that approval unless satisfied that the prisoner understands—

(a) the nature and purpose of the filming, interviewing, photographing, recording, or videotaping concerned; and

(b) the possible consequences to the prisoner and other people of the publication or broadcasting of the film, interview, photograph, recording, transcript, or videotape concerned.

(3) The chief executive may give that approval subject to any conditions reasonably necessary to—

(a) protect the interests of any person other than the prisoner; or

(b) maintain the security and order of the prison.

(4) Subclause (1) is subject to subclause (2).

[10] Thus if a journalist wishes to interview a prisoner, make a sound recording of an interview with a prisoner, or make or take pictures or footage recordings of a prisoner for the purposes of publication or broadcasting, the journalist must first obtain the written approval of both Corrections and the prisoner concerned.[4] The requirement for written approval applies to interviews conducted by telephone or electronic message in addition to interviews in person.[5] Mr Christian therefore needed approval to make an audio and/or visual recording of any visit with Mr Smith for the purposes of the proposed interview.

[11] As the power to grant an approval arises from regulations made under the Corrections Act 2004 (the Act), that power must also be exercised in accordance with the relevant purposes and principles of the Act.[6] The purpose of the Act is to improve public safety and contribute to the maintenance of a just society by, amongst other things, ensuring that sentences are administered in a safe, secure, humane and effective manner.[7] In relation to the principles, the requirement to take into account the relevant principles is made express by s 6(2). The relevant principles in Mr Smith's particular circumstances are:[8]

(a) In decisions about the management of persons under the control or supervision of Corrections, the maintenance of public safety is the paramount consideration.

(b) In decisions relating to the management of persons under the control or supervision of Corrections, victims' interests must be considered.

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4 Regulation 108(2). The requirement for written approval applies to an interview conducted by telephone or electronic message as well as an interview in person. See reg 108(4)(b).

5 Regulation 108(4)(b).

6 Corrections Act 2004, ss 5 and 6.

7 Section 5.

8 Section 6(1)(a), (b), (f)(ii) and (g). See also *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [31] [*Taylor*].

(c) The corrections system must ensure the fair treatment of persons under the control or supervision of Corrections by ensuring that decisions made about these persons are made in a fair and reasonable way.

(d) Sentences must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and safety of the public, Corrections staff, and persons under the control or supervision of Corrections.

A balancing approach[9]

[12] The correct approach when exercising the statutory power to decide whether to grant a request to interview a prisoner is to take the right to freedom of expression enshrined in s 14 of the NZBORA as the starting point. Corrections is then required to balance against that right any conflicting considerations, in particular the need to protect the interests of people other than the prisoner concerned and the need to maintain the security and order of the prison.[10] In undertaking this balancing exercise, Corrections must also have regard to the purposes and principles of the Act. Corrections must also "ensure that any reasons given for declining the interview are rationally connected to the objectives of safety and good order".[11] For present purposes it is not necessary to decide if Corrections is required to carry out a proportionality analysis.[12]

Grounds of review

[13] Mr Smith seeks judicial review of Corrections' refusal to grant Mr Christian's interview request on the following grounds:

(a) The 21 February 2019 decision was unlawful on the grounds Corrections failed to take into account implied mandatory relevant considerations.

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9 This was the approach adopted in *Taylor*, above n 8, at [72].
10 These being the two mandatory considerations referred to in reg 109(1).
11 *Taylor*, above n 8, at [86].
12 At [83]–[85].

(b) The 21 February 2019 decision was unlawful on the grounds of unreasonableness.

(c) The 21 February 2019 decision constituted a disproportionate limitation on Mr Smith's freedom of expression under s 14 of the NZBORA.

Failure to consider relevant considerations

[14] Mr Smith submits Corrections failed to take into consideration the following "implied mandatory factors", which he says impact on the weight that could reasonably be given to the effect of an interview on his victims:

(a) the length of time that has passed since his murder conviction;

(b) the fact he became eligible for parole in March 2009;

(c) the fact the victim of his offending who is likely to be most affected by the interview now lives in Australia;

(d) the punitive views of his victims; and

(e) the fact his victims have participated in interviews about his offending.

[15] The starting point for this ground of judicial review is the wording in the statutory power in question.[13]

[16] Regulation 109(1) requires the decision-maker to have regard to two mandatory factors: the need to protect the interests of people other than the prisoner concerned and the need to maintain the security and order of the prison. There are no other factors expressly listed. As already noted, in exercising the discretion under reg 109, the mandatory factors must be balanced against the prisoner's right to freedom of expression. As such, that right (and any encroachment upon it) is also a mandatory relevant consideration.[14]

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13 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
14 *Taylor*, above n 8, at [84].

[17] In order to guide his decision-making process, Mr Waggott used a standard form prepared by Corrections entitled "Request for Permission to Interview a Prisoner". That form, which is prepared by officials for the benefit of the ultimate decision-maker, explains the background to the request, the nature of the request and the relevant statutory powers invoked. It then goes on to outline the three mandatory relevant considerations discussed above. For present purposes, it is Mr Waggott's consideration of the need to protect Mr Smith's victims' interests that is the focus of this ground of review.

[18] In respect of the consideration of the need to protect the interests of people other than the prisoner concerned, the standard form provided the following:

19	Is the interview expected to have a negative impact on the offender's registered victims, or any other victims? What impact is it likely to have? Consideration should be given to whether concerns of victims are legitimate and reasonable and how the Department could allay those concerns.	Yes. Phillip Smith has an extensive criminal history dating to 1990, which include (sic) presenting a firearm at a person, assault, offensive/disturbing use of a telephone, theft, fraud, driving offences, kidnapping, breaking and entering, indecent assault on boy under 12, indecent act on boy 12-16, unlawful sexual connection and murder. He is subject to victim notification processes. Mr Smith's registered victims continue to be severely affected by his actions. (See, for example, https://www.stuff.co.nz/national/crime/98495749/the-only-human-right-he-should-have-is-to-breathe-victims-sister-on-killer-phillip-smith.) More information is provided in section 20.
20	Have the offender's victims been contacted in regards to the request? If not, why?	Mr Smith has [redacted] registered victims. They were approached in relation to the original request on 6 November 2017 for an interview. [Redacted] Due to the severe impact that is evident, the registered victims were not re-consulted on the reconsideration (which includes an expanded intended scope of interview, which would include Mr Smith's offending). Their views are assessed as being unlikely to change. As one victim said in the newspaper article referred to above, every time Mr Smith is in the news it brings all the grief back and all the horrible memories.

21	What, if any, impact could the interview have on other prisoners? For example, is the interview likely to cause disruption in the unit or adversely affect the day to day management of other prisoners?	The Prison Director has advised that Mr Smith would be taken out of his unit for the interview to take place, and that it would occur in the Intervention and Support Unit. She notes that the interview and subsequent publication will raise the profile of the prisoner as prisoners have access to newspapers, television news and may be provided with printed articles from the internet. Prisoners still have a high level of resentment towards Mr Smith following his escape to Brazil which greatly affected the temporary release process, with threats having been made against him. Additional media attention in these circumstances potentially increases the risk to Mr Smith's personal safety (and hence the risk to disorderly behaviour in the prison). In addition to the fact of an interview, other prisoners may take umbrage at Mr Smith giving views on how decisions about prisoners should be made, and how rehabilitation and reintegration can be achieved, thus increasing this risk.
22	What, if any, impact could the interview have on prison staff?	The Prison Director has advised that given the profile of the prisoner, [redacted].
23	Are there any other people whose interests could be affected by the proposed interview?	No other people are identified as being potentially impacted.
24	Are there any conditions that could be imposed which would avoid the described effects on other people? (regulation 109(3))	It is unlikely that any such condition that could be imposed would avoid the described effects on other people. A condition that might be considered is one requiring any subsequent article to be totally anonymised, so that Mr Smith's victims cannot identify him as the subject of or contributor to the publication. This would also prohibit photos or videos of Mr Smith, and would require Mr Christian to anonymise Mr Smith's name and remove any identifying particulars from the article that might cause a victim to identify him as the interviewee (i.e. the circumstances of his escape to Brazil). However, the risk with this condition is the Department cannot control what a journalist might choose to publish, it can only restrict access to the prison and prisoners. You would need to rely on a signed undertaking from Mr Christian to comply with such conditions, and the

		Department would have little recourse if such an undertaking was breached. Restricting the content of what could be reported also means the purpose and nature of the interview and topics covered would be very different to the one Mr Christian and Mr Smith have proposed, which is centered (sic) on Mr Smith's experience and personal views. Additionally Mr Smith's victims are likely to be able to identify Mr Smith from the article even if anonymised, as they are already aware of the interview request. Note that the topic outlined above "views on the importance of human rights considerations in managing prisoners, and ideas for the successful rehabilitation and reintegration of offenders" could be the subject of interview and thereafter reported on in a sufficiently anonymised way, as it is a more general topic. It would be up to Mr Christian whether he still wishes an interview to go ahead on that basis. Other conditions (i.e. an interview by telephone only) would not shield victims from the adverse consequences of publication of an interview or article.

[19] It was in light of this information that Mr Waggott "placed great weight on the victim's views, and the need to protect their interests".

[20] In my view, the first two factors raised by Mr Smith at [14] above cannot be characterised as "implied mandatory factors". Victims' trauma does not necessarily abate with either effluxion of time nor distance from the offender.

[21] Mr Smith relies on the fact the Court of Appeal in *Taylor v Chief Executive of the Department of Corrections* considered only minimal weight should be placed on potential harm to the prison officers (who were victims of Mr Taylor's offending) from a televised interview some eight years after he had confronted them with a firearm.[15] However, the Court went on to expressly state Mr Taylor's case was in a "totally different category" from one in which a prisoner's victims had been subjected to serious physical violence or sexual violation.[16] Mr Smith's offending is such a case.

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15 *Taylor*, above n 8, at [102].
16 At [103].

[22] Furthermore, the fact Mr Smith became eligible for parole in March 2009 is irrelevant in respect of Corrections' mandatory considerations under reg 109. He is still subject to a sentence of life imprisonment. Until such a time as the Parole Board decides otherwise, he will be subject to Corrections' supervision and control.

[23] Insofar as the remaining three identified factors raised by Mr Smith at [14] above impact on the weight that could reasonably be given to the effect of an interview on Mr Smith's victims, I am satisfied they were taken into account by Mr Waggott, or are implicit in his decision. Mr Waggott was aware of who Mr Smith's registered victims are, contacted them, and was provided with the views of one of those victims. Whether that victim's views were particularly punitive, and therefore what weight should be placed on those views, was, at least in respect of this ground of review, a matter for him. Similarly, the weight that should be placed on the fact some of Mr Smith's victims had previously commented on his offending was a matter for Mr Waggott. On this latter point, I simply note that this Court does not have sufficient information before it to identify how those comments were adduced. In contrast, Mr Waggott had the clear views of one of Mr Smith's victims on which he could base his decision.

[24] Accordingly, I am satisfied Corrections did not fail to take into account any relevant mandatory consideration in coming to its 21 February 2019 decision.

Unreasonableness

[25] Mr Smith submits Corrections' attempt to control the mode of his communication with Mr Christian (to confine it to written correspondence as opposed to a face-to-face, recorded interview) was unreasonable. Ms Taylor for Corrections submits that it was reasonable for Corrections to conclude that a face-to-face interview, accompanied by photos and/or a video recording, would have a different impact on victims than a story based solely on written correspondence with Mr Smith.

Legal principles

[26] The lawfulness of a decision can be challenged where it is unreasonable in an administrative law sense. Examples of unreasonable decisions in this context include

where a decision-maker had more than one option but the decision reached was unsupported by a reasoned justification,[17] or where the decision was so disproportionate in its weighing of competing factors that the outcome was unreasonable.[18] As such, conclusions that are unsupported by the evidence or are not rationally connected to the evidence are unreasonable in administrative law terms.[19]

Intensity of review

[27] As a preliminary matter, I turn to the issue of the intensity of review as set out in *Watson v Chief Executive of the Department of Corrections*.[20] In that case, Mr Watson successfully obtained judicial review of a decision by Corrections declining his application to be interviewed by a journalist. Mr Watson had been convicted of the murder of two teenagers and sentenced to life imprisonment with a minimum period of imprisonment of 17 years. He had exhausted all his appeal rights and his application for the Royal Prerogative of Mercy had been rejected. The interview was sought because the journalist wished to write an article on Mr Watson's case and to investigate his claim that he was a victim of a miscarriage of justice

[28] Dunningham J found that the intensity of review depends on the subject matter, and the range of rational decisions available to the decision-maker depends upon the circumstances of the case.[21] In the prison context, Dunningham J also distinguished between the mandatory considerations in reg 109 as follows:

> [48] To summarise, in the prison context, I accept it is appropriate to accord weight to the Chief Executive's assessment of what is required to ensure the security and good order of the prison. I also accept that a prisoner's right to freedom of expression is necessarily limited, both because that is inherent in the punishment imposed, and for reasons related to the effective administration of the prison.
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> [49] However, the courts have regularly recognised that the right to express concerns about an alleged miscarriage of justice is a legitimate exception to those restrictions and there is both an individual, and a public, interest in facilitating a prisoner's ability to ventilate these issues where that can be done in a responsible and considered way. In this area, the Chief Executive is not

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17 See *C v Medical Council of New Zealand* [2013] NZHC 825, [2013] NZAR 712.
18 See *Shaw v Attorney-General (No 2)* [2003] NZAR 216 (HC).
19 *Taylor*, above n 8, at [101].
20 *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227 [*Watson (No 1)*].
21 At [32]–[33], citing *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, (2001) 2 AC 532 at [28] per Lord Steyn; and *Pham v Secretary of State for the Home Department (Open Society Justice Initiative Intervening)* [2015] UKSC 19, [2015] 1 WLR 1591.

> in any better position than the courts to judge how concerns about the interests of the victims should be weighed against the protection of the right affirmed in s 14 of NZBORA.

Mr Waggott's affidavit

[29] Mr Waggott provided the Court with an affidavit dated 7 June 2019. In it, he provided some context for his 21 February 2019 decision and the factors he took into account in coming to that decision. Unsurprisingly, he explained that he considered the three mandatory considerations outlined on the standard form used by Corrections for requests to interview a prisoner. In respect of the interests of people other than the prisoner concerned, Mr Waggott stated the following:

> 15. The severe impact this interview would have on at least one of the victims was clear from both the response and the comments in the older article, which reflected the impact that media coverage of Mr Smith has had in the past. I also considered the request for photos and/or video to accompany the article would lift the level of visibility and exposure, which would exacerbate the impact.
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> 16. I placed a large amount of weight on the victim's views, and the need to protect all of their interests.

[30] Ordinarily in judicial review proceedings, the Court must come to its determination on the basis of the material before the decision-maker at the time of the decision.[22] If context or explanatory reasons are provided by way of affidavit after the fact, it must normally be shown that the context or explanatory reasons were contemporaneous with the decision itself. If that cannot be shown, the Court will give little weight to such evidence.[23]

[31] The policy behind this general principle is self-evident. As the Court said in *Taylor*, "the decision-maker must refrain from descending into ex post facto justification in an attempt to improve on the original decision."[24] Otherwise, an affidavit prepared after a decision may seek to bolster the original decision rather than

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22 *Taylor*, above n 8, at [33], citing *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 658; *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [46]; and *Palmerston North City Council v Drury* [2007] NZCA 521, [2008] NZRMA 90 at [62]–[63].

23 At [33], citing *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) at 691.

24 At [33], citing *Manukau City Council v Ports of Auckland Ltd* [2000] 1 NZLR 1 (PC) at 10; and *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 48.

reflect the actual views of, and process taken by, the decision-maker at the time the decision was made.

[32] There is nothing on the face of the decision itself addressing the additional impact on the victims of photos and/or video footage of an interview between Mr Smith and Mr Christian. Nor is there anything in the standard Corrections form used to brief Mr Waggott on Mr Christian's interview request that suggests Mr Waggott considered that any photos and/or video footage of the interview accompanying any subsequent article would lift the level of visibility and exposure of Mr Smith and thereby exacerbate the impact of publication on his victims. Accordingly, there is no evidence before the Court that this factor influenced his ultimate decision to refuse Mr Christian's interview request. This consideration appears, as Mr Smith says, "after the fact". I therefore cannot accept this explanation as being operative at the time Mr Waggott made his decision and must put it to one side.

[33] In order to determine whether Mr Waggott's decision was unreasonable, it is necessary to look more closely at Mr Christian's request. As outlined at [4] above, Mr Christian sought to interview Mr Smith on six discreet matters. Only the first matter — Mr Smith's offending — directly related to his victims and their families. The other topics related to his November 2014 escape to South America (including an alleged miscarriage of justice arising from his repatriation, and his treatment in prison since then), the importance of human rights considerations in the management of offenders, and his current circumstances and plans going forward.

[34] It is clear from the 21 February 2019 decision that Mr Waggott was influenced by two factors: the impact on Mr Smith's victims and the risk to Mr Smith's personal safety (and therefore the risk of disorderly behaviour in the prison). Mr Waggott did not consider that any conditions would ameliorate his concerns. In particular, anonymisation was not possible given the uniqueness of Mr Smith's offending and the purpose of the interview; his victims would be able to identify him regardless. In addition, Corrections could not control the content of what would ultimately be published. It was on this basis that Mr Waggott declined Mr Christian's request.

[35] Two aspects of the standard Corrections form used to brief Mr Waggott are therefore relevant to the question of unreasonableness. First, Mr Waggott was advised that regardless of the mode of interview, Mr Smith's victims would likely be negatively impacted by any resulting article:

> Other conditions (i.e. an interview by telephone only) would not shield victims from the adverse consequences of publication of an interview or article.

[36] Second, he was advised that if the interview request were declined, Mr Smith had other ways to express his opinion:

> Mr Smith is also able to write to reporters and express his opinion about the topics he proposes to cover in the interview, if he wishes - subject to security issues and knowingly false allegations against officers.

[37] Mr Waggott was therefore aware of the fact that *any* publicity given to Mr Smith would likely cause some distress to his victims and their families. This harm would not result solely from the publication of photos or video footage of the interview. Mr Smith would still be able to communicate with Mr Christian in writing and discuss his offending and his victims. This could then be published using older photos or videos of Mr Smith.

[38] Mr Smith submits that this case is similar to *Watson* where Corrections denied a journalist's request for a face-to-face interview but stated that Mr Watson could nevertheless convey to the journalist what would have been discussed in such an interview in written form. Dunningham J stated:

> [65] In this case, there is no justification articulated for limiting Mr Watson's contact with the media to written communication for the purpose of preparing an article, rather than a direct interview. Both may result in an article which could cause the victims distress if it challenges the reliability of Mr Watson's conviction or reiterates Mr Watson's denial of the offending. Nowhere does the Chief Executive identify why a face-to-face interview (which is Mr White's preferred method of hearing Mr Watson's side of the story), is more harmful to the victims than an article inconveniently stitched together through a protracted series of written communications.

[39] Corrections submit that *Watson* is distinguishable on the basis that in that case, the cause of harm was the continued denial of offending whereas in Mr Smith's case, the cause of harm is said to be the exposure of Mr Smith in the media. If I do not consider *Watson* distinguishable, Corrections submit that it should not be followed in

this case as it is reasonable for a decision-maker to conclude media publication of an interview is likely to have a greater impact on victims than publication of written correspondence.

[40] I do not agree. Because I reject Mr Waggott's affidavit evidence on the basis I do not consider his stated reasons to have been operative at the time of his decision, I am of the view that the same implications in *Watson* apply here. This is because publication of an article about Mr Smith was inevitable. This is evidenced by the fact Mr Christian's initial interview request did not include a request for photos/video footage meaning that Mr Christian was content for any resulting article to be based solely on a written record of the interview. Any resulting article could still have been accompanied by file photos or older video footage and may have garnered significant publicity in its own right. No doubt it would have also caused Mr Smith's victims some level of distress; the same outcome as if video footage of the interview would have been published.

[41] In addition, I note that the second reason for Corrections refusing Mr Christian's request is similarly unsupported by the evidence. The risk to Mr Smith's personal safety (and therefore the risk of disorderly behaviour in the prison) was linked to publicity being given to Mr Smith's views. Because publicity would result from any article regardless of how Mr Smith's views are conveyed to Mr Christian, Corrections' decision to decline a face-to-face interview on this ground was irrational.

[42] Therefore, it is my view that the two primary reasons given to decline Mr Christian's interview request (the interests of Mr Smith's victims and the risk to his personal safety) were not rationally connected to the evidence before Mr Waggott at the time the 21 February 2019 decision was made. Accordingly, Mr Waggott's decision is unreasonable in administrative law terms.

Disproportionality

[43] Mr Smith's third ground of judicial review alleges that Mr Waggott's refusal to grant Mr Christian's interview request was a disproportionate limitation on Mr Smith's right to freedom of expression.

[44] Having found that Corrections' decision was unreasonable, I strictly need not determine whether the refusal was a disproportionate limitation on Mr Smith's right to freedom of expression. This is because in *Taylor*, the Court of Appeal noted that it is not clear whether a full proportionality analysis is required for discretionary administrative decisions.[25] However, the Court went on to say:[26]

> It is unnecessary for us to determine whether the approach to administrative decision-making under the Bill of Rights should always embrace a full proportionality analysis of the type adopted in *Hansen*. But we are attracted to the view that s 5 of the Bill of Rights requires at least some form of proportionality analysis in the consideration of requests for interviews under reg 109.

[45] In light of this guidance and given the interconnectedness between the grounds of unreasonableness and disproportionality, I address this ground of review below.

Legal principles

[46] Ordinarily when considering, under s 5 of the NZBORA, whether legislation imposes a reasonable limit on a right guaranteed by that Act, a proportionality test is required.[27] Much has been written on this test and I need not repeat it here. It suffices to say that in *Hansen v R*, a majority of the Supreme Court adopted the proportionality test established by the Supreme Court of Canada in *R v Oakes*[28] and *R v Chaulk*:[29] any limit on a guaranteed right should impair the right as little as possible and the means chosen to achieve the objective of the impugned provision must be rationally connected to that objective.[30]

[47] Further, in *Attorney-General v Smith*, the Court of Appeal endorsed the principle that the value of a person's "expression" is relevant to whether limitations on it can be demonstrably justified under s 5 of the NZBORA.[31] The Court endorsed the House of Lords' view in *Campbell v MGN Ltd* that "there are undoubtedly different

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25 *Taylor*, above n 8, at [80]–[83].
26 At [84].
27 At [76].
28 *R v Oakes* [1986] 1 SCR 103 (SCC).
29 *R v Chaulk* [1990] 3 SCR 1303 (SCC).
30 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J, at [120]–[124] per Tipping J, at [203]–[205] per McGrath J and at [272] per Anderson J.
31 *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [38]. See also *Taylor*, above n 8, at [70].

types of speech...some of which are more deserving of protection in a democratic society than others."[32] Some types of speech will be outweighed by virtue of the deprivation of their liberty inherent in a sentence of imprisonment.[33]

[48] In *Taylor*, the Court of Appeal outlined the proportionality test in respect of reg 109 of the Regulations as follows:

> [85] Where, as here, there is a range of options for interviewing prisoners and the decision-maker has the ability to impose conditions on any form of interview granted, the decision-maker is obliged to consider whether the objectives reflected in the mandatory considerations in reg 109(1) could be met by granting an interview in a format that sufficiently addresses and mitigates the identified risks to safety and good order. That approach is consistent with minimising any impairment of the right to freedom of expression.

Analysis

[49] It is necessary to weigh the "value" of the types of speech proposed in Mr Christian's interview request. There are varying levels of public interest attached to each of the topics on which Mr Christian proposed to interview Mr Smith. This was outlined by Corrections officials in the standard form used to brief Mr Waggott, which stated:

37	Is there a particular public interest in the proposed interview topic/purpose? What is the level of the public interest?	There is some public interest in the proposed interview topics, insofar as they raise issues relating to prisoners' human rights, their treatment and conditions of detention, and ways of rehabilitating and reintegrating offenders — both generally and specifically in relation to Mr Smith. The level of public interest in Mr Smith's particular speech is not assessed to be high, because the general issues are raised and ventilated on a not infrequent basis, and because Mr Smith's particular treatment and cases have already been widely covered. There is no genuine public interest in Mr Smith's recounting of his offending and his escape, and his present circumstances and plans moving forward. The fact he is a well-known prisoner does not elevate these matters into matters of public interest.

[32] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [148].

[33] *Watson v Chief Executive of the Department of Corrections (No 2)* [2016] NZHC 1996 at [40] [*Watson (No 2)*], citing *R v Secretary of State for the Home Department (ex parte Simms)* [2000] 2 AC 115, [1999] 3 WLR 328 at 112; and *Television New Zealand v Attorney General* (2004) 8 HRNZ 45 (CA).

		There is a public interest in airing potential miscarriages of justice and ensuring they do not occur. This is addressed in section 38.

[50] Further, in respect of the potential miscarriage of justice, officials notified Mr Waggott that the alleged miscarriage of justice arising from Mr Smith's repatriation is currently before the Court of Appeal and the courts in Brazil, as well as the subject of a United Nations investigation.

[51] Mr Smith submits that the public interest in the proposed interview topics is high for the following reasons:

(a) there has been repeated public criticism of him by his victims for not showing remorse for his offending;

(b) his escape to South America resulted in a Government Inquiry and the level of public debate was high;

(c) his successes in the courts in respect of various human rights claims demonstrate there is a legitimate interest in debating the treatment of prisoners; and

(d) it is in the public's interests that potential miscarriages of justice be brought to light.

[52] Mr Smith submits that these public interest considerations outweigh the interests of his victims such that his right to freedom of expression under s 14 of the NZBORA should prevail.

[53] Corrections sensibly acknowledges that there may be some public interest in the topics Mr Christian initially proposed when he first approached Corrections on 6 November 2017: prisoners' rights and Mr Smith's treatment following his escape to South America and subsequent repatriation to New Zealand. There is undoubtedly public interest in knowing how prisoners are managed and treated, particularly because the vast majority of prisoners will eventually be reintegrated into the community.

[54] As for the remaining interview topics, Corrections submits there is low public interest and that airing them would not advance any public debate on a matter of public importance. I agree. Mr Smith's offending and escape to South America have both previously attracted considerable publicity and generated public debate. However, they are not topics in respect of which there is new information that would have a similar effect. I therefore consider the public interest in these topics to be low.

[55] Further, I consider there to be no public interest whatsoever in Mr Smith's current circumstances and his plans going forward. This is an entirely private matter.

[56] As for Mr Smith's miscarriage of justice claims, Mr Smith's circumstances can be distinguished from those in *Watson* where Mr Watson had exhausted his avenues of appeal but still maintained that a miscarriage of justice had occurred. Investigative journalism was therefore necessary to assist Mr Watson in proving his case.[34] Mr Smith's conviction appeal is still being considered by the courts and thus he has not yet exhausted his appeal rights. He does not require Mr Christian's assistance to draw public attention to his claims.

[57] Overall, there were aspects of Mr Christian's interview request to which there was attached a high level of public interest, and others which did not. It was necessary for Mr Waggott to consider the proposed interview topics individually rather than as a package, particularly because of the differing "values" of speech each topic attracted. In light of this assessment, I do not consider Mr Waggott's complete refusal to grant Mr Christian's interview request to be proportionate to Mr Smith's right to freedom of expression.

[58] As already discussed, Mr Waggott considered that he could not impose any conditions on Mr Christian's interview request that would allay his concerns. Accordingly, he considered a complete ban on an interview to be a justified and proportionate limitation on Mr Smith's right to freedom of expression. In my view, it was possible to impose conditions on any interview between Mr Christian and Mr Smith to limit any potential adverse impact on Mr Smith's victims.

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[34] Mallon J noted the importance of investigative journalism in this respect in *Watson (No 2)*, above n 33, at [25].

[59] While I accept that Mr Smith's victims may be caused distress by seeing Mr Smith in the media, that factor, in and of itself, is not sufficient to completely displace Mr Smith's right to freedom of expression. Nor is it determinative of Corrections' approach to applying reg 109 of the Regulations. If it were, reg 109 would effectively trump s 14 of the NZBORA.

[60] Nevertheless, limiting a prisoner's right to freedom of expression may be justified where publicity of that prisoner's views is highly likely, and the prisoner wishes to speak solely about his or her victims and offending. Therefore, a condition that Mr Smith refrain from discussing his offending and his victims would have constituted a reasonable limitation on Mr Smith's right to freedom of expression.[35] As would have a condition limiting the interview to the topics in Mr Christian's original request. I note that this was specifically suggested by officials in their briefing to Mr Waggott.

[61] It would have also been a reasonable limitation, had Corrections properly articulated the basis on which it distinguished between the effect of an article incorporating photos and video content and one based solely on written correspondence, for Mr Christian to have been permitted to take a sound recording of the interview for the purposes of having an accurate record on which to write an article, but not for the purposes of publication.

[62] For these reasons, I consider Mr Waggott's refusal to grant Mr Christian's interview request was a disproportionate limitation on Mr Smith's right to freedom of expression.

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[35] The High Court of England and Wales found this to be a reasonable limitation in *R (BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin), [2013] 1 WLR 964. By refusing to grant an interview request without having considered less restrictive alternatives to achieve his objective of protecting victims, the Minister's decision breached the principle of proportionality.

Appropriate relief

[63] In Mr Smith's statement of claim, he seeks the following relief:

(a) a declaration that the 21 February 2019 decision breached s 14 of the NZBORA;

(b) a declaration that the 21 February 2019 decision failed to take into consideration implied mandatory relevancies;

(c) an order quashing the 21 February 2019 decision and remitting it back to Corrections for reconsideration;

(d) any other declaration the Court sees fit; and

(e) costs, or where costs cannot be ordered, reasonable disbursements.

[64] When judicial review is granted the usual remedy is to quash the decision and refer it back to the decision-maker for reconsideration in light of the Court's decision. A declaration is a discretionary remedy. Quite apart from the fact I did not find that Corrections failed to consider any implied mandatory relevancies, I am not satisfied a declaration is necessary in these circumstances. This judgment recognises Mr Smith's rights and Corrections can be expected to adhere to it.

Result

[65] Corrections' 21 February 2019 decision declining Mr Christian's request to interview Mr Smith is quashed. Corrections is directed to reconsider the decision in light of this judgment.

[66] Mr Smith did not establish jurisdiction nor particularise his claim for disbursements. He has 21 days to file a memorandum addressing these matters. Corrections will have a further 21 days within which to reply. This matter will then be dealt with on the papers.

Doogue J

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