

**IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY**

**CIV-2016-409-247  
[2016] NZHC 1996**

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an application for judicial review of the  
refusal to allow a meeting between a  
victim with a journalist present

BETWEEN SCOTT WATSON  
Applicant

AND THE CHIEF EXECUTIVE OF THE  
DEPARTMENT OF CORRECTIONS  
Respondent

Hearing: 17 August 2016

Appearances: K H Cook and C B Morrall for the Applicant  
D J Perkins and T P Westaway for the Respondent

Judgment: 25 August 2016

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**JUDGMENT OF MALLON J**

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## **Introduction**

[1] Scott Watson is serving a sentence of life imprisonment, with a minimum non parole period of 17 years, for the murders of Olivia Hope and Ben Smart. He is into his eighteenth year of that sentence. He has always maintained his innocence. He has exhausted his appeal rights and an application for the Royal Prerogative of Mercy has been declined. He is able to make another application but needs new evidence in order to do so.

[2] With that purpose in mind, Mr Watson was interviewed by Michael White, a journalist, at Rolleston prison where he is serving his sentence. The interview took place following approval ultimately granted by the respondent (Corrections), after a High Court decision overturning Corrections' initial decision to decline the request.<sup>1</sup>

[3] Corrections have since granted permission for Mr Watson to receive a visit from Gerald Hope, the father of Olivia, with Mr White present as facilitator. This permission has been granted on the basis that Mr White does not attend the meeting in his professional capacity as a journalist and he does not record the interview nor write an article about it. Mr Watson challenges this aspect of the decision.

[4] The challenge is brought by way of an application for judicial review. The ground of review is unreasonableness.

## **The background**

[5] On New Year's day in 1998 Olivia Hope and Ben Smart disappeared from Endeavour Inlet in the Marlborough Sounds, following a New Year's eve gathering at Furneaux Lodge. Their bodies have never been found.

[6] Mr Watson, who had also been attending the New Year's festivities at Furneaux Lodge, was convicted of their murders at a trial in 1999. On the advice of

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<sup>1</sup> *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227, (2015) 10 HRNZ 505. The decision is required to be made by the chief executive of the Department of Corrections or his delegate. For convenience in this judgment I have referred simply to Corrections.

his lawyers he exercised his right to silence at the trial. He has, however, always steadfastly denied his involvement in Olivia and Ben's disappearance.

[7] Mr White was a reporter with *The Marlborough Express* at the time Olivia and Ben disappeared. He was assigned to the case when it was upgraded to a homicide investigation. In that capacity he liaised with the parents of Olivia and Ben on a regular basis. He also assisted Gerald Hope in conducting shoreline searches for any trace of Olivia and Ben. He was in charge of *The Marlborough Express* reporting staff when Mr Watson was arrested and then tried for the murders of Olivia and Ben.

[8] Mr White has maintained an interest in the matter. In 2007, as it was approaching the 10 year anniversary of Olivia and Ben's disappearance, he began researching a feature story on the case for *North & South* magazine where he is currently employed. As part of his research he approached Mr Hope, with whom he had continued to have contact in the intervening years in Mr Hope's role as councillor and then Mayor of Marlborough. Following Mr White's approach, they discussed the case on several occasions. In those conversations Mr Hope was critical of the police investigation and the trial process and expressed a wish, an offer which he had made previously, to meet face-to-face with Mr Watson to hear his views. Mr Hope's comments, and the comments of others involved in the case, were published in the November 2007 issue of *North & South*.

[9] Mr White was also well known to Mr Watson's family. Following publication of the November 2007 article Mr Watson's father contacted Mr White. He indicated that Scott was willing to meet with Mr Hope but at that time his application for the Royal Prerogative of Mercy was in the process of being prepared. When that application was rejected in July 2013, Mr Watson's father again approached Mr White to inquire if Mr Hope was still willing to meet with Scott. Mr White contacted Mr Hope who confirmed that he remained willing to do so. Both Mr Watson and Mr Hope wished to have Mr White present if the meeting could be arranged and to record what was said. They recognised the meeting could be emotionally charged and difficult to remember accurately after the event. Mr White then contacted Mr Cook, Mr Watson's lawyer, to see if a meeting could be arranged.

[10] On 9 October 2013 Mr Cook contacted Corrections requesting a visit with Mr Watson (the first request). He advised the visit would be attended by Mr Hope and Mr White, as well as Mr Watson’s counsel. Corrections declined this request on 18 February 2014. The letter advising of the decision noted that Corrections was required to consider the effect of the proposed meeting on other persons. It went on to say:

... a person who would be profoundly affected is Mr Hope. I have spoken to Mr Hope to obtain his view. He has advised me that since the recent publicity surrounding the proposed meeting he has reconsidered his position. He is now of the view that Mr White’s involvement, and the possibility of a magazine article following the meeting, would not be helpful. He would now prefer not to involve Mr White and seeks a private meeting with Mr Watson instead. On balance that was the decisive consideration.

[11] As Mr Cook subsequently understood matters, Mr Hope had agreed to exclude Mr White because Corrections had not regarded Mr White’s presence as desirable. Corrections was informed that Mr Hope had reconsidered his position and now supported the meeting taking place with Mr White present. However, on 19 March 2014, Corrections again declined the request for Mr White to be present on the basis of the views of other victims.

[12] Mr Watson then invited Mr White to interview him without Mr Hope present. The parties contemplated that a meeting with Mr Hope might take place subsequently. Accordingly, on 16 November 2014 Mr Cook sought permission from Corrections for a “meeting (likely more than one)” between Mr Watson and Mr White (the second request). Corrections declined this request on 18 December 2014. In declining the request Corrections advised it had taken into account that neither Mr Hope nor Mrs Smart (the mother of Ben Smart) supported the interview taking place and this was the decisive factor.

[13] Mr Watson challenged the decision on the second request via a judicial review proceeding filed on 27 January 2015. That challenge was heard in the High Court on 20 May 2015. The Court’s decision was delivered on 4 June 2015.<sup>2</sup> It considered there was no rational basis for declining the request. The decision on the

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<sup>2</sup> *Watson v Chief Executive of the Department of Corrections*, above n 1.

second request was quashed and Corrections was directed to reconsider the decision in light of the Court's judgment.

[14] On 1 July 2015 Mr Cook was advised that Corrections was not appealing the Court's decision and Mr Watson and Mr White could provide any further information they wished in support of the application before Corrections made a fresh decision. Mr Cook provided a letter dated 17 July 2015 from Mr White confirming that Mr White's request to visit Mr Watson remained unchanged. On 28 August 2015 Corrections reconsidered the decision and advised that the request was granted subject to a number of conditions. There were then discussions over the conditions, leading to the interview taking place over three dates in October 2015 at Rolleston Prison.

[15] Mr White then published a 17 page article in the December 2015 issue of *North & South* magazine, entitled "Scott Watson, The interview." Mr White describes the public and media interest that followed as being greater than any story he has written in his 20 year career as a journalist. Sales of this issue were double the average monthly readership of 250,000, with thousands more reading the online publication. As a result of this publicity, a "docudrama" on the case is being finalised with funding from New Zealand On Air. New witnesses have come forward. Others have reinforced earlier doubts they had expressed. Offers of assistance have also been forthcoming. In addition, Mr Hope again expressed his desire to meet with Mr Watson. This led to the decision that is presently at issue.

### **The present matter**

[16] On 10 December 2015 Mr Cook applied to Corrections for a meeting to be organised between Mr Hope and Mr Watson with Mr White to act as a facilitator (the third request). This request noted that this had been the intention for some time. It also referred to Mr White's intention to take notes of the meeting and an audio recording and that he might write an article on the meeting. It was for this reason permission for the meeting was sought.

[17] Mr Cook advised that Mr Watson, Mr Hope and Mr White all agreed to the proposed meeting and they did not wish to have anyone else present apart from

Mr Cook (Mr White and Mr Hope were copied into the request). Mr Cook explained that Mr White had been chosen for the meeting because he is known and respected by both parties. He submitted that neither the meeting nor any potential article would give rise to any issues which would sufficiently impact on either the interests of any other persons or the security and order of the prison. He was happy to discuss any issues that Corrections might perceive there to be.

[18] Corrections responded on 18 December 2015. Corrections view was that there were two components to the request, namely a request for a meeting between Mr Watson and Mr Hope, and a request for Mr White to attend the meeting as a journalist and to record and possibly write an article about it. Before making a decision Corrections sought further information about both aspects. In particular it sought an explanation of the basis on which Mr Hope satisfied the requirement that the purpose of the visit was “to maintain the family and social relationships of the prisoner in order to promote the prisoner’s re-integration into the community on release”.<sup>3</sup> It also required “a sufficient reason” to be advanced in relation to the request for Mr White to attend, commenting that the suggested absence of reasons for declining the request (ie there would be no impact on other persons or on the security and order of the prison) was not the same as a sufficient reason to grant it. It invited an explanation of why the presence of Mr White should be permitted.

[19] Mr Cook replied on 27 January 2016. As to the meeting between Mr Hope and Mr Watson he submitted, amongst other things, that this had an element of restorative justice. In relation to Mr White, Mr Cook explained:

In relation to the issue you raise about Mr White I suggest that the reasons are that Mr White may publicise this meeting, if agreed by all parties and this could, once again, highlight Mr Watson’s cause namely that he is the victim of a miscarriage of justice. Mr Hope has indicated that he wishes to speak to Mr Watson about his denials. Mr White’s main role arises from the fact that both parties have requested his presence as he is well-known to both parties. He is an independent observer and will be able to accurately record what is said in the case of any later disagreement or confusion. Mr White has both parties’ trust and confidence in relation to this role.

[20] By letter dated 3 March 2016 Corrections advised of its decision on the request. The letter again noted Corrections view that there were two requests, one

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<sup>3</sup> Corrections Regulations 2005, reg 98.

for a meeting between Mr Watson and the other for Mr White to attend that meeting as a journalist and to record and possibly write an article about it. The letter went on to say:

As to the first request, I approve a visit by Mr Hope to Mr Watson. This visit will be subject to any conditions deemed necessary by the Prison Director to ensure the safety of the parties involved and the security and good order of the prison.

If the parties wish Mr White to be present at that meeting then that would be permitted only if Mr White is present in his capacity as facilitator and not in his professional capacity as a journalist. He would need to give an undertaking to the effect that he not use any information received during the visit for professional purposes. I note that this is the approach taken in the UK Policy *Prisoner's Access to the Media* PSI 37/2010 which similarly permits journalists to visit prisoners otherwise than in their capacity as a journalist.

[21] As to the second request, the letter said:

As to the second request – that Mr White attends and makes a recording as a journalist intending to write an article – this engages regulations 108(1) and (2) of the Corrections Regulations 2005. As I explained in my earlier email of 18 December, I consider that before this aspect of the request can be granted a sufficient reason for it needs to be advanced. You have said publication of any article about the meeting could “highlight Mr Watson’s cause namely that he is the victim of a miscarriage of justice.”

I do not consider the presence of Mr White at the meeting between Mr Watson and Mr Hope is necessary to highlight Mr Watson’s assertions of a miscarriage of justice. There is no suggestion the proposed presence of Mr White is necessary to discuss new information which has come to light or the discovery of new evidence.

Mr White has, of course, recently met with Mr Watson on three occasions and has written an article published in the December issue of *North and South*. He is free to write further articles highlighting these assertions at any time and this is not dependent on his presence at the meeting between Mr Watson and Mr Hope. Mr White is, of course, at liberty to speak to Mr Hope after the latter’s meeting with Mr Watson and publish an article about that. Likewise, he may communicate through letters with Mr Watson about the meeting.

Accordingly, I decline the request for Mr White to attend the meeting between Mr Watson and Mr Hope as a journalist and to record and possibly write an article about it. If, in consequence of meeting with Mr Hope, your client considers there to be a basis for a fresh application for Mr White to be present as a journalist then it is open for him to make a fresh application which would then be considered in light of the information presented.

[22] On 14 April 2016 Mr Watson commenced this proceeding.

## The law

### *The right to freedom of expression*

[23] The starting point is the right of freedom of expression.<sup>4</sup> In the present context it is Mr Watson's right to impart information to Mr Hope and Mr White, and Mr White's right, and through him and *North & South* magazine the New Zealand public's right, to receive such information.

[24] The fundamental importance of this right needs no elaboration in this judgment other than to note that one of the important interests it serves is "facilitat[ing] the exposure of errors in the governance and administration of justice in this country".<sup>5</sup> It is this interest which is engaged in the present case.<sup>6</sup>

[25] Mr Watson considers the criminal justice system has failed him and he has been wrongly convicted. He has exhausted his avenues of appeal. He seeks the assistance of Mr White to bring his case to the forefront of public attention with the purpose of highlighting the miscarriage of justice, and leading to further lines of inquiry which may assist his cause. As Lord Steyn put it in a case involving similar issues in the United Kingdom, not all types of speech have equal value, but "it is not easy to conceive of a more important function which free speech might fulfil" than where a prisoner is seeking to challenge the safety of their conviction.<sup>7</sup> Investigative journalism performs an important role in this respect.<sup>8</sup>

[26] As a fundamental right, it is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>9</sup> In this case the right has been limited by Corrections exercising its power under the Corrections Act 2004 and Corrections Regulations 2005.

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<sup>4</sup> New Zealand Bill of Rights Act 1990, s 14 affirms this right. See also art 19(2) of the International Covenant of Civil and Political Rights.

<sup>5</sup> *R v Secretary of State for the Home Department (ex parte Simms)* [2000] 2 AC 115, [1999] 3 WLR 328 [*Simms*], per Lord Steyn at 126.

<sup>6</sup> As it was in *Simms*, above n 5, at 126.

<sup>7</sup> *Simms*, above n 5, at 127.

<sup>8</sup> *Simms*, above n 5, at 129. Mr White's affidavit seeks to illustrate this point in the New Zealand context with reference to Pat Booth's work leading to the pardoning of Arthur Allan Thomas, Donna Chisholm's work in relation to the exoneration of David Dougherty and Paula Penfold and Eugene Bingham's contributions in relation to the quashing of Teina Pora's conviction.

<sup>9</sup> NZBORA, s 5.

*The statutory power at issue*

[27] Prison visits are governed by the Corrections Act 2004 and the Corrections Regulations 2005. There are three categories of visitors:<sup>10</sup>

- (a) A statutory visitor: this covers, for example, an inspector, a visiting justice, and the Minister.
- (b) A specified visitor: this covers a person or class of persons approved by the chief executive as an official visitor. It also covers a person approved by the prison manager as an official visitor for one or more prescribed purposes (for example, a visitor providing religious guidance or assisting in a disciplinary hearing).<sup>11</sup>
- (c) A private visitor: a visitor who is not a statutory visitor or a specified visitor.

[28] The Act provides “minimum entitlements” which apply to every prisoner.<sup>12</sup> These minimum entitlements include “access to private visitors, as provided for in section 73”, “access to statutory visitors and specified visitors” and “access to legal advisers, as provided for in section 74”. They also include an entitlement to send and receive mail and to make telephone calls. A prisoner is entitled to send and receive as much information as they wish (subject to certain oversight as set out in the Act).<sup>13</sup> The minimum entitlement for outgoing telephone calls is at least one outgoing telephone call of up to five minutes’ duration per week.<sup>14</sup>

[29] For present purposes it is the access to private visitors which is at issue. A private visitor is not allowed to visit a prison unless the chief executive has approved the person as a visitor prior to the visit, or there are exceptional circumstances that

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<sup>10</sup> Corrections Act 2004, s 3.

<sup>11</sup> Corrections Regulations 2005, reg 91.

<sup>12</sup> Section 69.

<sup>13</sup> Sections 76, 105 and 108.

<sup>14</sup> Section 77(3).

justify the visit taking place.<sup>15</sup> Mr Hope and Mr White, as private visitors, needed to obtain approval prior to their visit.

[30] For all private visits (other than visits by enforcement officers, legal advisors or journalists, amongst other categories), the purpose of the visit is to “maintain the family and social relationships of the prisoner in order to promote the prisoner’s re-integration into the community on release.”<sup>16</sup> Corrections query regarding the proposed visit by Mr Hope was directed to this.<sup>17</sup>

[31] If a journalist wishes to interview a prisoner or make a sound recording of an interview with a prisoner, the journalist must first obtain the written approval of both the chief executive of Corrections and the prisoner concerned.<sup>18</sup> This requirement also applies to any person who wishes to interview a prisoner or take any recording or footage of prisoner for the purpose of broadcasting or publishing it.<sup>19</sup> Mr White therefore needed approval to make an audio recording of Mr Hope’s visit and discussion with Mr Watson and if he was intending to publish an article on that visit.<sup>20</sup>

[32] The chief executive’s power to grant written approval to Mr White for these purposes is as follows:<sup>21</sup>

### **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.

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<sup>15</sup> Corrections Regulations 2005, reg 99.

<sup>16</sup> Regulation 98.

<sup>17</sup> Refer [20] above.

<sup>18</sup> 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).

<sup>19</sup> Regulation 108(3).

<sup>20</sup> Corrections submits that the meeting does not easily fit within the meaning of “interview” under reg 108. While the visit involves a meeting between Mr Watson and Mr Hope, Mr White’s presence as a journalist and his intention to possibly write an article the discussion at the meeting is, in my view, within the meaning of “interview” on a purposive interpretation.

<sup>21</sup> Regulation 109.

- (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).

[33] As the power to grant approval arises from regulations made under the Act, that power must also be exercised in accordance with the relevant purposes and principles of the Act.<sup>22</sup> 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.<sup>23</sup> The relevant principles are:<sup>24</sup>

- (a) In decisions about the management of persons under control or supervision, the maintenance of public safety is the paramount consideration.
- (b) In decisions relating to the management of persons under control or supervision, victims' interests must be considered.
- (c) The Corrections system must ensure the fair treatment of persons under control or supervision by ensuring that decisions made about them are made in a fair and reasonable way.

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<sup>22</sup> Corrections Act 2004 ss 5 and 6. In relation to the principles, the requirement to take into account the relevant principles is made express by s 6(2).

<sup>23</sup> Section 5.

<sup>24</sup> Section 6. See also *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [31].

- (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 control or supervision.

*A balancing approach*

[34] The correct approach when exercising the statutory power to decide whether to grant approval is to take the right to freedom of expression as the starting point. Corrections is required to take this right into account when deciding whether to grant the request. Corrections is required to balance against that right any conflicting considerations, and 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.<sup>25</sup> In undertaking the balancing exercise Corrections must also have regard to the purposes and principles of the Act.<sup>26</sup> Corrections must also “ensure that any reasons given for declining the interview are rationally connected to the objectives of safety and good order.”<sup>27</sup>

*Intensity of review*

[35] In this case the ground of review is unreasonableness. As to the degree of deference this Court should afford Corrections in determining whether its decision is unreasonable, I note the following comments in *Taylor v Chief Executive of the Department of Corrections*:

[89] We accept that the court should be cautious in reaching a different view from the decision-maker on matters relating to the security and good order of the prison. But, as Dunningham J observed in *Watson*, the court is in as good a position as the decision-maker to weigh matters such as the effect on victims of the public broadcasting of an interview with a prisoner and the extent and nature of any public interest in the subject matter on the appeal. Where human rights are involved, prison authorities tend to be

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<sup>25</sup> These being the two mandatory considerations referred to in reg 109(1).

<sup>26</sup> This was the approach adopted in *Taylor v Chief Executive of the Department of Corrections*, above n 24, at [72].

<sup>27</sup> *Taylor v Chief Executive of the Department of Corrections*, above n 24, at [86]. For present purposes it is not necessary to decide if Corrections is required to carry out a proportionality analysis although there is scope in the statutory direction for Corrections to do so: see the discussion in *Taylor v Chief Executive of the Department of Corrections*, above n 24, at [76] to [86].

supervised intensively because they do not have special expertise or authority on rights and there are important individual interests at stake.

[90] And as Lord Steyn put it in *Simms* "... the more substantial the interference with fundamental rights, the more the court will require justification before it can be satisfied the interference is reasonable in a public law sense."

[91] That said, we keep in mind that applications for judicial review differ from general appeals on the merits. The court's supervisory role on judicial review has the objective of ensuring that decisions of the kind at issue in this proceeding are made according to law. The court will intervene on conventional judicial review grounds to ensure that objective is achieved. Substituting its own view for that of the decision-maker would be an exceptional step in this context.

### **Review of the decision in this case**

[36] Corrections' decision in relation to the request for Mr White to record the meeting and possibly to write an article about it (the decision) reasoned as follows. Mr White has already had the opportunity to interview Mr Watson, and to publish an article about that interview, in order to highlight Mr Watson's cause namely that he is the victim of a miscarriage of justice. As an interview has already taken place, it was necessary to show there is new information or evidence relating to Mr Watson's cause in order to gain approval for a further interview. Mr Watson and Mr Hope could exercise their rights to freedom of speech by Mr Hope speaking to Mr White after the meeting and by Mr Watson communicating by letter with Mr White. Mr White could write an article based on this.

[37] The reason for declining the request was, therefore, that only one approval for an interview (conducted over three visits) was appropriate unless there was new information or evidence which would warrant a further visit. Corrections has explained, in an affidavit filed in this proceeding, that in making this decision it was guided by the policy developed in the United Kingdom concerning prisoners' access to the media.<sup>28</sup> Corrections was not satisfied the request met the "exceptional need" test set out in that policy.

[38] For present purposes the relevant parts of the United Kingdom policy are:

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<sup>28</sup> Ministry of Justice "Prisoners' Access to the Media" (PSI 37/2010, 02 July 2010) <[www.justice.govt.uk](http://www.justice.govt.uk)>.

- (a) It sets out “the exceptional circumstances” under which prisoners should be allowed face-to-face visits with journalists.
- (b) A journalist who is a friend or relative of a prisoner, and who wishes to have a social visit with the prisoner, must give an undertaking not to use material obtained from the visit for professional purposes.
- (c) Approval for a visit by a journalist will normally only be granted where the prisoner fulfils the following criteria:
  - (i) the matter relates to an alleged miscarriage of justice, the sole purpose of the visit is to allow the prisoner the opportunity to highlight the alleged miscarriage, and they have exhausted all appeals and have no further access to publicly funded legal assistance (with a limited exception to this requirement); or
  - (ii) there is some other sufficiently strong public interest in the issue sought to be raised during the visit and the assistance of that journalist is needed.
- (d) The visit must be the only suitable method of communication and written communication between the prisoner and the journalist have proved to be inadequate, and the journalist intends a serious attempt to investigate or bring public attention to the case or other issue with a sufficiently strong public interest raised by the prisoner.
- (e) It is expected that one visit will be sufficient. Consideration may be given to allowing additional visits only where an exceptional need is shown, such as the discovery of new evidence, or the need to discuss new information that has come to light.

[39] The policy provides an example of how the rights and competing considerations are balanced in the United Kingdom. It is not an approach which Corrections is obliged to follow when considering a request for a journalist to visit a

prisoner in this country. The approach required in this country is to consider each case on its merits, taking the right to freedom of expression as the starting point and balancing that against the relevant competing considerations and the purposes and principles of the Act.<sup>29</sup>

[40] It is not, however, unreasonable or wrong in principle for Corrections to require a journalist to advance a sufficient reason for their visit. A prisoner's rights in respect of some types of speech will be outweighed by the deprivation of their liberty from a sentence of imprisonment.<sup>30</sup> In this case, however, the request is to advance Mr Watson's claim that he is a victim of a miscarriage of justice. That is an example of the kind of case where permission might be given.

[41] I also accept that it was relevant to take into account whether the prisoner has already had an opportunity for a face-to-face visit with a journalist to highlight their cause. That factor may diminish the weight that should be given to the prisoner's right to freedom of expression when balanced against other considerations. But the extent to which it does depends on the circumstances. It is also to be kept in mind that sentences are not to 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 Corrections control or supervision.<sup>31</sup>

[42] Corrections submits the request failed to articulate why a further visit by a journalist should be granted in this case. Mr Watson's response is effectively that it did address this and, to the extent it did not do so in detail, the reasons were obvious. Here Mr Watson's right to highlight his case, through a responsible journalist, is of high value. He has exhausted his legal remedies and does not have the funds to pay for further lines of inquiry to be pursued. The meeting with Mr Hope, with Mr White present, had been proposed for some time. It is a meeting which Mr White regarded as "obviously" further engendering "enormous media attention and public

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<sup>29</sup> *Taylor v Chief Executive of Department of Corrections*, above n 24, at [72] and [106].

<sup>30</sup> *Simms*, above n 5, at 127; *Television New Zealand v Attorney General* (2004) 8 HRNZ 45 (CA); and *Taylor v Chief Executive of Department of Corrections*, above n 24, at [105]-[106].

<sup>31</sup> Section 6. See also *R v Allison* [2002] 1 NZLR 679 (CA) at [22]: "As to the common law, constitutionally a prison inmate retains all rights and privileges of citizens save for those that are inconsistent with the prison regime"; see also *Taunoa v Attorney General* [2008] 1 NZLR 429 at [97] per Elias CJ: "Sentenced prisoners retain all civil rights not expressly or by necessary implication removed by law."

interest”, and with that, the possibility that further witnesses or information may come forward. It does not appear that Corrections took this into account and therefore gave it appropriate weight.

[43] It was also relevant to consider whether the purpose of the visit could be met in other ways. A face-to-face visit involves some cost and disruption to the usual routines of the prison. If the purpose of the visit can be met in other ways the good order of the prison may count against granting the approval. Here Corrections considered the right could be exercised through subsequent communication with Mr Hope and correspondence with Mr Watson. However, in reaching that view, it does not appear that Corrections took into account that it had decided to permit Mr Hope to visit Mr Watson, and to permit Mr White to attend that visit as a facilitator. The decision did not explain why Mr White’s attendance in a professional capacity would impose any additional cost and disruption to the usual routines or order of the prison or raise other relevant concerns which justified declining the approval.

[44] The affidavit filed by Corrections in this proceeding provides further elaboration.<sup>32</sup> In addition to not being satisfied there was an exceptional need for Mr White’s visit in a professional capacity, Corrections considered there were “serious practical concerns” about the meeting. Those arose because the meeting between Mr Watson (the person convicted of the murders Olivia and Ben) and Mr Hope (the father of Olivia) was viewed as being a “very unique meeting”. Corrections considered it was likely to be “very tense” and therefore needed to be “carefully managed”. It considered the outcome of the meeting was unpredictable and there was “potential for the meeting to go badly and the possibility of at least psychological harm coming to any of the persons present.” Corrections was required to consider the interests of the victims (which was not necessarily the same as their wishes) and the security and safety implications of the proposed meeting.

[45] In light of that context, the affidavit went on to explain:<sup>33</sup>

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<sup>32</sup> There is a danger with such evidence that it descends into ex post facto justification in an attempt to improve on the original decision: *Taylor v Chief Executive of the Department of Corrections*, above n 24, at [33]. I have considered this evidence because it does appear to assist in providing a better understanding of the concerns which Corrections had when it declined the request even though they were not referred to in the letter advising of the decision.

<sup>33</sup> At [57.3].

The insertion of Mr White into the meeting in his capacity as a journalist, with the ability to report on what is said by the participants and how they interact, would introduce an additional element of complexity and unpredictability into an already difficult meeting. There was the possibility of an incident occurring at the meeting which is published in the media, and which is detrimental to the interests of the parties. I had no issue with the presence of Mr White attending as a facilitator, provided he gave an undertaking he would not use the information during the visit for professional purposes (this is the approach taken in the UK). It was his attendance in his capacity as a journalist which caused me some concerns.

[46] Corrections' view was, therefore, that although Mr Watson and Mr Hope wanted the meeting to occur with Mr White able to record the meeting and potentially to write about it, this might not be in their best interests. Corrections was concerned this could harm their interests if an incident occurred at the meeting which was then published in the media.<sup>34</sup>

[47] There are a number of aspects about this which Corrections' decision seems not to have taken into account. The first aspect concerns the practicalities of Corrections' decision. On the one hand it permits Mr White to be present, but requires that he give an undertaking not to use the information received during the visit for professional purposes. On the other hand, as Corrections explained in their decision, Mr White would be free to contact Mr Hope after the meeting, to communicate with Mr Watson through letters, and to publish an article on the basis of these communications. It may be difficult for Mr White to publish anything about the meeting obtained in this manner uninfluenced by what he knows from his own presence at that meeting. The situation is quite different from a social visit by a person who is a friend of the prisoner, who happens to be a journalist, which is the situation envisaged by the UK policy relied on by Corrections in seeking an undertaking from Mr White.<sup>35</sup> Mr White has a professional interest in the case, he intends to continue pursuing that interest and Mr Watson wishes him to do so.

[48] This leads to the next point. Corrections notes the meeting is unusual and is likely to be very tense. As Mr White puts it, it is likely to involve a high degree of emotion and to be as intense "as any that one could imagine". There is the potential

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<sup>34</sup> Corrections did not advance physical safety issues as concerns because it considered those issues could be addressed. Corrections considered the views of Mrs Smart were unlikely to have changed.

<sup>35</sup> Ministry of Justice, above n 28.

for misunderstandings to arise and for the participants to inaccurately recall what exactly was said after the event. It is not intended the audio would be broadcast. Its intended purpose is to ensure there is an accurate record of the meeting for the purposes of any article Mr White may wish to write. It also provides a more timely source of information than Mr Watson could convey through letters.

[49] The next point relates to the unpredictability of the meeting and the potential for it not to go well for the participants. Corrections is concerned about the possibility of an incident occurring at the meeting and that incident being published in the media to the detriment of the parties' interests. That is a reason for caution. However, if there is an incident at the meeting, Corrections' decision does not prevent Mr Hope from conveying that to Mr White, or others if he chooses to. Nor does it purport to restrict Mr Watson from conveying that information to Mr White, or others if he chooses to do so, by letter. In these circumstances it is difficult to see what additional detriment might arise if Mr White was able to report on the meeting from his first hand experience of it.

[50] Lastly, Mr White is an experienced professional journalist whom the participants trust. They both consent to his presence in his capacity as a journalist. They also consent to the meeting being recorded by him. If something goes wrong, it may be that one or both of the participants will not wish Mr White to publish details of their private meeting. In seeking Corrections approval, it was not proposed that a condition of the visit might be that the participants would have the opportunity at the end of the meeting to reconfirm or withdraw their consent to the publication of an article about the meeting. That may be a condition Corrections could consider imposing to address its concern.

[51] In light of these unexplained aspects of Corrections decision, I consider the decision is unreasonable in a judicial review sense. The right to freedom of speech has a high value in this particular instance. As permission has already been granted for Mr Hope to visit Mr Watson, and for Mr White to be present at that meeting, Corrections has not demonstrated that the practical considerations which it relied on outweighed that right. In other words, Corrections' reasons do not demonstrate that the interference with freedom of expression is justified.

## **Appropriate remedy**

[52] 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. Counsel for Mr Watson submits it is appropriate in this case to depart from that usual approach and to substitute my decision on the request for Mr White's visit. He makes that submission on the basis of a desire for expediency and because he submits it is the only proper decision to make.<sup>36</sup>

[53] I am not satisfied this is a case where this Court should substitute its decision for that of Corrections. Any such visit will need to be subject to conditions. It is therefore appropriate that Corrections reconsider the request in light of the conditions to which any such visit would be subject. There is no reason why Mr Watson's counsel cannot put forward now, for Corrections' consideration, the proposed conditions on which such a meeting would take place. That may enable a more timely outcome than occurred after the decision on the second request was quashed.

[54] Mr Watson also seeks a declaration that Corrections has breached his rights protected by the NZBORA. A declaration is a discretionary remedy. I am not satisfied it is appropriate to grant the remedy. Mr Watson's rights are recognised by this judgment. Corrections can be expected to comply with the direction to reconsider the request in light of the reasons in this judgment.

## **Result**

[55] The decision of Corrections dated 3 March 2016 that Mr White may not attend the meeting in his capacity as a professional journalist, record the meeting, and potentially write an article about it is quashed. Corrections is directed to reconsider this decision in light of this judgment.

[56] Costs on a 2B basis are awarded in Mr Watson's favour. Although indemnity or increased costs were sought, I am not satisfied they are appropriate. While it was

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<sup>36</sup> *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341, referred to in *Watson v Chief Executive of the Department of Corrections*, above n 1, at [751].

open to Mr Watson to bring this proceeding, it was also an option to provide a fuller explanation of the importance of Mr White's presence as a journalist and to seek a reconsideration of Corrections' decision in light of that explanation. The practical concerns which Corrections had may then have been able to be addressed. Additionally, once this proceeding was filed, there is nothing about Corrections' conduct of this proceeding which would warrant an award of increased costs.

Mallon J