IN THE COURT OF APPEAL OF NEW ZEALAND

CA816/2013
[2015] NZCA 477

BETWEEN	ARTHUR WILLIAM TAYLOR Appellant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	16 September 2015
Court:	Randerson, Harrison and Cooper JJ
Counsel:	Appellant in person (by AVL) R L Roff and T P Westaway for Respondent
Judgment:	8 October 2015 at 2:15pm

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is declined except to the extent stated in [40].

B The appeal is allowed.

C The respondent's decision dated 11 June 2013 declining a request by Television New Zealand to interview the appellant is set aside.

D The respondent must pay to the appellant reasonable disbursements incurred by him in bringing the appeal.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The appellant Mr Taylor is a serving prisoner at Auckland Prison, commonly known as Paremoremo. On 11 June 2013 an authorised delegate of the respondent (the Chief Executive) declined a request by Television New Zealand (TVNZ) to interview Mr Taylor in prison. TVNZ intended to record the interview on camera and broadcast it on television and TVNZ's internet news service. Mr Taylor's application for judicial review of the Chief Executive's decision was declined by Heath J in the High Court.[1] Mr Taylor now appeals against the High Court's decision.

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[1] *Taylor v Chief Executive of the Department of Corrections* [2013] NZHC 2953 [High Court judgment].

[2] As Heath J succinctly put it, the issues arising involve the balance to be struck between the need to maintain order in a prison and the human rights of its inmates.[2]

Background

[3] TVNZ's request to interview Mr Taylor arose following proceedings in the High Court in which Mr Taylor had successfully challenged the legality of steps taken to create a "smoke-free" environment in prisons throughout the country. On 20 December 2012, Gilbert J upheld Mr Taylor's challenge to a rule made by the Chief Executive under s 33 of the Corrections Act 2004 purporting to ban smoking in all areas, including prison cells and open areas.[3]

[4] Before Gilbert J's judgment was delivered, an Order in Council was passed introducing a new regulation purporting to declare tobacco (and equipment used for smoking it) to be an unauthorised item in a prison.[4] Mr Taylor then challenged the validity of that regulation. Parliament's response was to pass the Corrections Amendment Act 2013, which effectively banned smoking in prisons.[5] In a judgment delivered on 3 July 2013, Brewer J found that the regulation was not authorised by the Act when it was passed. Further, it was not necessary to give effect to the policies underlying the Smoke-free Environments Act 1990.[6]

[5] It is common ground that the Department of Corrections conducted an extensive publicity campaign commencing at least 12 months prior to 1 July 2011 claiming that substantial benefits to prisoners, prison staff and the good order and management of prisons would result from the blanket ban on smoking contemplated by the rule that was the subject of Gilbert J's judgment. Mr Taylor maintains that

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2 At [9].

3 *Taylor v Manager of Auckland Prison* [2012] NZHC 3591.

4 Corrections Regulations 2005, reg 32A (revoked on 4 June 2013 by reg 8 of the Corrections Amendment Regulations 2013).

5 After Mr Taylor filed the second proceeding in the High Court concerning the validity of reg 32A, Parliament passed the Corrections Amendment Act 2013, which included a number of anti-smoking measures that came into force on 5 March 2013 (see Corrections Amendment Act 2013, ss 4(2), 34, 39 and 48).

6 Section 6A(1) of the Smoke-Free Environments Act 1990 required a superintendent of a prison to ensure the written policy on smoking in prison cells was in place "for the protection of the health of employees and inmates" (repealed on 5 March 2013 by s 48(4) of the Corrections Amendment Act 2013).

there was further publicity on the issue on 24 December 2012 after Gilbert J's judgment was delivered. This included a broadcast by TVNZ of statements made by the general manager of Corrections Services and a New Zealand Herald report quoting the then Minister of Corrections. According to Mr Taylor, the statements made at that time asserted that the smoking ban had been successful and that prisons were safer and healthier in consequence. Although not formally admitted in the pleadings, it was not suggested Mr Taylor's evidence on this point was incorrect.

Mr Taylor's history

[6] There is no dispute that, as the Judge put it, Mr Taylor is one of the more notorious prison inmates in New Zealand. The Judge recorded that Mr Taylor was aged 57 years and had spent most of his adult life in prison. His first recorded convictions in the District Court were in 1975. His statutory release date is in 2022 although he has completed the minimum non-parole period imposed upon him and has been eligible for parole since 2012. He has not been successful so far in his applications for parole but, as we discuss later, he has been successful in securing the downgrading of his security classification from the highest level of maximum security. Since February this year he has been classified as low-medium for security purposes.

[7] The Judge described Mr Taylor's criminal record as extensive. It is not in dispute that he has multiple convictions for aggravated robbery, firearms offences, burglary, receiving stolen goods and other offences involving dishonesty. Since 2004, Mr Taylor has been convicted of a number of other serious offences.

[8] He was convicted on charges arising from items found in a storage unit in Paraparaumu in 2004. He was not in custody at the time but was on parole. The convictions included possession of controlled drugs, precursor substances, firearms and ammunition, as well as receiving a computer and cellphone. He was sentenced to eight years for that offending. In his judgment, Heath J inadvertently referred to the storage unit being located at Auckland Prison.[7] It is accepted this was in error. While Mr Taylor submitted this was a serious error that flavoured Heath J's decision,

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7 High Court judgment, above n 1, at [21].

we do not accept the error made was material to the outcome. Rather, our focus in this judgment is on the decision made by the Chief Executive's delegate and the material available to him at that time. The location of the storage unit was not a matter before the person who declined TVNZ's interview request.

[9] In addition, Mr Taylor has a number of convictions for escaping from custody. The most recent of these was in 2005 when he escaped while on prison leave. Mr Taylor was also convicted on charges of kidnapping three prison guards for a brief period during this incident. He received a cumulative sentence of four years imprisonment with a MPI of two years. Concurrent sentences of one year were imposed on the three kidnapping charges.[8]

[10] Mr Taylor was also convicted on one charge of conspiracy to supply methamphetamine and sentenced to a term of imprisonment of seven years with a MPI of three and a half years (reduced on appeal to five and a half years with a MPI of two years and 9 months).[9] This offending occurred in 2007 while Mr Taylor was in prison. His most recent conviction was for intentional damage relating to an incident in prison in 2009. He was sentenced to a concurrent term of five months imprisonment on that occasion.

[11] As well as his convictions for criminal offending, Mr Taylor has been found guilty of misconduct offences arising from disciplinary breaches while in prison.

TVNZ's request for an interview with Mr Taylor

[12] On 20 March 2013 Ms Lisa Owen, who was then employed by TVNZ as a journalist, wrote to the principal media adviser for the Department of Corrections, Mr Chris Wright. She sought permission to record a "face-to-face on camera interview" with Mr Taylor, principally for TVNZ's news programmes and internet news service. The key section of Ms Owen's letter said:

> The focus of the interview would be around the legal challenges taken up by Mr Taylor and his reasons for pursuing these maters through the courts, his

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8 *R v Taylor* HC Wellington CRI-2005-085-5744, 19 December 2007, aff'd in *R v Taylor* [2008] NZCA 558, [2009] 1 NZLR 654.

9 *Taylor v R* [2012] NZCA 332.

> view of the Corrections Amendment Bill now enshrining the ban in law, the ban itself, the consequences of Justice Gilbert's ruling and any subsequent declaratory judgments and his future plans in terms of compensation. An interview would also cover Mr Taylor's self-education in the law over the past fifteen plus years.
>
> Mr Taylor has as mentioned educated himself in the law while in prison and is regarded as a formidable courtroom opponent. Choosing to exercise legal options (above others) to challenge what one disagrees with and pursuing an education must be regarded as positive moves and messages.
>
> Mr Taylor has been filmed numerous times over the years at various court appearances and therefore is likely to have been seen by his victims on the television.
>
> As TVNZ is only requesting permission to interview Mr Taylor on camera, there should be no issues regarding the privacy of other prisoners.

[13] Ms Owen advised that the film crew would comprise three persons: a field producer, a camera operator and herself.

[14] As required by reg 108(2) of the Corrections Regulations 2005, Mr Taylor provided his consent to the interview in a letter of 13 March 2013. He described the legal challenges that had been and were being made at that time in respect of the smoking ban, which he asserted were matters of public interest. In the letter he drew attention to the media publicity of 24 December 2012 which we have already mentioned. He maintained that the statements made in this publicity were misleading and that it was important that both sides of the issue were placed before the public so they were properly informed. And he referred to the right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

[15] This request was declined by the Chief Executive's delegate Mr Vince Arbuckle in April 2013. Mr Arbuckle said the Chief Executive could give approval where the interview had a positive benefit, particularly for the offender. However, he did not consider the exposure Mr Taylor would receive as a result of the interview would benefit his rehabilitation.

[16] Mr Taylor then launched proceedings for judicial review of Mr Arbuckle's decision. Not long afterwards the Chief Executive accepted there had been an error in Mr Arbuckle's approach, namely the absence of any consideration of the

mandatory provisions of reg 109(1) of the Corrections Regulations, which we discuss below.

[17] In late May 2013, TVNZ's editor of daily programmes, Mr Gillespie, sought reconsideration of Mr Arbuckle's decision, drawing attention to the relevant regulations. He said there was no evidence there had been a balancing of competing values, relying on the views expressed in this Court in *Television New Zealand Ltd v Attorney-General*.[10] He reiterated that the focus of the interview would be Mr Taylor's legal challenges to the smoking ban and the subsequent legislative amendments. This subject was, he said, a matter of public interest.

Consideration of the request

Mr Wright's memorandum

[18] On 27 May 2013 Mr Wright provided an extensive memorandum to the acting Deputy Chief Executive of the Department of Corrections (Mr Graeme Carruthers). The memorandum referred once again to the relevant Corrections Regulations and described Mr Taylor's history of criminal offending and prison disciplinary offences. Mr Wright described Mr Taylor's offending as having escalated over the years and stated that Mr Taylor was classified as a maximum security prisoner with the highest internal risks. He asserted Mr Taylor had little interest in rehabilitation and advised that Mr Taylor was housed in D Block in the east wing of Auckland Prison: "the most volatile and challenging in our system". He said random and unprovoked acts of violence between prisoners and against Corrections staff were not uncommon despite intense efforts to make the environment safer.

[19] Under the heading "Things to consider" Mr Wright stated:

> The starting point is that prisoners have the right to freedom of expression under the NZ Bill of Rights Act subject only to limitations that are made necessary by reason of their being in prison. Regulation 109 refers to two specific considerations:

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[10] *Television New Zealand Ltd v Attorney-General* (2004) 8 HRNZ 45 (CA).

> Protecting the interests of people other than the prisoner concerned, and the maintenance of the security and order of the prison concerned.

[20] Addressing the application for an in-person on-camera interview in the presence of a journalist, camera operator and producer, Mr Wright said it would be impracticable for the interview to take place in the interview room in the east wing. It would need to take place in one of the more open areas in that part of the prison.

[21] To assess the potential risk associated with the proposed interview, Mr Wright had obtained a report from the Acting Manager of Auckland Prison, Mr Tom Sherlock. This report was peer reviewed by Mr Neil Beales, the Chief Custodial Officer and a former manager of Auckland Prison, who had dealt with Mr Taylor over a number of years. As well, a report was obtained from an unidentified national intelligence analyst.

Mr Sherlock's report

[22] Mr Sherlock provided a comprehensive report on the risks he foresaw in relation to security and order at the prison. This canvassed different forms by which an interview could occur with Mr Taylor and an assessment of the differing degrees of risk involved with each. Mr Sherlock acknowledged he could manage any security and order risks that might arise from moving Mr Taylor around the prison. However, he noted that a face-to-face television interview would need to take place in a larger room such as the prison chapel or the Parole Board room. He did not have any special fears for the safety of his officers but was not confident that the safety of the TVNZ personnel could be guaranteed. While he accepted Mr Taylor was not usually violent, Mr Sherlock said his behaviour could be manipulative and unpredictable. He said the type of interview requested had never happened at Auckland Prison before.

[23] Mr Sherlock also had some concern about the possibility of the interview precipitating an orchestrated protest within the prison, given that many prisoners would wish to watch the interview. They would likely regard it as a protest about the smoking ban and it would be precedent setting. He considered this could be very

disturbing to the prison. He said it could "balloon quite big" and there were other prisoners who had equally sensational stories.

[24] Mr Sherlock went on to consider other options. The first was that the interview could be undertaken in the AVL (audio visual link) suite at the prison. He saw the same risks arising with the exception that there would be none to the TVNZ personnel. The same assessment would apply to a live sound recording at the prison and an interview conducted over the telephone. The lowest risk would be to permit an interview by written questions and answers.

[25] Mr Sherlock concluded his report by observing that the Department should approve the words said or written by Mr Taylor to avoid any inciting to action or, violence or impact on the rights of victims.

Mr Beale's peer review

[26] Mr Beale agreed with Mr Sherlock's assessment. In particular, he emphasised the risk of Mr Taylor orchestrating or encouraging incidents happening during or after the interview. He referred to Mr Taylor's desire to portray himself as a champion of the prisoner and a self-appointed advocate of their issues. He considered Mr Taylor would seek any opportunity to comment negatively on aspects of prison life and would seek to personally embarrass individual staff, particularly managers. He continued:

> Regardless of whether AWT [Mr Taylor] actually intends to create any disruption or not, I believe that this remains a high risk given the subject matter, the individual being interviewed and the unknown potential reactions of prisoners not only in Auckland but across the estate. Prisoners may wish to visibly show their support whether AWT expressly requests it or not.
>
> The precedent this sets is also deeply concerning, as we will be in a difficult position to resist any future requests by other prisoners or AWT himself.

The comments by the national intelligence analyst

[27] This report commented on Mr Taylor's personal characteristics and what the analyst saw as Mr Taylor's need to maintain his status and public profile, particularly as an advocate for prisoner's rights. The analyst saw this as more important to Mr Taylor than ongoing criminal offending.

[28] The analyst's conclusion was:

> … the impact of the interview and its broadcast on TAYLOR in relation to the security and good order of [Auckland Regional Prison] is that it will increase the likelihood of him obtaining more cellphones in order to make communication to persons outside the prison avoiding the prisoner phone call recording system (possessing a cellphone is a serious misconduct).

[29] None of the others who contributed to the report prepared for Mr Carruthers referred to cellphones and this did not feature in Mr Carruthers' reasons for declining the interview request. We view it as an unnecessary and illogical distraction.

The incident of 2 June 2013 allegedly involving Mr Taylor

[30] On 2 June 2013, just nine days before Mr Carruthers issued his decision declining permission for TVNZ to interview Mr Taylor, a SMS message was received by Mr Carruthers to the effect that Mr Taylor had jammed the lock of his cell in D Block, flooded the landing and started a small fire. It was reported that contractors had been requested to release the lock and a Control and Restraint team had been formed to extract Mr Taylor from the cell. It is not known who sent this message but it is presumed to be from someone within Corrections.

[31] This message has assumed importance since it was referred to by Mr Carruthers in his decision but is now acknowledged to be incorrect. Heath J did not consider the error made was material to Mr Carruthers' decision,[11] a finding we discuss below.

Mr Carruthers' decision

[32] Mr Carruthers' decision of 11 June 2013 is relatively brief and we set it out in full:

> **REQUEST FOR INTERVIEW WITH PRISONER ARTHUR TAYLOR**
>
> I have been asked to consider an application for a face to face interview with Arthur Taylor by TV1.
>
> I have read and considered all of the information provided regarding TV1's application for an on camera interview with Mr Taylor, including

[11] High Court judgment, above n 1, at [61]–[62].

submissions made by Mr Taylor to the Court giving his reasons for participating in the camera interview.

I make my decision fully cognisant of the right to freedom of expression. I must also have regard to regulation 109 of the Corrections Regulations which requires me to be satisfied that:

1. The interests of people other than the prisoner concerned are protected; and

2. The security and order of the Prison is maintained.

I note in particular that the request is for a face to face on camera interview requiring an interviewer, a cameraman and a field producer to be present in the Maximum Security Prison.

I also note the offending history of Mr Taylor whilst in custody and I particularly note additional information on Mr Taylor's latest incident on 2 June 2013 where Mr Taylor jammed the lock of his cell, flooded the landing and started a small fire.

In all the circumstances I am not satisfied that:

1. The interests of people other than the prisoner concerned are protected.

   These concern the risks to the safety of the TV1 crew and the impact on current and former staff directly affected by Mr Taylor's actions.

2. The security and order of the Prison is maintained.

   Mr Taylor is an unpredictable and manipulative Maximum Security Prisoner. His latest conduct clearly shows his volatility and unpredictability.

   I have had regard to the submission of the Prison Manager of Auckland Prison and agree with his view that a face to face on camera interview would put at risk the good order of New Zealand's Maximum Security Prison.

My decision is that the application to allow a face to face on camera interview with Arthur Taylor by TV1 is declined.

Graeme Carruthers
Acting Deputy Chief Executive

The scope of evidence in the High Court

[33] A number of affidavits were filed in the High Court. It seems likely they were received without objection. As the Judge acknowledged, the general rule is that judicial review proceedings are determined on the basis of the material before the

decision-maker at the time of the decision.[12] A decision-maker may file affidavits explaining relevant facts and circumstances at the time the decision was made.[13] But where, as here, the record reveals an adequate record of the decision and the facts before the decision-maker, the scope for additional explanatory evidence will be limited. Evidence addressing allegations of breach of natural justice, alleged bias or improper motive or the consequences of the relief sought are examples of exceptions to this general rule. The decision-maker must refrain from descending into ex post facto justification in an attempt to improve on the original decision.[14] The court will give little weight to such explanations in the absence of compelling reasons.[15]

[34] In the present case and leaving aside affidavits relating to discovery, Mr Taylor filed two affidavits sworn by himself and an affidavit by Mr Roger Brooking. The Chief Executive filed two affidavits by Mr Carruthers, an affidavit by Mr Sherlock, and another by one of the three prison guards who were escorting Mr Taylor at the time of the incident in 2015. Some of the content of the affidavits could be regarded as falling within one or more of the exceptions to which we have referred. And the uncontroversial material Mr Sherlock provided describing the prison layout and prison routines does not give rise to any concern. So too descriptive material regarding the areas in the prison where an interview could take place. This sort of material could be expected to be known by Mr Carruthers as the decision-maker, or available to him.

[35] However, material elaborating on Mr Taylor's personal characteristics and behaviour in prison is at the margin of material that is appropriate to receive on judicial review. It is tantamount to providing further material to justify the impugned

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12 *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 658 and *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [46], both endorsed in *Palmerston North City Council v Drury* [2007] NZCA 521, [2008] NZRMA 90 at [62]–[63]. See also *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaau Hapu Charitable Trust* [2013] NZCA 33, [2013] NZAR 539 at [117].

13 Graham Taylor *Judicial Review: A New Zealand perspective* (3rd ed, LexisNexis, Wellington, 2014) at [10.23] citing *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 342 (CA) at 346 and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 561–562.

14 *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.

15 *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) at 691.

decision. We prefer to rely upon Mr Sherlock's detailed report provided to Mr Carruthers at the time he made his decision.

[36] With regard to Mr Carruthers' affidavits, material responding to Mr Taylor's affidavit is legitimate, including Mr Carruthers' acknowledgements of errors of fact. However, we are concerned by his assertion in an affidavit sworn on 24 June 2013 that the acknowledged error of fact over the alleged locking of Mr Taylor's cell and the consequences of that was "not in itself a determining factor in reaching my decision". With respect to Mr Carruthers, that is a matter to be determined by the Court on the basis of the material available to Mr Carruthers at the time of his decision and the Court's interpretation of the reasons he gave at that time.

[37] It appears no objection was taken to the affidavit of the prison guard who was one of those involved in the kidnapping in 2005. This constitutes material not readily available to the decision-maker at the time. We have distinct reservations as to whether it should have been received. We discuss its significance further below.

[38] Finally, Mr Brooking's affidavit relates to incidents at Rimutaka Prison and difficulties he experienced in gaining entry to that prison. He deposes that he had encountered difficulties with Corrections staff. He referred to allegations that he breached prison security by using a cellphone at the prison and said Corrections staff, including Mr Arbuckle, had told him he could not enter the prison because of criticisms he had made of Corrections.

[39] Mr Taylor contends this evidence is relevant to his contention that TVNZ's application was declined because of fears he would be critical of Corrections should permission for the interview be granted. Certainly, his pleadings contained allegations of that nature but we do not view Mr Brooking's affidavit as being of any assistance. If objection had been taken, it would in all probability have been excluded by the High Court on the ground that it related to events elsewhere at a later time involving other Corrections staff.

Mr Taylor's application to adduce further evidence on appeal

[40] Mr Taylor has sought leave to adduce further documentary evidence on appeal. The first three items are already in the case on appeal and their introduction is not opposed.[16] Most of the remaining items are further requests by television, radio and print media for permission to interview Mr Taylor. They all post-date Heath J's judgment. All requests were declined.

[41] The Chief Executive opposed the admission of these additional documents on the grounds they lack cogency. Mr Taylor submitted to the contrary that they demonstrate an improper purpose on the part of the Chief Executive, namely to decline any applications by media to interview Mr Taylor in whatever form might be sought.

[42] The difficulty in introducing this evidence is that it all relates to events subsequent to the impugned decision. None of the decisions declining the subsequent requests by others is the subject of the proceeding in the High Court. None of them has been made by Mr Carruthers. In order to draw the inference for which Mr Taylor contends, the circumstances of each case would need to be the subject of more detailed evidence and consideration. In any event, as our judgment will demonstrate, it is unnecessary for us to make any determination on the allegations of improper purpose.

[43] The next document Mr Taylor seeks to produce is his most recent security classification, reviewed at 23 February 2015. It is unnecessary to have this document before the Court, since the Chief Executive accepts that Mr Taylor's security classification from that date is low-medium as already noted.

[44] The final document relates to Mr Garth McVicar being declined permission to visit Mr Taylor in prison. Again, we do not view this document as having any material bearing on the issues we have to determine.

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[16] These are: the Chief Executive's response declining the first interview request; the request from Mr Gillespie asking for a review of the first decision; and the Chief Executive's decision letter of 11 June 2013 declining the request for review.

[45] Except as stated at [40] above, we decline the application to adduce further evidence.

The grounds for review

[46] Mr Taylor issued an amended statement of claim after the decision made by Mr Carruthers. Heath J rightly focused on the grounds Mr Taylor advanced to challenge that decision rather than the earlier decision of Mr Arbuckle. There were multiple grounds upon which Mr Taylor relied to challenge Mr Carruthers' decision. For the purposes of appeal the parties agreed the main issues were:

(a) Whether the decision of 11 June 2013 was unlawful on the grounds of illegality.[17]

(b) Whether the decision was unlawful on the grounds of unreasonableness.

(c) Whether the High Court was correct to find that concerns about security and the good order of Auckland Prison outweighed Mr Taylor's right to freedom of expression.

[47] The unreasonableness ground embraced a variety of topics including error of fact.

The judgment in the High Court

[48] Heath J commenced by noting that no objection had been taken to Mr Taylor's standing to bring the application for judicial review.[18] That was so despite the fact that TVNZ applied for the interview and had taken no part in the

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17 Mr Taylor alleged breaches of ss 5(1)(b), (6)(1)(f)(ii) and 6(1)(g) of the Corrections Act 2004, s 4(1)(d) of the Broadcasting Act 1989, s 14 of the New Zealand Bill of Rights Act 1990, art 19 of the International Covenant on Civil and Political Rights and rr 60(1) and 61 of the United Nations Standard Minimum Rules for Treatment of Prisoners.

18 High Court judgment, above n 1, at [32].

proceeding before the Court. Secondly, Heath J noted there was no dispute as to the validity of the Corrections Regulations at issue.[19]

[49] The Judge referred to reg 108, which prohibits interviews by the media with a prisoner without the prior written approval of the Chief Executive and the prisoner concerned. The matter fell to be determined by 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).

[50] The Judge then found:[20]

> That discretion had to be exercised by reference to the Chief Executive's primary obligation to ensure the maintenance of good order and security in the prison, a concept that embraces the need to protect the interests of persons other than the prisoner.

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[19] The validity of the predecessors to regs 108 and 109 of the Corrections Regulations 2005 (regs 87 and 88 of the Penal Institutions Regulations 2000) was upheld by this Court in *Television New Zealand Ltd v Attorney-General*, above n 10.

[20] High Court judgment, above n 1, at [39].

[51] The Judge referred to "s 109" as authority for that proposition although in context it is clear that the Judge was referring to reg 109.

[52] Heath J then continued:

> [40] The existence of the reg 109(3) discretion necessarily means that the decision-maker must take into account other relevant factors (of which the right to freedom of expression is one), and balance them against the need for good order and security in the prison environment. In a finely balanced case, reg 109(3) makes it clear that the obligation to maintain good order and a secure environment prevails over the rights of individual prisoners.
>
> (footnote omitted)

[53] We take a different view from the Judge regarding the effect of reg 109(3).

[54] The Judge then discussed at some length the observations of Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Simms*, noting particularly Lord Steyn's focus on the fact that the interviews with prisoners were sought in that case because the prisoners in question wished to challenge the safety of their convictions.[21]

[55] Leaving aside for the moment the allegations of error of fact, Heath J concluded:

> [53] Assuming the factual information provided to the decision-maker was correct, I do not see any basis on which freedom of expression, in the form of an interview for a television programme about the smoke-free policy litigation, could outweigh concerns about the good order and security of the prison environment, particularly in light of Mr Taylor's criminal history. Public debate on the "smoke-free" policy issue has been informed by two reasoned judgments of this Court, both publicly available. In addition, both lawyers and academics specialising in human rights have been available to comment to media outlets on the public policy implications of the decisions. The addition of Mr Taylor's voice to the debate would have added little, in the qualitative sense to which Lord Steyn referred in *Simms*.
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> [54] The limited areas in which an interview could have taken place, the number of prison officers that would have been required to allow the interview to take place safely, the inability of officers assigned to attend to Mr Taylor to respond promptly to any emergency calls within the prison while with him and Mr Taylor's behavioural history all pointed to rejection of TVNZ's request.

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[21] *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 (HL).

…

> [56] All that is required is for the decision-maker to address the mandatory considerations set out in reg 109(3) and to balance them against any countervailing interests, in this case freedom of expression. In this case, the decision-maker did consider freedom of expression in reaching his decision, so there is no question about failing to take account of a material relevant factor.
>
> (footnotes omitted)

[56] Heath J then addressed the allegations of material factual error in Mr Carruthers' decision. The first related to the acknowledged error in relation to the incident referred to in the SMS message of 2 June 2013. The Judge accepted a submission made on behalf of the Chief Executive that the reference to this incident in Mr Carruthers' decision was illustrative of Mr Taylor's past behaviour. The Judge regarded it as inevitable that the same conclusion about the good order and maintenance of security in the prison would have been reached given the state of knowledge of Mr Taylor's previous conduct in prison and his disciplinary record.

[57] The second was the acknowledged error in Mr Taylor's security status at the time of the impugned decision. However, the Judge noted the submission made on behalf of the Chief Executive that the downgrading of Mr Taylor's classification from maximum security to high security did not take effect until 27 August 2013, after the date on which Mr Carruthers' decision was made.

[58] The third error relied upon was Mr Sherlock's statement in the report provided to Mr Carruthers that there had been no prior interviews of the type sought by TVNZ within the relevant prison environment. In fact, as Mr Sherlock subsequently accepted, television interviews were recorded in June 2011, when two inmates were interviewed for the Campbell Live programme on TV3. The Judge considered that the interviewees' situation for the TV3 interview was very different from that of Mr Taylor. He noted they had been chosen by prison authorities because they supported the smoke-free policy. The inmates were not named, giving their interviews anonymously. That being so, Heath J considered they were necessarily compliant and unlikely to cause disruption to prison order or security.

[59] On this basis, the Judge declined the application for judicial review.

Discussion

The statutory background

[60] The purpose of the Corrections system is set out in s 5 of the Corrections Act. It 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.[22] The statutory purpose is also to be achieved in other ways including by providing for Corrections facilities to be operated in accordance with rules set out in the Act and in regulations made under it, based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners.[23]

[61] The principles that guide the operation of the Corrections system are set out in s 6 of the Corrections Act. They must be taken into account by those exercising powers and duties under the Act or regulations.[24] The maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision.[25] Victims' interests must be considered in decisions relating to the management of persons under control or supervision.[26] Mr Taylor also emphasised s 6(1)(f)(ii), which provides that 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. Finally, sentences must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, Corrections staff, and persons under control or supervision.[27]

[62] Under s 69(1) of the Corrections Act, every prisoner has minimum entitlements, including access to visitors and legal advisers, the right to send and receive mail as provided in s 76 and the right to make outgoing telephone calls as provided in s 77(3). Although a prisoner may send and receive as much mail as the

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22 Corrections Act, s 5(1)(a).
23 Section 5(1)(b).
24 Section 6(2).
25 Section 6(1)(a).
26 Section 6(1)(b).
27 Section 6(1)(g).

he or she wishes,[28] the minimum entitlement to telephone calls is one outgoing call of up to 5 minutes duration per week.[29] This entitlement is in addition to any telephone call made to an official agency or a legal adviser. The entitlements in respect of mail and telephone calls are subject to restrictions under ss 105–115 of the Act.

[63] The regulations at issue are authorised under s 200(1)(a) of the Corrections Act (ensuring the good management of prisons) and s 201(b) (regulating the visiting of prisoners, including regulations requiring members of the public or any specified class of persons to obtain approval from the Chief Executive before visiting a prisoner).

Principles to be applied in decision making under regs 108 and 109

[64] The general principles applicable to prisoners' rights in this context have been stated authoritatively by the House of Lords in the leading decision *R v Secretary of State for the Home Department, Ex parte Simms*.[30] The House was concerned with the legality of a prison rule that was found to amount to a blanket exclusion of all professional visits by journalists to prisoners. The ban was grounded on the view that to allow such interviews would undermine proper control and discipline in the system. The appellants were convicted prisoners who had exhausted their rights of appeal through the ordinary court processes in the criminal jurisdiction and sought to enlist the investigative services of journalists as a way of gaining access to justice by reference of their cases to the courts. Essentially, the prisoners wished to further their contention that they had been the subject of a miscarriage of justice.

[65] The leading judgment was delivered by Lord Steyn. His Lordship commenced with the general proposition that a sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner such as the right to freedom of movement and association. On the other hand, he considered it to be

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28 Section 76(1).
29 Section 77(3).
30 *Ex parte Simms,* above n 21.

well-established that a convicted prisoner in spite of his imprisonment retains all civil rights not taken away expressly or by necessary implication.[31]

[66] Lord Steyn went on to discuss freedom of expression, which he regarded as the starting point for consideration of the issue before the Court. Before us, Ms Roff accepted that the right to freedom of expression was the appropriate starting point in considering any request for an interview under reg 109. Under the European Convention the right to freedom of expression is protected by art 10,[32] while in New Zealand the right is protected by s 14 of the Bill of Rights in these terms:

> **14 Freedom of expression**
>
> 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.

[67] A high value is attached to freedom of expression. Lord Steyn discusses this in terms relevant to the present case by reference to the free flow of information and ideas informing political debate; freedom of expression acting as a brake on the abuse of power by public officials; and as facilitating the exposure of errors in the governance and administration of justice.[33] The high value placed on the importance of freedom of expression has been recognised in New Zealand, for example in *Jennings v Buchanan*[34] and *Television New Zealand Ltd v Attorney-General*.[35]

[68] The right of freedom of expression under s 14 includes the freedom to seek, receive, and impart information and opinions of any kind in any form. In the present context the right therefore includes Mr Taylor's right to impart information and opinions and the right of TVNZ (and, through it, the New Zealand public) to receive such information and opinions.

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31 At 120 citing *Raymond v Honey* [1983] AC 1 (HL) at 10 and *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 (CA) at 209.

32 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 September 1950, entered into force 3 September 1953), art 10.

33 *Ex parte Simms,* above n 21, at 126. See also *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114] citing *RWDSU, Local 559 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

34 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [60].

35 *Television New Zealand Ltd v Attorney-General*, above n 10, at [18].

[69] It is common ground that the right to freedom of expression is not absolute and may be subject to justifiable limitations.[36] This is set out explicitly in s 5 of the Bill of Rights:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[70] While s 14 of the Bill of Rights protects information and opinions "of any kind in any form", the nature of the information or opinions to be imparted and the reasons relied upon by those seeking to do so is relevant when considering whether a limit on the right is justified. As Lord Steyn observed in *Simms*, not all types of speech have an equal value.[37] For example, Lord Steyn said a prisoner would never be permitted to have interviews with a journalist to publish pornographic material or to indulge in "hate speech". Nor, given the purpose of a sentence of imprisonment, could a prisoner claim to join in a debate on the economy or on political issues. In cases of that kind, the prisoner's right to free speech would be outweighed by deprivation of liberty and the need for discipline and control in prisons. However, in the case under consideration, the appellants wished to challenge the safety of their convictions. Lord Steyn said that, in principle, it was not easy to conceive of a more important function that free speech might fulfil.[38]

[71] In the circumstances before the House, the blanket ban on interviews with prisoners by journalists was unlawful as being in conflict with the fundamental rights claimed by the appellants. Taking full account of the essential public interest in maintaining order and discipline in prisons, it was found to be administratively workable to allow prisoners to be interviewed for the narrow purposes at stake provided a proper foundation was laid in correspondence for the requested interview.[39]

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[36] It is also recognised in the leading New Zealand authorities: *Television New Zealand Ltd* v *Attorney-General,* above n 10, at [16]; *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [18] and [65] per Elias CJ and [263] per Anderson J; and *Brooker v Police*, above n 33, at [59] per Blanchard J, at [91] per Tipping J, at [117]–[135] per McGrath J.

[37] *Ex parte Simms,* above n 21, at 127.

[38] Ibid.

[39] At 130–131.

[72] Here, the right to freedom of expression is abridged by regs 108 and 109, the validity of which (as we have already noted) is not in issue. 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. Taking the right to freedom of expression as the starting point, the decision-maker is required to balance against that right any conflicting considerations and, in particular, those reflected in the two mandatory factors.[40] In exercising this discretion and undertaking the balancing process, the decision-maker must also have regard to any purposes and principles of the Corrections Act relevant to the task. These include those we have identified at [60] and [61] above.

[73] We accept that the Chief Executive has the very important obligation of maintaining good order and security in prisons. That obligation necessarily flows from the statutory purpose of ensuring that sentences are administered in a safe, secure, humane and effective manner. It is also reflected in the specific powers and functions given to prison managers by s 12 of the Act, which include ensuring the prison operates in accordance with the purposes set out in s 5 and ensuring the safe custody and welfare of prisoners received in the prison. Consistently with this, reg 6(1) of the Corrections Regulations provides:

> Subject to the Act and to the control of the chief executive, the manager of a prison is responsible for its good management and the fair, safe, secure, orderly, and humane management and care of its prisoners.

[74] These obligations must be met together with other relevant obligations of the prison authorities.

[75] However, we do not accept the Judge's proposition that in a finely balanced case, reg 109(3) makes it clear that the obligation to maintain good order and a secure environment prevails over the rights of individual prisoners. Rather, we view reg 109(3) as authorising the imposition of conditions when they are reasonably necessary to achieve the objectives referred to in reg 109(1). In this respect, reg 109(3) is a machinery provision enabling the Chief Executive to impose

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[40] *Television New Zealand Ltd* v *Attorney-General*, above n 10, at [16].

conditions for the purposes specified. As we interpret it, reg 109(3) does not have the effect of providing any additional emphasis to the mandatory considerations in reg 109(1). Reg 109(3) could be used, for example, to specify the type of interview that may be authorised.

Is a proportionality analysis required in administrative decisions such as requests under reg 109?

[76] It is well-established that in considering under s 5 of the Bill of Rights whether legislation imposes a justified limit on a right guaranteed by the Bill of Rights, a proportionality test is required. In *R v Hansen*, the majority of the Supreme Court adopted the proportionality test established by the Supreme Court of Canada in *R v Oakes* and *R v Chaulk*.[41] Amongst other things, 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.

[77] In the United Kingdom, it is accepted that the principle of proportionality extends not only to the legislation limiting the right but also to a decision applying it.[42] Ms Roff submitted that the proportionality test endorsed in *Hansen* was not necessarily appropriate where judicial review of an administrative decision is impugned on Bill of Rights grounds. Rather she submitted that the Supreme Court in *Brooker v Police* had supported a less structured approach depending on context but focusing on balancing of the competing values.[43] She submitted that a limitation on freedom of expression could not be found on judicial review to be unreasonable in terms of s 5 of the Bill of Rights if it was within the range of reasonably available decisions.

[78] In *Brooker*, the Supreme Court was considering the correct approach to a charge of disorderly behaviour in relation to a protest made by the appellant outside the home of a police constable. The majority found that for behaviour to be

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41 *Hansen v R,* above n 36, at [64] per Blanchard J; at [120]–[124] per Tipping J; at [203]–[205] per McGrath J; at [272] per Anderson J, citing *R v Oakes* [1986] 1 SCR 103 and *R v Chaulk* [1990] 3 SCR 1303.

42 *R (British Broadcasting Corporation) v Secretary of State for Justice* [2012] EWHC 13 (Admin), [2013] 1 WLR 964 at [51] applying the decision of the House of Lords in *Huang v Secretary of State for the Home Department* (2007) 2 AC 167 at 19.

43 *Brooker v Police*, above n 33.

disorderly it had to be disruptive of public order in the particular circumstances of time and place. The right to freedom of expression was regarded as an important consideration. Blanchard J found that the court considering whether the appellant's behaviour was disorderly was obliged to consider whether the value protected by the Bill of Rights was outweighed by the value of public order. This was necessary because of the "overriding" requirement of s 5 that the exercise of any guaranteed right may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[44] Tipping J and McGrath J focused more on the concept of balancing the competing values.[45] However, each emphasised the recognition to be given to s 5.

[79] The Chief Justice took a different view, finding that it was consistent with the right to freedom of expression that restrictions on the right be imposed where necessary to protect other interests, such as privacy.[46] To that end, s 6 of the Bill of Rights meant that a meaning should not be given to "disorderly behaviour" that was more restrictive of freedom of expression than was necessary to protect public order.[47] The Chief Justice elaborated on the topic of proportionality of outcome in *Morse v Police*:[48]

> [40] … But if in the result the limitation of freedom of expression is disproportionate to the statutory purpose of securing public order, the courts (which in their decisions must conform to the New Zealand Bill of Rights Act) are not justified in finding criminal liability under s 4(1)(a). Lack of proportionality in outcome (more restriction than is necessary to achieve the legitimate outcome of preservation of public order under s 4(1)(a)) is a result that is substantively unreasonable and amounts to error of law able to be corrected on appeal restricted to points of law, as Glazebrook J in the Court of Appeal rightly recognised.
>
> (footnote omitted)

[80] Both *Brooker* and *Morse* were decided in the criminal context but there is support in leading texts for the proposition that in cases where limitations on rights guaranteed by the Bill of Rights are at issue, the makers of discretionary administrative decisions are obliged to exercise their powers in a way that is

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44 At [59] per Blanchard J.
45 At [91] per Tipping J and at [130] and [132] per McGrath J.
46 At [41].
47 At [42].
48 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

consistent with the Bill of Rights. For example, in *The New Zealand Bill of Rights* reliance is placed on s 6 of the Bill of Rights: where an enactment is capable of being interpreted consistently with the Bill of Rights it should be so applied.[49] It is argued that there is no meaningful distinction between what a statute means and how it is applied. Decision-makers may not exercise their powers in a way that is inconsistent with the Bill of Rights.[50] If the effect of the decision is to limit a guaranteed right, the decision-maker should consider whether the limitation is justified under s 5 and, if necessary, conduct a proportionality analysis.

[81] However, in a recent article Professor Claudia Geiringer has expressed the view that there is no clear appellate precedent for the proposition that a proportionality analysis should be applied to administrative decision-making under the Bill of Rights.[51] She notes the argument based on s 6 as well as the alternative of a straightforward application of ss 3 and 5. Under s 3(b), the Bill of Rights applies to any person or body performing any public function, power or duty conferred or imposed by or pursuant to law. It would follow that a person exercising statutory powers must apply s 5 of the Bill of Rights as a mandatory relevant consideration, which, in the event of inconsistency, would require a proportionality analysis. Professor Geiringer concludes, however, that:[52]

> … within the spectrum of possible approaches to proportionality inquiry, highly structured and formalistic approaches are less likely to gain traction in the New Zealand administrative law context than softer ones. This suggests that the proportionality framework developed by the Canadian Supreme Court in *R v Oakes* may well be particularly unhelpful in this context.

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49 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 139–140. Rishworth points out that another way of saying this is that every statutory power can be read as if qualified by the phrase "do not breach the Bill of Rights when you use this power".

50 See Rishworth, above n 49, at 158; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2014) at [22.12.3(1)] citing *Police v Beggs* [1999] 3 NZLR 615 (HC); *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at 72–73; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [3.2.5].

51 Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power under the Bill of Rights Act" (2013) 11 NZJPIL 123 citing *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194; *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA) and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. See also Butler & Butler, above n 50, at [6.6.2]: "New Zealand position unclear".

52 At 159.

[82] Andrew Butler and Petra Butler also note that the case law does not provide a clear approach in an administrative law context but suggest that the trend is towards balancing the right in question against countervailing considerations, with varying degrees of formality.[53] Paul Rishworth and others note that the New Zealand approach will likely be similar to the emerging position in the United Kingdom: administrative decisions affecting protected rights will be scrutinised on a broad s 5 basis with the degree of scrutiny and deference paid to any balancing exercise carried out by the primary decision-maker varying with context.[54]

[83] We accept that the correct approach may depend on the particular context. In the present context, the balancing approach has been endorsed by this Court in *Television New Zealand v Attorney-General* but without any explicit acknowledgement of proportionality analysis under s 5:[55]

> [16] In a case in which an inmate who is fully informed of the implications of doing so desires to be interviewed, the inmate's right to freedom of speech would support the application. In those situations the decision of the Chief Executive on an application for approval requires a balancing of that right against conflicting values. In the case of inmates who have been convicted of criminal offending the Chief Executive would have to take account of the interests of victims which is specifically addressed in reg 88(1)(a). It is also relevant that part of the effect of imprisonment as a punishment is curtailment of some freedoms including that of free speech.

[84] For the purposes of this judgment, we propose to follow this balancing approach. 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. It is common ground that, at the least, the right to freedom of expression is a mandatory consideration when requests for interviews are made under reg 109.

[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

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53 Butler & Butler, above n 50, at [6.6.4].
54 Rishworth, above n 49, at 193.
55 *Television New Zealand v Attorney-General*, above n 10. We note that this balancing approach is also endorsed in the texts: See Butler & Butler, above n 49, at [6.6.6]–[6.6.10].

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.

[86] Also relevant to the exercise of discretion in this context is the need to ensure that any reasons given for declining a request for an interview are rationally connected to the objectives of safety and good order. The concept of rational connection is part of the proportionality analysis discussed in *Hansen*[56] but it is also required on conventional judicial review grounds. An administrative decision that is not supported by a rational reasoning process is unreasonable and liable to be set aside on that ground.

The intensity of review

[87] Much has been written on this subject and we do not intend to prolong this judgment by rehearsing the authorities.[57] They have been reviewed recently in the present context by Dunningham J in *Watson v Chief Executive of Department of Corrections*.[58] In that case Mr Watson successfully obtained judicial review of a decision by the Chief Executive declining his application to be interviewed by a journalist. Mr Watson has been convicted of the murder of two Blenheim 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 Mr Watson's claim that he was a victim of a miscarriage of justice.

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[56] *Hansen v R,* above n 36, endorsing the *Oakes* test at [70] per Blanchard J; at [119]–[121] and [125] per Tipping J; at [185], [204] and [212]–[216] per McGrath J; and at [272] per Anderson J.

[57] A recent article canvasses the case law with specific reference to the role of the courts in reviewing administrative decisions made under s 5 New Zealand Bill of Rights Act: Hanna Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZULR 866.

[58] *Watson v Chief Executive of Department of Corrections* [2015] NZHC 1227, [2015] NZAR 1049.

[88] Dunningham J found that the intensity of review in a public law case depends on the subject matter.[59] She also cited the judgment of Lord Sumption in *Pham v Secretary of State for the Home Department (Open Society Justice Initiative Intervening)* to the effect that the range of rational decisions available to the decision-maker depends upon the circumstances of the case.[60] In assessing the appropriateness of the balance drawn by the decision-maker, the court must have regard to the fact that the decision-maker has the statutory power to make the decision and that the decision-maker has "special institutional competence".[61]

[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 of the appeal.[62] Where human rights are involved, prison authorities tend to be supervised intensively because they do not have special expertise or authority on rights and there are important individual interests at stake.[63]

[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."[64]

[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

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59 Citing the observations of Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, (2001) 2 AC 532 at [28].

60 *Pham v Secretary of State for the Home Department (Open Society Justice Initiative Intervening)* [2015] UKSC 19, [2015] 1 WLR 1591.

61 *Pham,* above n 60, at [108]. See also *Huang v Secretary of State for the Home Department*, above n 42, and the observations of Lord Bingham at [16].

62 *Watson v Chief Executive of Department of Corrections*, above n 58, at [49].

63 Wilberg, above n 57, at 885 citing *Television New Zealand v Attorney-General*, above n 10 and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429. The Chief Executive relied on *Pell v Procunier* 417 US 817 (1974) for the proposition that prison officials must be accorded latitude in decision-making. We note that that case arose in very different factual circumstances (a blanket ban was imposed in a Californian prison after a violent episode was attributed to the former policy of unrestricted face-to-face prisoner-press interviews) and can be readily distinguished.

64 *Ex parte Simms,* above n 21, at 130 citing *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 (CA) at 514.

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.

This case

[92] We are satisfied that the appeal must be allowed on four main grounds. First, applying the approach we have discussed at [84] to [86] it is evident that no consideration was given by Mr Carruthers to the possibility of an alternative method of conducting the interview with Mr Taylor. This may be understandable because TVNZ had applied for a face-to-face interview on camera, which necessarily required the presence of three TVNZ personnel. We understand this was also the basis advanced in the High Court, although reference was made to the possibility of conducting the interview in booths where prisoners are separated from visitors by a metal grill and a Perspex barrier.[65]

[93] Mr Sherlock's report carefully considered several different options for conducting the interview and the differing risks attached to each. For the reasons we have given, Mr Carruthers was obliged to consider these options. His failure to do so was an error of law, or alternatively, could be treated as a failure to take into account relevant considerations. Importantly, his concerns for the safety of the TVNZ personnel did not arise if, for example, the interview were to be conducted by AVL in the suite provided by the prison. Prisoners are routinely linked to the courts by AVL without incident.[66] And, as Mr Sherlock responsibly accepted, any risks involved in moving Mr Taylor to the AVL suite (or indeed elsewhere in the prison) could be managed.

[94] Secondly, there were several errors of fact in the decision. Although the scope for judicial review for error of fact may not be definitively determined, as the

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65 High Court judgment, above n 1, at [64].

66 Mr Taylor represented himself in this appeal by AVL.

Judge noted, there is support for the proposition that error of fact may constitute a ground of review.[67] This ground of review may alternatively be put on the basis that the decision-maker must take reasonable steps to ascertain the facts and circumstances relevant to the decision.[68]

[95] The most important error of fact was that Mr Taylor had been responsible for the incident on 2 June 2013. If this had been substantiated, it was an important fact going to the risk of the security and good order of the prison. The correct facts of that incident were or ought to have been within the knowledge of the Corrections Department. Contrary to the view reached by the Judge and to Mr Carruthers' assertion in his affidavit filed in the High Court, we consider the acknowledged error in this respect was material and that it was not inevitable that the same conclusion would have been reached without the error.

[96] That is evident from Mr Carruthers' reference to the incident on two occasions in his decision. In the first reference, he "particularly note[d]" the additional information in Mr Taylor's "latest incident" just nine days before the decision. And, in the second reference, Mr Carruthers said Mr Taylor's "latest conduct clearly show[ed] his volatility and unpredictability". We consider this error of fact was clearly influential in Mr Carruthers' decision.

[97] We accept Mr Carruthers considered Mr Taylor's conduct more widely but his conclusions about Mr Taylor's volatility were influenced by a further error of fact with regard to his security classification at the time of the decision. At that time, Mr Taylor's security classification was maximum. Two days after Mr Carruthers' decision, Mr Taylor sought a review of the classification on the ground that errors had been made in the assessment of the points allocated for three categories. On 16 August 2013, Corrections acknowledged there were three errors, in consequence

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[67] See particularly the remarks of Cooke J in *Daganayasi v Minister of Immigration* [1982] 2 NZLR 130 (CA) at 145 and 149. See also the cases cited in Taylor, above n 13, at 15.12, n 5.

[68] See Taylor, above n 13, at [15.17] citing *Daganayasi*, above n 67; *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014 at 1030; and *Faavae v Minister of Immigration* [1996] 2 NZLR 243 (HC). See also Matthew Smith *New Zealand Judicial Review Handbook* (2011, Brookers, Wellington) at [51.3] citing, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 200 and at [51.3.5] citing, for example, *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA) at [114].

of which Mr Taylor's security classification was reduced to high.[69] As earlier noted, Mr Taylor's classification has been reduced since February 2015 to low-medium.

[98] We do not consider it is legitimate for the Chief Executive to argue that Mr Taylor's security classification was maximum at the date of Mr Carruthers' decision in circumstances where this was found soon afterwards to be an error in the assessment Corrections staff had themselves conducted. The fact that Mr Taylor was a maximum security prisoner was plainly considered by Mr Carruthers to be a material factor. We accept that Mr Carruthers was entitled to take into account Mr Sherlock's view that Mr Taylor was an unpredictable prisoner but this had to be rationally connected to the security and good order issues. If something less than a face-to-face television interview were considered, these considerations would become immaterial on the basis of Mr Sherlock's considered assessment. There would be no risks to TVNZ on this footing.

[99] Another error of fact related to whether granting the application by TVNZ would be the first occasion on which a television interview with a prisoner had been permitted. Mr Sherlock had stated in his report considered by Mr Carruthers that there had been no previous occasions of this kind. It was accepted in the High Court that this was in error, as noted at [58] above. We do not view this error as material to the decision under review but it is relevant to the public interest in permitting opposing views on the smoking ban, which we discuss below.[70]

[100] Mr Taylor submitted there was an error in respect of his history of internal disciplinary offences. Mr Taylor claimed this was overstated in Mr Wright's report and that a number of charges said to be pending at the date of the report had since been dismissed or not pursued. It is unnecessary to reach any conclusion on this other than to observe that the existence or otherwise of relatively minor charges for damage to prison property or obstructing prison officers would not ordinarily carry significant weight in assessing a request for an interview. In this case the

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[69] The errors related to the time since Mr Taylor's last escape in 2005; active charges since his last conviction in 2011 (there were none); and convictions over the nine month period prior to the assessment for drugs, violence, or escape-related offences (again, there were none). We note that Mr Taylor's concerns about his security classification have recently been successfully reviewed in a judgment by Ellis J: *Taylor v Chief Executive of Corrections* [2015] NZHC 2196.

[70] At [106].

decision-maker would have to give weight to Mr Sherlock's acceptance that moving Mr Taylor in the prison environment could be managed and the unlikely prospect Mr Taylor would misbehave in front of television cameras or on AVL while being interviewed.

[101] A third ground of review relates to Mr Carruthers' assessment of the risks to current and former staff (one of the mandatory considerations under reg 109(1)). On the basis of Mr Sherlock's evidence, there would be no unmanageable risks to current staff in moving Mr Taylor within the prison. And we do not consider there was any rational connection between a decision to grant an interview and the impact on the three prison guards who were on duty at the time of Mr Taylor's escape from custody. This event had occurred some eight years before Mr Carruthers' decision, in 2005. Only one of the three was still employed by Corrections and another had left the country. The one prison guard still employed said in his affidavit filed in the High Court proceedings after Mr Carruthers' decision that he was "really annoyed" over the incident and if he saw Mr Taylor "getting some publicity for himself" on television, it would bring back memories of what had happened. Conclusions that are unsupported by the evidence or are not rationally connected to the evidence are unreasonable in administrative law terms.

[102] While we accept the prison officers involved would have been rightly concerned at that time to have a firearm presented to them by Mr Taylor, we consider any upset they may have experienced if there were a television interview with Mr Taylor while he was in the controlled environment of the prison some eight years later could only have been given minimal weight in the circumstances. There is no dispute that Mr Taylor's image has been broadcast on a number of occasions in connection with his court appearances. There is no evidence this has caused concern to his victims.

[103] This case is in a totally different category from one in which a prisoner is to be interviewed about convictions for offending in which victims have been subject, for example, to serious physical violence or sexual violation where wholly different considerations would arise.

[104] The final error relates to the assessment of the risk proposed to the good order of the prison. Those providing reports considered by Mr Carruthers referred to the risk of disorder arising from an "orchestrated protest" in the prison in consequence of the interview. How this might arise was not explained to us in any satisfactory manner. Mr Taylor pointed out that the successful court proceedings he has brought in relation to the smoking ban have already attracted substantial publicity including within the prison population. As well there has been public comment from a Minister of the Crown and a senior executive from Corrections. Yet our attention has not been drawn to any evidence of disturbances to the good order of the prison in consequence of Mr Taylor's success in bringing these matters to public attention through his court proceedings. Again, there is no rational connection between the identified risk and the refusal of TVNZ's request.

[105] Finally, we offer a word of warning about interviews with so-called celebrity prisoners. Nothing we have said in this decision should be taken as endorsing media applications to interview prisoners who, for one reason or another, have achieved celebrity status or notoriety by reason of their crimes or other activities. There is a range of means by which prisoners may communicate their views to others. These include communication by letter or other forms of writing, by telephone, or by face-to-face interview with a reporter or journalist other than on radio or television. Permission to give interviews on radio or television is unlikely to be routinely permitted. Examples may include cases where issues of genuine public interest are at stake or cases involving alleged miscarriages of justice where all the ordinary avenues of redress through the courts and otherwise have been exhausted.

[106] These examples are intended to be illustrative only. Each case must be assessed on the merits. We do not perceive Mr Taylor as seeking publicity for his own sake. He has established himself as an advocate for prisoners' rights, for which he has considerable skills. The publicity given to the views of those in favour of the smoking ban suggests there is a public interest in allowing Mr Taylor to present an opposing viewpoint.[71] That would be consistent with one of the rationales for the

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[71] See the discussion on "Viewpoint neutrality" in Butler & Butler, above n 50, at [13.18.1]–[13.18.2].

right to freedom of expression. That is, by advancing public debate on matters of interest to the community or a section of it.

Result

[107] We conclude for the reasons given that there were a number of errors in the decision refusing TVNZ permission to interview Mr Taylor which warrant intervention on administrative law grounds. We are satisfied the errors are such as to warrant setting aside the decision.

[108] Ordinarily, an order would be made directing the decision-maker to reconsider the decision in accordance with law and the judgment of the court. However for several reasons, we have decided not to order reconsideration in this instance. First, although we were informed by Mr Taylor that Ms Owen still wishes to conduct an interview with him, neither she nor TVNZ has taken any part in the proceedings before the High Court or this Court. We have no direct evidence that TVNZ still wishes to pursue the application. We understand Ms Owen no longer works for TVNZ but is now engaged by TV3. Secondly, there have been a number of material changes since the decision was first made, not least the major reduction in Mr Taylor's security classification. Third, a fresh application may be made by TVNZ or any other media organisation for an interview with Mr Taylor. That can be achieved without undue cost or delay.

[109] We consider the better course is a fresh start in the light of the judgment of this Court and all relevant facts and circumstances placed before the Chief Executive. Nothing in this judgment should be taken as indicating a view as to the outcome of any such application.

Formal orders

[110] We make the following orders:

(a) The application to adduce further evidence on appeal is declined except to the extent stated in [40].

(b) The appeal is allowed.

(c) The respondent's decision dated 11 June 2013 declining a request by Television New Zealand to interview the appellant is set aside.

(d) The respondent must pay to the appellant reasonable disbursements incurred by him in bringing the appeal.

Solicitors:
Crown Law Office, Wellington for Respondent