AS TO THE ADMISSIBILITY OF

Application No. 33742/96
by Jeremy BAMBER
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 11 September 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 August 1996 by Jeremy BAMBER against the United Kingdom and registered on 12 November 1996 under file No. 33742/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1961 and currently detained in HM Prison Woodhill, Buckinghamshire. He is represented before the Commission by Mr. R. Price, a solicitor practising in Birmingham.

The facts of the case, as submitted by the applicant, may be summarised as follows.

a) The particular circumstances of the case

On 28 October 1986 the applicant, who has consistently maintained his innocence, was convicted of murder and sentenced to life imprisonment. His appeal against conviction was dismissed on the 28 March 1989. In 1992 the applicant petitioned the Home Secretary to refer his case to the Court of Appeal. The Home Secretary declined to do so. In November 1994 the applicant successfully challenged the refusal by the Home Secretary to disclose his reasons for not referring the case to the Court of Appeal.

On 22 May 1995 the applicant participated in a programme on Talk

Radio by placing a telephone call from prison. The applicant raised issue with the assertion made by the programme's host that a convicted person should serve the entirety of the sentence imposed by the trial judge without remission, and thus by way of example a life sentence should mean life imprisonment. The applicant considered such an approach ignored the fact that remission provided an incentive to good behaviour, that it was unfair in the case of murder since life imprisonment was mandatory irrespective of the circumstances of the crime, and that in any event generalisations were inappropriate and each case should be judged on its own facts.

This exchange triggered a parliamentary question to the Home Secretary concerning prison policy in relation to prisoners' contact with the media. The Home Secretary responded by written answer stating that it was inappropriate for prisoners to participate in radio phone-in programmes and that immediate steps would be taken to amend the standing order governing prisoners' communications to reflect this policy.

On 21 June 1995 Standing Order 5 was amended. The effect of the amendment (see below) was to preclude prisoners from contacting the media by telephone save with permission, which would only be granted in exceptional circumstances. Prisoners were notified of the amendment as follows :

> "To minimise the risk of prisoners improperly using the card phone system to contact the media and the difficulties in curtailing such calls because of the immediacy of the transmission, Standing Order 5 has been amended to disallow prisoners from making any communication of this kind. For the purpose of this Instruction "the media" should be construed as a person or place associated with broadcasting or publication of material. Any breach of this instruction will be a disciplinary offence under Prison Rule 47(20) or Rule 50(20) of the YOI rules."

On 20 September 1995 the applicant telephoned the News Editor of the London News Agency in order to discuss his conviction. The telephone call was not made for the purposes of immediate or subsequent transmission, but may have formed the basis of, or subsequently have been incorporated within a newspaper article. On 21 September 1995 the applicant was disciplined for breaching Standing Order 5G rule 2B and fined. The fine was suspended for three months on the applicant undertaking not to breach the standing order pending proceedings to challenge its lawfulness.

On 6 November 1995, prisoners at HM Prison Full Sutton, where the applicant was then detained, were given personalised identification numbers in lieu of telephone cards. Each prisoner was restricted to telephoning 20 previously approved telephone numbers. The applicant sought approval for the telephone numbers of two journalists, Ms S. P. and Mr. J. R., employed by the London News Agency. The applicant was informed that he would not be permitted to contact either journalist without first making a written application to the prison governor, and then only in the event that he undertook not to discuss anything for use in the media.

On 15 November 1995, the applicant sought leave from the High Court to apply for judicial review in order to challenge the restriction in his access to the media consequent on Standing Order 5G rule 2B. In his response to the application for leave, the Secretary of State, through the officer responsible for prison policy relating to prisoners' communications, outlined the basis for the restriction in prisoners' communications with the media in the following terms :

> "The policy which lies behind <the> general prohibition <on contacting the media save where such

communication consists of serious representations about conviction or sentence or forms part of a serious comment about crime, the process of justice or the penal system> is I believe clear. Where an inmate has, like the <applicant>, been convicted of serious offences, it is likely that any public discussion by him about those offences may cause serious distress to his victims or their surviving relatives or may indeed attract general public outrage. It is for this reason among others that written correspondence is subject to the severe restrictions imposed by paragraph 34 of Standing Order 5 section B.

The provisions of Standing Order 5 Section B in relation to correspondence can be enforced by reason of the fact that the written correspondence of certain categories of prisoners, including category A prisoners like the applicant ... are required to be read before dispatch, and if they contravene Standing Order 5 Section B, prisoners will not be permitted to send them. ... The main point is that written correspondence is capable of being vetted for compliance with the Standing Order before despatch. ...

... The policy which lay behind the introduction of card-phones into prisons, despite their obvious risks, was primarily to enable prisoners to take responsibility for keeping more closely in touch with family and friends, so that they would more easily reintegrate into society on their release. However the difficulty about allowing the use of the card-phone system for calls to the media ... is the immediacy of the form of communication: once a conversation has taken place, it cannot be recalled and although it can be monitored, it is impracticable effectively to control the conversation once it has commenced. There is no opportunity for the Governor or other responsible official to take time to reflect on the propriety of the communication as with a letter, or seek advice. It was found by the prison Service that telephone calls were being made to the media in breach of the rules.

... It was further noted that there was another aspect to "immediacy" in this context. It was well known that the live voice heard on radio or television might well make a substantially greater impact on the audience than would the same message carried on print. It was considered that the public and in particular the victims of crime and their immediate families who might already have sustained serious distress as a result of the crime, might experience further distress or outrage upon hearing the live voice of the convicted and imprisoned offender on the radio or television, offering a one-sided protestation of his innocence and alleging expressly or impliedly that the victim had been mistaken or untruthful. The Secretary of State believed that it was necessary to protect the legitimate interests of persons likely to be affected by such broadcasts and that in doing so he would be reflecting the views of law-abiding citizens who would be outraged at the prospect of a live platform on television and radio made freely available to those convicted of serious crimes and serving prison sentences.

The only effective remedy in order to avoid such distress was to prohibit telephone calls to the media being made without the prior approval of the Governor, but because effective control of a telephone call ... was impracticable such approval would normally be withheld. It was considered that if such a prohibition was imposed, this would not impinge disproportionately on a prisoner's

freedom of expression, because he would retain the right to communicate with the media ... by correspondence."

Leave to apply for judicial review was refused by a judge of the High Court on 29 November 1995. In the course of his reasoning the judge stated :

> "The difficulty about the use of the telephone ... is that it is not possible for the authorities to know about or monitor what is being said until after is has been said. This is more particularly the case with communications of the sort that gave rise to this problem in the first place, that is to say live communications to broadcasting media. It is not possible to monitor or know the content until the actual statement has been made. Prisoners' written correspondence, and certainly the correspondence of prisoners in the category that <the applicant> falls into, is read before it leaves the prison, for the precise reason of ensuring it complies with the rules. Again, nobody to my knowledge has ever sought to say that that in itself is offensive. It may be, of course, that issues arise of a different sort about what may be impeded from leaving, but that is not the present question. In the case of telephone communications, in practical terms it is not possible for them to be monitored. It would, of course, be possible for the prison authorities to spend a great deal of time listening in on the telephone and to interrupt, I suppose, if matters were said which they felt fell outside the rules. I could not think that would be a reasonable use of scarce official time."

The applicant renewed his application for leave before the Court of Appeal. The Court of Appeal refused the applicant leave on 15 February 1996.

b) Relevant domestic law and practice

Control over and responsibility for prisons and prisoners is vested in the Home Secretary who, pursuant to s. 47 of the Prison Act 1952 :

> "may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

The rules currently in place are the Prison Rules 1964. Rule 33(1) states that the Secretary of State :

> "may, with a view to securing discipline and good order or the prevention of crime or the interests of any persons, impose restrictions, either generally or in a particular case, upon communications between a prisoner and other persons."

The regulation of and restrictions on prisoners' communications is governed by Standing Order 5. As regards written correspondence, Standing Order 5 provides under section B, in respect of contact with the media, inter alia, that :

> "34. General correspondence <excluding correspondence between an inmate and his or her lawyer> may not contain ...
>
> (9) material which is intended for publication or use by radio or television (or which, if sent, would be likely to be published or broadcast) if it ...

c. is about the inmate's own crime or past offences or those of others except where it consists of serious representations about conviction or sentence or forms part of serious comment about crime, the process of justice or the penal system."

In respect of prisoners' use of telephones, section G of Standing Order 5 provided that :

"2. Inmates are not permitted to make calls to or via the operator or receive incoming calls, or to communicate by telephone matters which they would not be allowed to include in correspondence under the terms of <Standing Order> 5B 34."

Section G was amended on 21 June 1995 to include a further paragraph which provides:

"2B. Inmates are not permitted to make calls to the media if it is intended, or likely, that the call itself or the information communicated will be used for publication or broadcast. Any prisoner wishing to contact the media by telephone should make a written application for permission to do so, but such applications will only be approved in wholly exceptional circumstances. Inmates should instead communicate such information in written correspondence, subject to the provisions of standing order 5B and in particular paragraph 34(9)."

The contact of prisoners with the media is further governed by section A of Standing Order 5 which provides :

"37. Visits to inmates by journalists or authors in their professional capacity should in general not be allowed ...

38. Where, exceptionally, a journalist or author is permitted to visit an inmate in his or her professional capacity ... he or she will be required to give a written undertaking that no inmate will be interviewed except with the express permission in each case of the governor and the inmate concerned, that the interviews will be conducted in accordance with such other conditions as the governor considers necessary, and that any material obtained at the interview will not be used for professional purposes except as permitted by the governor."

COMPLAINTS

The applicant complains that the restriction in his contact with the media by telephone amounts to an interference with his right to freedom of expression under Article 10 para. 1 which is not justified under the terms of para. 2 thereof. Specifically, the applicant complains that the restriction prevents him from communicating effectively with the media. The applicant submits that since the restriction precludes him from making serious representations about his wrongful conviction, it cannot be justified as having as its object one of the legitimate aims identified in Article 10 para. 2; alternatively, that the restriction is too wide since it prevents the applicant from contacting the media by telephone irrespective of whether the call is for transmission.

THE LAW

The applicant complains that the restriction in his contact with

the media by telephone constitutes an interference with his right to freedom of expression in breach of Article 10 (Art. 10) which, so far as relevant, provides :

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others ..."

The applicant, whilst not identifying the grounds upon which he challenges his conviction, states that the restriction on his right to telephone the media prevents him from communicating effectively with the media about his wrongful conviction. The applicant submits that the restriction cannot be justified as having one of the legitimate aims identified in Article 10 para. 2 (Art. 10-2); alternatively that the restriction is excessive since it applies irrespective of whether the call is to be transmitted.

The means of communication apart, the applicant does not complain that the restriction in the scope of his communications with the media - which in any case is limited to "serious representations about conviction or sentence or forms serious comment about crime, the process of justice or the penal system" - is such as to raise any issue under Article 10 (Art. 10). Accordingly, the Commission's examination in the present case are limited to a determination of whether the restriction on the applicant's access to the media by telephone is such as to constitute an interference with his right to freedom of expression in breach of Article 10 (Art. 10).

The Commission recalls that the right to freedom of expression does not require a State to secure to an individual a general and unfettered right of access to a particular medium or means of communication (see, inter alia, No. 9297/81, Dec. 1.3.82, D.R. 28, p. 204; and No. 25060/94, Dec. 18.10.95, D.R. 83, p. 66). Nonetheless, where, as in the present case, the State imposes restrictions on an individual's access to a particular means of communication which, but for the restriction, he would have enjoyed, the Commission considers that such a restriction may constitute an interference with the individual's right to freedom of expression.

In this regard the Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society (see, inter alia, Eur. Court HR, Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49), and notes that any restriction in the means available to an individual for communicating the relevant information may be such as to inhibit its effective communication. The Commission also does not underestimate the role which the media may play in cases where there has been a miscarriage of justice.

In the present case the effect of the restriction is to prevent the applicant from communicating with the media by telephone, whether for the purposes of direct transmission or subsequent publication, any grievance concerning his conviction or sentence. Whilst the applicant has not been denied access to the media in that he is not precluded from contacting the media by letter (see Standing Order 5 section B rule 34(9)) and may, in more limited circumstances, be interviewed by the media (see Standing Order 5 section A rules 37 and 38) the

Commission considers that in the circumstances the restriction on the applicant's right to communicate with the media by telephone nonetheless amounts to an interference with the his right to freedom of expression under Article 10 para. 1 (Art. 10-1).

The Commission must therefore go on to consider whether the interference was prescribed by law and necessary in a democratic society in accordance with one or more of the aims identified in Article 10 para. 2 (Art. 10-2).

Although it does not appear that Standing Order 5 section G rule 2B has the force of law in domestic terms, recalling the decision of the Court in Silver and others v. the United Kingdom (judgment of 25 March 1983, Series A no. 61, pp. 33-36, paras. 86-90 and 94; see also No. 18714/91, Dec. 9.5.94, D.R. 77, p. 42) and having regard to the notice given to prisoners of the restriction in their contact with the media, the Commission finds that the interference in question was a sufficiently clear and foreseeable application of section 33(1) of the Prison Rules 1964 as to have been prescribed by law within the meaning of Article 10 para. 2 (Art. 10-2).

The Commission also considers that the restriction in question pursued proportionately a legitimate aim under the terms of Article 10 para. 2 (Art. 10-2) in that it sought to control communications with the media with a view to the prevention of disorder, and the protection of morals and/or the rights and freedoms of others.

As to whether the interference was necessary in a democratic society, the Commission recalls that the interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued (see Eur. Court HR, Handyside v. the United Kingdom, loc. cit., pp. 22-23, paras. 48-49; and Eur. Court HR, Silver and others v. the United Kingdom judgment, loc. cit., pp. 37-38, para. 97). In the result, the Commission must be satisfied, allowing for a State's margin of appreciation, that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it (see inter alia Eur. Court HR, The Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, pp. 40-41, para. 65).

The Commission recalls that in the present case the State withdrew the right of prisoners to contact the media by telephone as it was considered impracticable effectively to control telephone calls to the media; and that where the call was transmitted this might cause distress to the victims or their families.

The Commission does not consider that the distress which victims or their families might experience necessarily justifies the scope of the restriction which goes so far as to prevent the applicant from making even serious representations to the media by telephone about his conviction, and irrespective of whether the call would be transmitted.

Accordingly, the Commission considers the issue in the present case to be whether the restriction was justified as a necessary interference with the applicant's right to freedom of expression having regard to the State's assessment that it was impracticable effectively to control communication with the media by telephone.

In this respect, the Commission recalls that the assessment of whether the interference was necessary must be made having regard to the ordinary and reasonable requirements of imprisonment, and that some measure of control over the content of prisoners' communications - the scope of which is not in issue in the present case - is not in itself incompatible with the Convention (see Eur. Court HR, Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 21, para. 45; and Silver and others v. the United Kingdom judgment, loc. cit.).

The Commission accepts that for any control to be meaningful it must be capable of being exercised effectively, and in the present case the Commission does not find any sufficient grounds to dispute the assessment of the prison authorities that it was impracticable to exercise effective control over communications with the media by telephone.

The applicant in the present case is, moreover, not precluded from any direct contact with the media for the purposes of making serious representations about his conviction and any perceived miscarriage of justice in his case; nor is it contended on his behalf that there is any restriction in his lawyers effective access to and use of the media in this regard.

In these circumstances the Commission finds that the interference with the applicant's right to freedom of expression can be regarded as necessary and pursued a legitimate aim within the terms of Article 10 para. 2 (Art. 10-2). Accordingly, the Commission concludes that there has been no appearance of a violation of Article 10 (Art. 10).

It follows, therefore, that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber