Neutral Citation Number: [2012] EWHC 13 (Admin)

Case No: CO/9556/2011

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2012

**Before** :

**LORD JUSTICE HOOPER**
**MR JUSTICE SINGH**

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**Between :**

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| **The Queen on the application of** | **Claimants** |
| **(1) British Broadcasting Corporation** | |
| **(2) Dominic Casciani** | |
| **- and -** | |
| **Secretary of State for Justice** | **Defendant** |
| **- and -** | |
| **Babar Ahmad** | Interested party |

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**Lord Pannick QC and Tom Cleaver** (instructed by **BBC Legal Department**) for the **Claimants**
**James Eadie QC and Martin Chamberlain** (instructed by **Treasury Solicitor**) for the **Defendant**
**Phillippa Kaufmann QC** (instructed by **Bhatt Murphy**) for the **Interested Party**

Hearing date: 9th December 2011

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# Judgment

**Mr Justice Singh :**

## Introduction

1. This is the judgment of the Court, to which both its members have contributed.

2. On 10 October 2011 Ouseley J directed that the application for permission in this case should be listed before a Divisional Court at a "rolled-up" hearing, with the substantive hearing to follow immediately if permission were granted. At the start of the hearing this Court granted permission and proceeded to hear the substantive claim for judicial review. This was both because we considered the claimants' grounds to be arguable and because we regarded the case as raising important issues which should be fully considered in the public interest.

3. In this case the British Broadcasting Corporation (BBC) and one of its home affairs correspondents, Mr Dominic Casciani, have applied for permission to conduct a face-to-face interview with Mr Babar Ahmad, who is currently detained at HMP Long Lartin, and whose extradition has been sought by the United States of America (USA). The claimants also wish to broadcast the filmed product of that interview.

4. Initially, a junior minister, Mr Crispin Blunt MP, the Parliamentary Under-Secretary of State for Prisons and Youth Justice made the decision, communicated in a letter dated 15 July 2011, to allow a face-to-face interview, but with audio recording only (not video recording). In that letter it was made clear that permission to conduct the interview was subject to an undertaking that, in line with normal policy, the recording would not be broadcast.

5. After a letter before claim was sent on 2 August 2011, in which it was made clear that the claimants were not content with permission to conduct an interview only, since they wished to film that interview and to be able to broadcast the product of that interview, the Secretary of State for Justice, Mr Kenneth Clarke MP, decided to review the decision personally and took a fresh decision. He refused permission to have a face-to-face interview at all. That decision was communicated by a letter dated 22 September 2011 and is the subject of the present claim for judicial review.

6. In a nutshell, the claimants' contention, which is supported by the interested party, is that the Secretary of State's decision violates the right to freedom of expression in article 10 of the Convention[1] rights, as set out in Sch. 1 to the Human Rights Act 1998 (HRA) and is, therefore, unlawful by virtue of section 6(1) of that Act.

## Factual Background

The following facts have helpfully been placed by the parties before the Court and are either agreed or at least are not in dispute.

[1] The European Convention on Human Rights, to which we will refer as "the Convention."

7. Mr Ahmad is a British citizen. He was born in the United Kingdom and has lived here all his life.

8. In December 2003 Mr Ahmad was arrested at his home and, as the Metropolitan Police later admitted in civil proceedings, was physically abused by the arresting officers. Mr Ahmad was released without charge after six days.

9. In July 2004 the Crown Prosecution Service (CPS) concluded that there was insufficient evidence to provide a realistic prospect of securing a conviction against Mr Ahmad in this country of charges under the Terrorism Act 2000.

10. On 5 August 2004 Mr Ahmad was arrested in London following a request by the US for his provisional arrest with a view to extradition. He was arrested on the authority of a warrant issued by the District Judge at Bow Street Magistrates' Court.

11. On 6 October 2004 a Federal Grand Jury in Connecticut issued an indictment alleging four offences against Mr Ahmad between 1997 and 2004: (1) conspiracy to provide material support to terrorists; (2) providing material support to terrorists; (3) conspiracy to kill, kidnap, maim or injure persons, or damage property, in a foreign country; and (4) money laundering. The alleged facts of the offences included that Mr Ahmad had participated in fundraising for terrorism online, and that in 2001 Mr Ahmad had acquired then-classified US Navy plans relating to a battlegroup operating in the Persian Gulf, which discussed its vulnerability to terrorist attack. Some of the websites that Mr Ahmad is said to have used for these purposes were based in Connecticut, hence the jurisdictional connection with that state in the USA.

12. In October 2004 the Independent Police Complaints Commission (IPCC) recommended that a disciplinary tribunal should be convened to determine whether one specific officer who arrested Mr Ahmad in 2003 had used excessive force but made no recommendations in respect of the other officers.

13. In the general election of May 2005 Mr Ahmad was a candidate for Parliament in the constituency of Brent North. He came fourth.

14. On 17 May 2005 Senior District Judge Workman found that there were no bars to Mr Ahmad's extradition under the Extradition Act 2003 and sent the extradition request to the Secretary of State for the Home Department (then Mr Charles Clarke MP). On 15 November 2005 the Home Secretary ordered Mr Ahmad's extradition.

15. On 30 November 2006 the Divisional Court (Laws LJ and Walker J) dismissed an appeal against the Senior District Judge's decision but certified two points of public importance. However, on 6 June 2007 the House of Lords refused leave to appeal.

16. On 12 June 2007 the European Court of Human Rights gave an indication to the Government of the UK under rule 39 of its Rules that Mr Ahmad should not be extradited until the Court had given due consideration to his application to it.

17. In February 2008 the *Sunday Times* reported that Mr Ahmad's conversations with his MP, Mr Sadiq Khan, were covertly monitored while he was in prison. A later report by Sir Christopher Rose concluded that the monitoring was lawful.

18. On 18 March 2009 the Metropolitan Police admitted liability in a civil claim arising out of Mr Ahmad's arrest in 2003 and paid damages of £60,000.

19. On 6 July 2010 the European Court of Human Rights held that Mr Ahmad's application to that Court was admissible in part. There were two specific grounds of complaint which the Court considered raised such serious questions of fact and law of such complexity that their determination should depend on an examination of the merits of the case. The first ground related to the fact that, should he be extradited to the USA, Mr Ahmad would be at real risk of detention at ADX Florence and, therefore, that his extradition would violate article 3 of the Convention, which prohibits torture and inhuman and degrading treatment (para. 146 of the Court's decision on admissibility). The second ground related to the fact that there is a possibility that a life sentence will be imposed if Mr Ahmad is convicted in the USA and that such a sentence would, in the circumstances of his case, violate article 3 of the Convention (para. 153 of the Court's decision on admissibility). The Court's judgment on the merits is currently awaited: it is not yet clear whether the Court will hold a hearing, which nowadays is rare, or will decide the case on the papers.

20. On 8 July 2010 the *Independent* published an interview with Mr Ahmad constructed from written correspondence.

21. On 14 March 2011 Mr Ahmad wrote to the Governor of HMP Long Lartin, Mr Simon Cartwright, requesting permission for a media visit. On 4 April 2011 Mr Casciani also wrote to Mr Cartwright, on behalf of himself and a colleague, Mr Naresh Puri, requesting an interview with Mr Ahmad. In that letter he referred to a number of matters, including what he described as the Parliamentary and wider public interest in the case.

22. In May 2011 the four officers involved in the 2003 arrest were tried at Southwark Crown Court and were found not guilty. Mr Ahmad gave evidence at that trial.

23. In June 2011 the Parliamentary Joint Committee on Human Rights published a report, *The Human Rights Implications of UK Extradition Policy*, concluding that the Extradition Act 2003 does not, in practice, afford adequate human rights protection to those subject to it.

24. Also in June 2011 HM Chief Inspector of Prisons reported on the detainee unit at HMP Long Lartin, making specific reference to "the longest detained British citizen in the unit", which appears to be a reference to Mr Ahmad, who has been detained without charge or trial for more than seven years.

25. On 18 October 2011 an independent panel set up by the Government to review the UK's extradition arrangements, chaired by Sir Scott Baker, published its report, which referred to Mr Ahmad's case. The report concluded that the human rights

bar in the Extradition Act 2003 provides sufficient protection against prospective human rights violations.

26. On 10 November 2011 a Government e-petition calling for Mr Ahmad to be tried in the UK rather than the USA was closed with over 140,000 signatures. On 18 November 2011 a letter addressed to the Leader of the House of Commons and signed by 100 lawyers called for a Parliamentary debate on Mr Ahmad's case.

27. Some of the above factual developments have occurred after the decision under challenge in the present case or were not specifically brought to the Secretary of State's attention before that decision was taken. Normally the Court in a claim for judicial review would be concerned to assess the lawfulness of a decision under challenge by reference to the material that was before the decision-maker at the time it was taken: see R v Secretary of State for the Environment, ex parte Powis [1981] 1 WLR 584, at 595-597 (Dunn LJ, giving the judgment of the Court of Appeal). However, that is not always the rule and, especially in human rights cases, the courts have been prepared to look at the up to date position: see e.g. R v Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839, at 860-861 (Lord Hope of Craighead), a pre-HRA case; and R (Limbuela) v Secretary of State for the Home Department [2004] QB 1440, at para. 113 (Carnwath LJ), a post-HRA case (the case went to the House of Lords but not on this point: [2006] 1 AC 396).

28. The Secretary of State did not submit at the hearing before us that we should ignore the up to date material. It seems to us that it would be unrealistic and undesirable in the present case to ignore some of the material that was placed before us. This is because the Secretary of State has had the opportunity to consider such material, right up to the time of the hearing in this case, and has made it clear that he stands by his decision of 22 September 2011. Furthermore, if the Court were to dismiss the claim for judicial review on the basis of limited material, the claimants could be expected simply to place the additional material before the Secretary of State and invite reconsideration of his earlier decision and then, given the stance taken by the Secretary of State at the hearing before us, they would have to bring a further challenge in this Court. Such a process would be time-consuming and would add to costs without serving any practical purpose. Accordingly, we have considered all the material that was placed before the Court in reaching our decision in this case.

## The Secretary of State's policy

29. The current policy on Prisoners' Access to the Media is set out in PSI 37/2010, which was issued by the National Offenders Management Service, an executive agency of the Ministry of Justice, on 2 July 2010, with effect from 12 July 2010 until 1 July 2014.

30. Para. 2.2 of the policy states that:

> "Correspondence which is intended for publication or for use by radio or television or for posting on the internet (or which if sent, would be likely to be published or broadcast) must not contain material which:
> …
> - is about the prisoner'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 processes of justice or the penal system;
>
> …"

31. Paras. 4.4-4.6 of the policy state that:

> "4.4 Approval for a visit by a journalist will normally only be granted where the prisoner fulfils the criteria below.
>
> 4.5 The criteria are that:
>
> (i) the matter relates to an alleged miscarriage of justice where the sole purpose of the visit is to allow a prisoner the opportunity to highlight an alleged miscarriage of justice in their own case;
>
> and
>
> the prisoner has exhausted all appeals …
>
> or
>
> (ii) there is some other sufficiently strong public interest in the issue sought to be raised during the visit and the assistance of that journalist is needed. It is not possible to define all the factors that may have to be taken into account to determine what the public interest is in a matter raised by a prisoner and how strong that public interest is. (The circumstances in which the 'sufficiently strong public interest' test might be met are, for example, where the prisoner intends to make serious representations about matters of legitimate public interest that affect prisoners or prisons or the processes of justice or the penal system; or the prisoner claims they have information relating to allegations of torture). However, consideration should always be given to the possible impact on the victim, or the victim's family, of the publication of an interview with the prisoner and the need for confidence in the criminal justice system.
>
> 4.6 *In respect of either reason for a visit mentioned above the Secretary of State must also be satisfied that*:

(i) a visit is the only suitable method of communication; and the journalist and prisoner have previously communicated by written correspondence, which has proved to be inadequate;

and

(ii) the journalist intends a serious attempt to investigate or bring to public attention the prisoner's case or the other issue with a sufficiently strong public interest raised by the prisoner;

and

(iii) permitting the visit will not pose a threat to security, or to good order or discipline (this will include a consideration of the prisoner's behaviour in prison)." (Italics in original)

32. Para. 4.11 of the policy sets out further details of the matters to be considered in deciding whether the criteria in paras. 4.5 and 4.6 are met.

33. Para. 4.27 of the policy provides that:

> "*Visits by journalists are intended to be permitted for research purposes only, and requests for interviews to be filmed or broadcast will normally be refused*." (Italics in original)

34. Para. 4.29 of the policy states that:

> "Where a journalist requests permission to tape record interviews this may be allowed where:
>
> (i) this is for personal use only as an aid to memory;
>
> (ii) the journalist has signed the undertaking that this recording will not be broadcast in any form;
>
> (iii) this poses no security risk."
>
> Annexes B and C to the policy set out templates for the undertakings that a journalist must sign.

**The right to freedom of expression**

35. As we have mentioned, the claimants rely upon the right to freedom of expression in article 10, which is one of the Convention rights set out in Sch. 1 to the HRA.

36. Article 10 provides as follows:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

> without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since 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 national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

37. It is clear from the text of article 10(1) that it confers not only the right to "impart" information and ideas but also the right to "receive" them: see Sunday Times v United Kingdom (1979) 2 EHRR 245, at paras. 65-66. The claimants emphasise this because they submit that there is a particularly strong public interest in the case of Mr Ahmad and that the public have a right to see a programme about it which would include extracts from a recorded interview with him.

38. It is also important to recall that the press and broadcasting media are not given special rights under article 10 as privileges. Rather, as has frequently been said by the European Court of Human Rights, they enjoy these rights on behalf of all of us as members of the public. The media are regarded as essential in a democracy as the "watchdog" of the public: see e.g. Bladet Tromso and Stensaas v Norway (1999) 29 EHRR 125, at para. 59.

39. In a case which preceded the coming into force of the HRA Lord Steyn emphasised the reasons why the right to freedom of expression is so important. In R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, at 126, he said:

> "Freedom of expression is, of course intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'The best test of truth is the power of the thought to get itself accepted in the competition of the market': Abrams v United States (1919) 250 US 616, 630, per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country…."

40. One important aspect of the right to freedom of expression is that the state may not normally prescribe the content of what may be said or received by members of the public. In American constitutional jurisprudence such "content-based" restrictions are viewed with particular suspicion under the First Amendment,

although they are not absolutely prohibited. As Jackson J put it in West Virginia State Board of Education v Barnette (1943) 319 US 624 (a freedom of religion case), at 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion to force citizens to confess by word or act their faith therein."

41. One reason for this is to be found in the "marketplace of ideas" rationale mentioned by Lord Steyn in Simms. History has taught us that, in fields as diverse as politics, religion, science and the law, what starts as a heresy may well end up as the orthodoxy. Indeed, that is what happened to the views on the First Amendment of Holmes J in Abrams (cited by Lord Steyn in Simms), which were expressed in a dissenting judgment in the US Supreme Court. Society benefits when there is free trade in ideas.

42. The Secretary of State fairly points out that in the present case he has not sought to impose a content-based restriction. He notes that Mr Ahmad and others speaking on his behalf have had plenty of opportunity to contribute to public debate about his case, for example in newspaper articles and on the internet, and may do so in the future. He also observes that there is nothing to prevent the claimants from making a programme about Mr Ahmad's case and the more general issues of public interest which it raises.

43. The claimants emphasise that the rights in article 10 include the right to choose not just the content of what is to be expressed but also the form of such expression. They submit that this is especially important as an aspect of journalistic and editorial freedom. In News Verlags GmbH and CoKG v Austria (2001) 31 EHRR 8, at para. 39, the European Court of Human Rights said:

> "The Court recalls that it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed."

44. The claimants submit that, in the present case, it is important for them to be able to exercise their professional judgment in deciding whether a face-to-face interview with Mr Ahmad is necessary and whether they should include extracts from that interview in a programme about his case. The Secretary of State submits that it is sufficient that they may correspond with Mr Ahmad in writing.

45. In this context it is worth recalling the particular power that television has in modern life. This can cut both ways. The claimants submit that a broadcast interview will bring home to the public the real human story of Mr Ahmad's case, for example the impact on his appearance, voice and manner of many years of detention without trial. On the other hand, the Secretary of State points out that it is precisely because of the greater impact that television can have that it needs to be more carefully regulated, for example because of the distress it could cause to

the victim of a prisoner's crime. In R (ProLife Alliance) v British Broadcasting Corporation [2004] 1 AC 185, at para. 20, Lord Hoffman explained that the power of the medium is the reason why broadcasting has been required to conform to standards of taste and decency which in the case of other media would nowadays be thought to be an unwarranted restriction on freedom of expression:

> "The main reason for singling out television and, to a lesser extent, radio for the imposition of standards of taste and decency is the intimate relationship which these media establish between the broadcaster and the viewer or listener in his home. Television in particular makes the viewer feel a participant in the events it depicts and acquainted with the people (real or fictitious) whom he regularly sees. The visual image brings home the reality which lies behind words."

46. As is well-known, the right to freedom of expression in article 10 is not absolute. In principle it can be limited provided the conditions in article 10(2) are satisfied.

47. First, the limitation must be prescribed by law: there is no dispute about that in the present case.

48. Secondly, the limitation must have one or more of the legitimate aims set out in article 10(2): again, there has been no dispute about that in the present case. In particular, the Secretary of State relies upon the legitimate aims of the protection of the rights of others and the protection of their health. There are hints in the evidence before the Court that the Secretary of State also relies upon the legitimate aims of the prevention of crime and the maintenance of the authority of the judiciary.

49. Thirdly, the limitation must be necessary in a democratic society. This requires in turn that the limitation must meet a pressing social need and satisfy the principle of proportionality, to which we will return in more detail. It is important not to lose sight of the phrase "in a democratic society." These words, which appear in many of the articles of the Convention, are not superfluous. The framers of the Convention, arising as it did out of the ashes of European conflict in the 1930s and 1940s, recognised that not everything that the state asserts to be necessary will be acceptable in a democratic society. The jurisprudence of the European Court of Human Rights has frequently stressed that the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness: e.g. Handyside v United Kingdom 1 EHRR 737, at para. 49.

50. In this context, the Court has said in many cases that, since freedom of expression constitutes one of the essential foundations of a democratic society, "it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population": Sunday Times, at para. 65.

51. The principle of proportionality was explained by the House of Lords in Huang v Secretary of State for the Home Department [2007] 2 AC 167, at para. 19, in a single opinion of the appellate committee which was given by Lord Bingham of

Cornhill. Although that was a case about article 8 (the right to respect for private and family life), the structure of that article is similar to article 10 and the principles which Lord Bingham set out were derived from comparative law relating to human rights generally. After drawing on well-known authority from the Privy Council, the Supreme Court of Canada and other Commonwealth jurisdictions, Lord Bingham summarised the requirements of proportionality as follows (we adapt the language slightly to make it pertinent to cases such as the present):

(i) the objective is sufficiently important to justify limiting a fundamental right;
(ii) the means used to achieve that objective are rationally connected to it;
(iii) the means used to impair the right or freedom are no more than is necessary to accomplish that objective; and
(iv) there is maintained a fair balance between the rights of individuals or groups and the interests of the community.

52. Also in Huang Lord Bingham gave important guidance as to the relevance of the judgment of the Secretary of State when a court is called upon to adjudicate on the question of proportionality. At para. 16 he said:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed."

53. As has been observed in the past, the concept of "deference" is inapt in this context since it has "overtones of servility": e.g. the ProLife Alliance case, at para. 75 (Lord Hoffmann). More often used are phrases such as the "margin of appreciation" or the "discretionary area of judgment". The former should not be used in the domestic context as it is a concept of international law, more appropriate in the Strasbourg Court: R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326, at 380 (Lord Hope of Craighead). We have found helpful the concept of "appropriate weight" to which Lord Bingham referred in Huang. As the passage from which we have quoted makes clear, how much weight should be given to the judgment of a person such as the Secretary of State will vary according to the subject matter and the extent of their expertise and access to specialist sources of knowledge and advice. As we understand it, this is what is meant by "institutional competence", about which there was some debate at the hearing before us. The passage we have quoted from Huang also makes it clear that, at the end of the day, the assessment of proportionality under the HRA is a judicial task, once all the material has been taken into account and appropriate weight given to the views of others, including those of the decision-maker. As Lord Bingham observed in his opinion in A v Secretary of State for the Home Department [2005] 2 AC 68, at para. 42, the HRA "gives the courts a very specific, wholly democratic mandate" to adjudicate on human rights issues.

54. The European Court of Human Rights has frequently stressed that, in view of the importance of the right to freedom of expression, restrictions upon it have to be "established convincingly": see e.g. Bergens Tidende v Norway (2001) 31 EHRR 16, at para. 48. Furthermore, in Sunday Times the Court made it clear that the assessment of proportionality will in article 10 cases be highly fact-specific. It will not suffice to demonstrate that, in principle, a legislative or other measure complies with the principle of proportionality; it will also be necessary to show that the decision applying it to the facts of a particular case does so. At para. 65, the Court said:

> "….the Court's supervision under article 10 covers not only the basic legislation but also the decision applying it. It is not sufficient that the interference involved belongs to that class of the exceptions listed in article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."

**The Claimants' case**

55. In the present case, the claimants submit that this case is highly exceptional, and the public interest in making a programme about Mr Ahmad's case is especially strong, for the following main reasons:

(1) Mr Ahmad has been detained without trial in the United Kingdom for over 7 years awaiting extradition to the USA. He has not been convicted.

(2) The extradition arrangements with the USA are controversial. The Extradition Act 2003 is also controversial, as it does not require a court in this country to be satisfied that there is a *prima facie* case against a person whose extradition is sought.

(3) Mr Ahmad was arrested but released in relation to suspected offences in this country. The CPS did not consider that there was sufficient evidence to bring him to trial in this jurisdiction. Yet it is in essence those offences in respect of which his extradition is sought.

(4) He was seriously injured by his arresting officers in 2003 leading to an admission of liability by the Metropolitan Police and the payment of £60,000 in damages. The officers concerned were subsequently tried and found not guilty in 2011.

(5) While in prison Mr Ahmad has stood for election to the House of Commons in the constituency of Brent North where he came fourth.

(6) He has had his communications monitored including those with his Member of Parliament which prompted an investigation, which found that the monitoring was lawful.

(7) Conditions at the detainee unit at the prison where he is detained have been the subject of criticism in a report by HM Inspectorate of Prisons in June 2011.

(8) A recent e-petition which called for Mr Ahmad to be tried in the UK obtained over 140,000 signatures. His case has attracted specific interest in Parliament.

(9) Mr Ahmad's application to the European Court of Human Rights has been held to be admissible in part, on important issues under article 3 of the Convention, and in the meantime that Court has given an indication under rule 39 which in effect operates as a stay of his proposed extradition.

(10) It is clear from paragraph 8 of Mr Casciani's statement[2] that the BBC has carried a number of news and other items concerning Mr Ahmad's case since 2003.

56. The claimants further submit that it is important for them to be able to conduct a face-to-face interview rather than simply communicate in writing or by telephone for the following reasons: the scope for assessing the personal impact on Mr Ahmad of his lengthy detention and the other features of his case; the scope for assessing Mr Ahmad's credibility; and the scope for targeted questioning. These points are developed in the evidence filed on behalf of the claimants.

57. At paragraph 11 of his statement Mr Casciani informs the court that the claimants have been unable either to gain a proper understanding of, or to convey to the public, the full detail of the unique and extraordinary circumstances in which Mr Ahmad finds himself, his perception of those circumstances and their impact upon him, both physically and emotionally.

58. At paragraph 12 of his statement Mr Casciani explains that the value of a face-to-face interview with Mr Ahmad cannot be overstated in the circumstances for the following reasons, which we will quote in full:

"12.1 First, without a face-to-face interview it will be simply impossible to get any sense of the physical impact that the last eight years have had on Mr Ahmad, and immeasurably more difficult to get a sense of their mental impact.

12.2 Second, without a face-to-face interview I will be unable to form any useful impression of Mr Ahmad's credibility about the issues on which he speaks. First, I will be unable to tell anything about his demeanour. Second, any person interviewed by written correspondence can think through his replies as much as he wishes, and can take his time over – or simply ignore – a difficult or searching question.

[2] References in this judgment to Mr Casciani's statement are to his second witness statement, dated 22 November 2011.

12.3 Third, there is a simple issue of practicalities. Without wishing to state the obvious, Mr Ahmad has experienced an awful lot over the last eight years and there is an extremely wide range of subject matter on which he is qualified to speak. It would be immensely more fruitful to explore those subjects in an interview, with the ability to home in on issues of interest as they arise, than to attempt to deal with them through lists of written questions and delayed responses.

12.4 Whilst corresponding in writing with Mr Ahmad might be sufficient in order to check basic facts or to obtain a comment upon a single issue, it is wholly inadequate in order to conduct a challenging interview exploring events commencing with his arrest in 2003 and subsequent detention, and to form an impression of his demeanour and credibility."

59. The claimants also submit that there are good reasons why the claimants should be able to broadcast the product of the interview to the public: the scope for assessing the personal impact of his detention on Mr Ahmad; the scope for assessing Mr Ahmad's credibility by the public; and the reduced impact that "disembodied" reporting has as compared with a story that has human interest. The claimants stress that it is a matter of editorial discretion whether the BBC, particularly having regard to its well known remit to be impartial, should present the results of an interview through a filmed broadcast or in some other way.

60. These points about a broadcast interview are developed at paragraph 13 of Mr Casciani's statement as follows:

"13.1 It would afford them [the public] a unique insight into the effects of prolonged detention without trial for suspects and possible extradition to face trial in an unfamiliar country.

13.2 It would give them a further, and greater, opportunity to understand and engage with the public interest issues which Mr Ahmad's case engages, since information of this sort has a particular immediacy and impact when it is conveyed directly by a person who is being intimately affected.

13.3 It would enable them to make their own judgements as to Mr Ahmad's demeanour and credibility, since they would be able to see how he responds to questions. The public can already see [from a website] and elsewhere, how Mr Ahmad puts his case in writing (or how others do so on his behalf). A face-to-face interview would give them a much greater opportunity to assess him and the points he makes."

61. At paragraph 14 of his statement Mr Casciani explains that, since a great deal of written information about Mr Ahmad's case is already in the public domain, a further written interview with him or some other report with information from Mr Ahmad appearing "in a disembodied form" would be of considerably less value than a filmed interview and its publication would be more difficult to justify. At paragraphs 15 and 16 of his statement Mr Casciani makes it clear that he regards the present situation as an unsatisfactory one for him as a journalist and that it intrudes upon his journalistic, and the BBC's editorial, freedom.

62. At paragraph 17 of his statement Mr Casciani states as follows:

> "…although I do not accept the concern raised by the defendant, that Mr Ahmad might use a broadcast interview as a platform to make observations or to disseminate views likely to be seriously offensive to victims of offences or other members of the public – he has not done so in his written communications or through any other person and there is no evidence that he intends to start now – any broadcast or publication by the BBC would nevertheless be constrained by the BBC's Editorial Guidelines which require, at paragraph 8.2.3, that 'we must seek to balance the public interest in reporting crime with respect for the privacy and dignity of victims and their families.' Furthermore, in previous interviews of individuals said to have been connected to terrorism, in particular men who are subject to control orders, I have never let an assertion go unchallenged. I would regard it as a dereliction of my professional duty to put myself, or the BBC, in a position where we could be considered to have been 'used' by someone in this manner. As such, any relevant and legitimate concern the defendant might have in this regard would in any event be assuaged."

**The Secretary of State's case**

63. For his part the Secretary of State submits that there are good reasons in the public interest why a face-to-face interview and a broadcast should not be permitted in this case. In brief they are the risk of causing distress to victims of terrorist acts in this country and abroad, and the risk of damage to confidence in the criminal justice system. The Secretary of State also submits that his decision was in accordance with his policy under PSI 37/2010 and that the policy is justified for reasons of resource management in requiring prisoners and journalists to demonstrate that face-to-face contact is needed. He submits that the claimants have not sought permission to communicate in writing and have not explained why face-to-face contact is needed exceptionally in this case. These reasons have been set out in more detail in material which is before the Court, both in the Secretary of State's decision letter of 22 September 2011 and in the first witness statement filed on his behalf by Mr Ronald Elder.

64. In his letter of 22 September 2011 the Secretary of State set out his reasons for refusing the claimant's application for permission to conduct a face-to-face interview with Mr Ahmad, and to broadcast any recording of such an interview, in the following way:

> "(1) In assessing the balance of rights and interests, the Secretary of State attaches particular importance to the impact on victims and the need for confidence in the criminal justice system (see the last sentence of paragraph 4.5 (ii) of the Policy).
>
> (2) He has had particular regard to the gravity of the charges that Mr Ahmad faces. He considers that allowing a face-to-face interview with Mr Ahmad would pose a significant risk of causing distress and anger to victims of terrorist acts in this country and abroad. That risk would be further increased if a recording of that interview were to be broadcast. Having

regard to article 10 of the European Convention, the Secretary of State is of the view that imposing this restriction is necessary to prevent damage to the health of others and to protect the rights of third party victims of terrorism.

(3) The Secretary of State has also concluded that there is a substantial risk of damage to confidence in the criminal justice system if terrorist suspects, in particular persons charged with conspiracy to kill (as is the case with Mr Ahmad), are allowed to give face-to-face interviews from prison, particularly ones intended for broadcast, while awaiting either possible extradition and trial or deportation. Mr Ahmad is able to communicate with the journalists in writing and, in the context of this case, refusing permission for a face-to-face interview and the broadcasting of that interview is proportionate. Accordingly, the Secretary of State considers that it would not be right to grant permission for:

(a) the journalists to visit Mr Ahmad in prison for a face-to-face interview;
(b) the broadcast of any type of interview with Mr Ahmad.

(4) In considering specifically your request for a video recording of a face-to-face interview to be broadcast, the Secretary of State has taken into account the following additional considerations:

(a) The policy specifies that where exceptionally such an interview is permitted then it is on the basis that it is for 'research purposes only, and requests for interviews to be filmed or broadcast will normally be refused' (paragraph 4.27).
(b) Tape recording of the interview is permitted only as an aid to memory (paragraph 4.29).

(5) Finally, and although this consideration is not central to his decision, the Secretary of State notes that paragraphs 4.6(i) and 4.11(i) of the policy are not satisfied. The journalists and Mr Ahmad have not communicated by written correspondence which has proved to be inadequate. Mr Ahmad has previously been able to express his concerns in relation to his extradition through written communication with journalists. For example, on 8 July 2010 The Independent published an interview with Mr Ahmad in which he gave his replies to a series of questions that had been put to him in writing. On 7 May 2008 Mr Ahmad gave an interview to [a website] in which he answered questions (which had also been put to him in writing)… Having looked afresh at the application by Mr Ahmad and the journalists, the Secretary of State is not satisfied that a visit is the only suitable method of communication between the journalists and Mr Ahmad and that therefore permission for a face-to-face interview is essential as required by paragraphs 4.6 and 4.11(i) of the policy. In any event, as is clear from the background facts set out above, there has not even been any attempt to communicate in writing between Mr Ahmad and the journalists."

65. At paragraph 7 of his statement in these proceedings, Mr Casciani explains that the claimants have conducted interviews with Mr Ahmad's family, including his former wife, his father and his sister. At paragraph 7.4 of his statement Mr Casciani specifically deposes that he has corresponded directly with Mr Ahmad in writing, in which he was able to raise general issues about his case. This was after the Secretary of State's decision of 22 September 2011. There does not appear to be any dispute that the claimants have now corresponded with Mr Ahmad in writing and there has been compliance with the Secretary of State's normal policy in that respect. However, as was made clear at the hearing, the Secretary of State maintains his decision of 22 September 2011, having considered the claimants' evidence in these proceedings.

66. In the first witness statement by Mr Elder there is a helpful outline of the history of relevant policies in relation to contact between prisoners and the media. Mr Elder describes the policy as it was before the decision of the House of Lords in Simms. He also describes the development of the policy after that decision and in the light of several other decisions of the courts. Finally he sets out the relevant parts of the current policy, PSI 37/2010, from which we have already quoted material passages.

67. At paragraphs 21 to 29 Mr Elder's statement sets out the rationales for the current policy. He seeks to set out in outline why the restrictions imposed on prisoners' access to the media are considered by the Secretary of State to be necessary and proportionate to protect the victims of crime, to ensure confidence in the criminal justice system and to address practical issues when running a prison.

68. At paragraphs 24 and 25 of his statement Mr Elder explains that an additional rationale exists for the policy that permission will not generally be granted for broadcasting of interviews, even if permission to speak to a prisoner by telephone or face-to-face is granted. First he explains that there is a real risk that allowing prisoners access to the broadcast media would cause significant distress for victims of crime. He refers, for example, to a convicted murderer who was able indirectly to place a sound recording in the public domain without having been authorised to do so. He had telephoned a friend who happened to be a journalist.

69. At paragraph 26 Mr Elder states that, even when it is not possible to identify specific victims (for example because the prisoner has not been convicted), there remains a genuine risk of distress to the victims of crime generally, and to the wider public, if prisoners are given a platform to discuss their circumstances or to attempt to justify their behaviour, especially in cases where the prisoner is accused of serious offences.

70. At paragraph 28 Mr Elder explains that a second rationale for the policy on broadcasting is that the essence of prison management is to deliver the orders of the court in accordance with the law and in a way that maintains public confidence in the justice system. He states that allowing prisoners to have direct access to the broadcast media risks undermining public confidence in the justice system.

71. At paragraph 29 Mr Elder explains that, where prisoners have not been convicted, the public's expectation is that they will use the court system to raise issues about

their cases and the circumstances of their detention. If prisoners were to be allowed more extensive access to the media, he says that it would enable them to use the media in parallel with the court system. It would permit prisoners to mount media campaigns, which would have the potential to undermine the public's faith in the judicial process.

72. From paragraphs 30 to 37 Mr Elder's statement sets out a description of the application of the Secretary of State's policy to the claimants' request in the present case.

73. The crux of the Secretary of State's reasoning is set out at paragraph 32 of the statement by Mr Elder, which states:

"The Secretary of State decided to refuse the request [by the claimants]. His reasons are set out in the letter of 22 September 2011. He took the view that the principal rationales underlying the policy against allowing broadcasts from prison applied in this case. In particular:

(a) Although Mr Ahmad has not been convicted, he is accused of serious terrorist offences. Whilst it may not be possible to identify specific victims of the offences with which he is charged, there are nonetheless many victims of terrorism living in the United Kingdom today. These victims would be understandably and justifiably distressed if persons accused of serious terrorist offences and detained pursuant to orders of the court (even if pending trial or other criminal process) were given a platform from which to expound their views.

(b) The public is entitled to expect that those accused of serious offences such as those with which Mr Ahmad is charged will argue their cases before the courts. To allow such persons to mount media campaigns from prison, in parallel with court processes, would risk undermining confidence in the criminal justice system."

74. At paragraph 33 Mr Elder explains that the Secretary of State also considered and applied the presumption in the policy that communication between prisoners and journalists would, in the first instance be in writing. Only if written communication proved insufficient would permission be given for communication by other means. Mr Elder states that the BBC has not demonstrated why it would not suffice to communicate by written correspondence in the present case.

75. At paragraph 34 of his statement Mr Elder explains that, since the decision was taken on 22 September 2011, the Secretary of State has considered carefully the grounds for judicial review in the present case. He states that, despite those grounds, the Secretary of State has affirmed the policy, reflected in PSI 37/2010. Further he has reconsidered the facts of this case and emphasised that, in his view, no special reason has been demonstrated to depart from the normal policy here. At paragraph 35 Mr Elder states that the Secretary of State reaffirmed the policy, reflected in PSI 37/2010, that permission to broadcast audio or video recordings of interviews with prisoners should normally not be granted and considered that the

reasons justifying that policy (the need to protect victims of crime from justifiable distress and the need to avoid undermining confidence in the criminal justice system) remained pressing and proper ones, and applied in the circumstances of this case. At paragraph 36 Mr Elder explains that the Secretary of State has considered in particular the grounds advanced by the claimants in the present claim for judicial review as to why, exceptionally, a broadcast should be allowed in this case. He concluded that for the reasons set out in the detailed grounds on behalf of the defendant (which he had read in draft and approved in terms), those grounds were not compelling. The Secretary of State remained of the view that there was no good reason why Mr Ahmad could not ventilate his concerns in writing as he had done in the past.

**Assessment**

76. In our judgment, and even after giving appropriate weight to the views of the Secretary of State, the decision of 22 September 2011 constitutes a disproportionate interference with the right to freedom of expression in article 10. In the circumstances of this particular case, the justification for that interference has not been "convincingly established", as the jurisprudence on article 10 requires.

77. The Secretary of State's own policy in PSI 37/2010 recognises that there may be instances where a face-to-face interview will be permitted. The policy does not envisage that permission to conduct such an interview will normally be refused. Rather, it envisages that there may well be cases in which such an interview should be permitted either because its purpose is to highlight a potential miscarriage of justice or because there is some other sufficiently strong public interest: see para. 4.5 of PSI 37/2010. However, under the policy, permission for a face-to-face interview will only be given when the conditions set out in para. 4.6 are met.

78. In our judgment, the claimants have demonstrated on the evidence before the Court that they do require a face-to-face interview with Mr Ahmad and that they have achieved as much as they can by written correspondence: see in particular paragraph 12 of Mr Casciani's statement.

79. The practical considerations which form part of the rationale for the Secretary of State's policy in PSI 37/2010 do not justify the decision in the present case, although they may well do so in many cases. It was essentially because of such practical considerations that the (former) European Commission of Human Rights held to be inadmissible the application in Bamber v United Kingdom (App. No. 33742/96, 11 September 1997).

80. If the decision of Mr Blunt of 15 July 2011 had stood, there can be little doubt that the authorities would have found practical ways of permitting the face-to-face interview with Mr Ahmad to take place. As counsel for the Secretary of State fairly accepted during the hearing before us, the nub of the Secretary of State's reasoning for refusing the claimant's request in the present case can be found in paragraph 32 of Mr Elder's first witness statement. The two reasons which are given there are essentially reasons of principle and not ones that turn on practical

considerations. They focus on the Secretary of State's policy that permission will normally be refused for the broadcasting of any interview where recording is allowed. It is because the claimants wished to broadcast the interview that the initial decision of 15 July 2011 to permit an interview was revoked on 22 September 2011.

81. Turning to the question of whether the claimants should be permitted to broadcast the product of any recorded interview, the policy in PSI 37/201 does envisage that this will normally be refused: see para. 4.27. However, the policy is not absolute, nor could it be as a matter of administrative law, since a rigid and inflexible policy would be unlawful. The policy on its face admits of the possibility in exceptional cases of permitting such an interview to be recorded for the purpose of broadcasting.

82. In our judgment, it is difficult to think of a case which would fall within the exception if not the present one. We accept the claimants' contention that, as a result of the particular combination of circumstances, this case is highly exceptional. By saying that we make it clear that we do not consider that the present case should be regarded as setting any precedent for other cases. It is because of the unusual combination of facts that the present case, in our view, justifies departure from the normal policy. More than that, in our view, the claimants' rights under article 10 require that departure in the exceptional circumstances of this case, and the Secretary of State has not been able to justify denying those rights on the facts of this case. However, the Secretary of State is entitled to maintain the policy which he does: no challenge has been made to his entitlement to have such a policy in principle and to apply it to the great majority of cases. It is on the unusual facts of the present case that its application constituted a disproportionate interference with the right to freedom of expression.

83. As we have mentioned, and as counsel for the Secretary of State accepted, the nub of the reasoning which is said to support his decision in this case is set out at paragraph 32 of Mr Elder's first witness statement. In our judgment, while that reasoning tends to justify the general policy which the Secretary of State is entitled to adopt and maintain, it does not amount to a sufficient justification for the interference with the right to freedom of expression on the particular facts of the present case.

84. The first of the reasons advanced by Mr Elder, at paragraph 32(a), is that the restriction on the right to freedom of expression is necessary in the present case in order to protect the victims of terrorism from distress.

85. In our judgment, this reason does not stand up to scrutiny in the circumstances of the present case, having regard to the principle of proportionality, which we have outlined earlier. As is accepted by the Secretary of State, mere offence is not sufficient to justify a restriction on the right to freedom of expression: see Sunday Times, at para. 65, which we have quoted earlier. If it is to justify a restriction on the right to freedom of expression, distress must, therefore, be something more than offence. It is important to recall that Mr Ahmad has not been convicted of any offence; he has not been charged in this jurisdiction even though in principle he could have been if the CPS had considered there was sufficient evidence; and

no *prima facie* case has to be demonstrated to a court in this country before he can be extradited. We also remind ourselves in this context of what we have said earlier about the nature of a democratic society: it is one which is characterised by pluralism, tolerance and broad-mindedness. This country has a proud and well-known tradition of fairness, which includes the presumption of innocence, that everyone is presumed to be innocent until proved guilty, a presumption which also finds its place in article 6(2) of the Convention rights.

86. The case of Nilsen v United Kingdom (App. No. 36882/05, 9 March 2010), on which the Secretary of State placed some reliance, is distinguishable. In that case the European Court of Human Rights held the application to be inadmissible as it was manifestly ill-founded. The application was brought not by a reputable organisation like the BBC but by a notorious murderer who was serving a whole-life tariff. The applicant in that case had been convicted of the most serious offences and wished to publish his autobiography. He had nothing serious to say in the public interest, although the policy applied in his case would not have prevented even him from engaging in such serious debate: see paragraph 51 of the admissibility decision. To the contrary, the applicant wished to use his memoirs as a platform to seek to justify his conduct and denigrate people he disliked and his manuscript contained "several lurid and pornographic passages" and highly personal details of a number of his offences: see paragraph 53. The applicant did not take issue with the description of his crimes as being "as grave and depraved as it is possible to imagine": see paragraph 54. Even in such an extreme case, the Court was careful to distinguish between the causing of offence to members of the public, which would not be a sufficient justification for restricting article 10 rights, and "an affront to human dignity", which would, that being itself a fundamental value in the Convention: see paragraph 54.

87. When the policy in PSI 37/2010 refers, towards the end of para. 4.5, to the need to give consideration to the possible impact of permitting an interview on "the victim" or "the victim's family", it clearly envisages that there is a specific victim of the particular offence committed by the prisoner. That entails that it has already been established that the prisoner has in fact committed that offence. That passage in para. 4.5 does not appear to have in mind the notion of "victims" of crime more generally and in the abstract.

88. However, we do not say that there can never be cases in which the Secretary of State can properly apply the policy in PSI 37/2010 to a person who has not yet been convicted of an offence. Counsel for the Secretary of State submitted that, if the claimants succeeded in the present case, there would be nothing to stop every prisoner on remand insisting on a face-to-face interview to be broadcast on television. We do not agree. Most prisoners on remand in this country will be there because there was thought to be sufficient evidence for them to be charged, which is not the case with Mr Ahmad; and because they are awaiting trial in this country, usually for a relatively short period, certainly nothing like the more than seven years that Mr Ahmad has been in detention.

89. The second reason advanced by Mr Elder to justify the restriction in the present case, at paragraph 32(b) of his statement, is that a broadcast interview with Mr Ahmad would undermine the public's confidence in the criminal justice system.

We have no doubt that, in many cases, the Secretary of State would be perfectly entitled to rely upon this rationale to justify application of his normal policy in PSI 37/2010 to a prisoner. If the only purpose of an interview, or a broadcast of it, were to enable a prisoner to argue his innocence, either in place of, or in parallel with, the ordinary processes of the courts, whether in this country or elsewhere, application of the normal policy would ordinarily be proportionate and compatible with article 10. However, as we have already emphasised, the present case is far from ordinary: it is, as the claimants submit, highly exceptional. This is because of the combination of circumstances which we have set out earlier. Together, those circumstances mean that the public interest in the claimants' right to freedom of expression is especially strong on one side of the balance. On the other side of the balance, this second reason advanced by Mr Elder is relatively weaker on the facts of this case. We note, in this context, what Mr Casciani says, at paragraph 17 of his statement, that the BBC has no intention of being "used" by Mr Ahmad to suit his own ends. Quite apart from his professed innocence, there are many wider issues which the claimants wish to explore in the public interest.

90. A major plank of the Secretary of State's submissions included reliance on the decision of the House of Lords in the ProLife Alliance case. In that case the House of Lords had to consider a decision by the BBC, which happened in that case to be the defendant to proceedings brought under the HRA, to prevent the claimant, a political party opposed to abortion, from including highly graphic images of terminations of pregnancy in a party election broadcast in Wales. That decision was taken under the requirement which prevents material which is offensive on grounds of taste and decency being broadcast on television in this country.

91. We do not accept the suggested analogy with the ProLife Alliance case. The requirement in that case, as embodied either in primary legislation (section 6(1)(a) of the Broadcasting Act 1990) or, in the BBC's case, in its licence agreement with the Secretary of State for National Heritage, was absolute. It did not permit of exceptions. No challenge was made by the claimant organisation in that case to the legislation itself, as in principle it might have been, since a declaration of incompatibility could have been sought under section 4 of the HRA. Since there was no such challenge to the legislation (or the agreement applicable to the BBC) itself, the only question was whether the BBC had been entitled to apply the requirement on taste and decency on the facts of the particular case. The House of Lords held that it had been so entitled and the courts could not properly, in the exercise of their supervisory jurisdiction, disturb the BBC's judgment on that issue: see in particular paras. 9-16 (Lord Nicholls of Birkenhead) and paras. 49-51 and 78-81 (Lord Hoffmann).

92. The present case is different in material respects. There is no primary legislation or the equivalent: this case concerns an administrative policy, in PSI 37/2010. Most importantly, that policy is not absolute, nor could it properly be: it envisages that there may be exceptions. The question in the present case is not whether the Court is entitled to interfere with the application of a policy to a given set of facts but whether an exception to that policy must be made on the facts of the present case in order to comply with article 10 and, in particular, to comply with the

principle of proportionality. In our judgment, it must, in the highly exceptional circumstances of this case, for reasons we have set out earlier.

93. The Secretary of State filed evidence, exhibited to Mr Elder's second witness statement, about the practice adopted in various European states in relation to similar issues as arise in the present case. As counsel for the Secretary of State fairly accepted, that evidence discloses that there is no uniformity even among the states referred to (it had not been possible to obtain evidence about every member of the Council of Europe). He submitted that it assisted his case in that it showed that reasonable people could take different views. In our view, the evidence as to the variety of practices in different states does not assist in answering the crucial question in the present case. As we have already said, the Secretary of State is entitled to adopt and maintain the general policy that he does in PSI 37/2010. The crucial question is whether, in the very unusual circumstances of the present case, when taken together, an exception must be made. We have come to the conclusion that it must.

94. We remind ourselves of the main requirements of the principle of proportionality, as summarised earlier by reference to Huang. In our judgment, while in principle (i) the reasons advanced by the Secretary of State to justify his decision in the present case disclose objectives that are sufficiently important to justify restricting the right to freedom of expression; and (ii) the means used to achieve those objectives are rationally connected to them; (iii) it has not been demonstrated by the Secretary of State that the means used are no more than is necessary to accomplish their objectives; and (iv) it has not been shown that a fair balance has been maintained between the right to freedom of expression and the general interests of the community.

95. As to (iii), there are less restrictive alternatives available in principle to achieve the policy's objectives. For example, it could have been agreed with the claimants that any broadcast of an interview with Mr Ahmad must not allow him to use the programme as a platform to mount a media campaign to protest his innocence or to cause distress to the victims of terrorism. It is not certain what stance the claimants would have taken to such a proposal but it is likely, in the light of Mr Casciani's statement, in particular at paragraph 17, that they would have had no objection in principle to such an agreement, since it is not their wish to be "used", as Mr Casciani puts it, in that way. We remind ourselves that the BBC has a worldwide reputation for integrity and independence, and we have no reason to doubt what Mr Casciani says in his evidence about the kind of programme the BBC wishes to make and broadcast about Mr Ahmad's case.

96. However, the stance which the Secretary of State took on 22 September 2011 and has maintained to date is not to envisage the conditional grant of permission to the claimants but rather to refuse them permission as a matter of principle. In other words, when they made clear that the reason they wished to conduct a face-to-face interview with Mr Ahmad was with a view to broadcasting recorded extracts of it, he did not say "Yes but ..."; he simply said "No." In our judgment, on the facts of the present case, that stance goes beyond what is necessary to achieve the Secretary of State's legitimate objectives and, for that reason, breaches the principle of proportionality.

97. Turning to issue (iv), for reasons that we have already set out, we have come to the clear conclusion that the Secretary of State has not established that a fair balance has been maintained on the facts of this case. This is not a case where the public interest lies only on one side of the balance. The public interest in preventing distress to victims of terrorist offences is important, as is the public interest in maintaining confidence in the criminal justice system. However, there are powerful public interests on the other side of the balance too. Article 10 confers a right on the public to receive information, in particular about matters of public concern in a democratic society, such as the treatment of a prisoner who has been in detention for a very long time without charge; and the extradition arrangements applied in this case. It is not for this Court to pronounce on the rights and wrongs of different views that may be held in debate about such matters. The importance of the rights in article 10 is that, in principle, the public should be able to engage in such debates and be as fully informed as possible and make their own minds up. For this reason too, the failure to maintain a fair balance, the Secretary of State's decision breaches the principle of proportionality.

98. Since the Secretary of State's decision of 22 September 2011 was disproportionate, it was incompatible with the right to freedom of expression in article 10. Accordingly, by virtue of section 6(1) of the HRA, the Secretary of State's decision was unlawful.

## Conclusion

99. For the reasons we have given, this claim for judicial review succeeds. The decision of 22 September 2011 will be quashed. This means that the decision will have to be retaken in accordance with this Court's judgment.