

# UNLOCK



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## **BARRED FROM VOTING: THE RIGHT TO VOTE FOR SENTENCED PRISONERS**

This briefing provides an update on the Barred From Voting campaign, which is calling for sentenced prisoners to be given the right to vote. It looks at the European Court of Human Rights 2004 judgment in the *Hirst vs United Kingdom* case, which found that the UK Government's blanket ban on sentenced prisoners voting in General Elections violated the European Convention on Human Rights. It revisits the case for reform, and calls on the UK Government to overturn the ban and give prisoners the right to vote. It also looks at the situation in other countries and considers how voting could take place in practice.

### **Key Facts and Figures**

- On 11th March 2005 the prison population in England and Wales stood at 75,479. The vast majority, just under 62,000, are sentenced prisoners who are denied the right to vote.
- The electoral ban on sentenced prisoners voting is contained in Section 3 of the Representation of the People Act 1983, amended by the Representation of the People Acts 1985 and 2000.
- The only other adults who cannot vote in General Elections are hereditary peers who are members of the House of Lords, life peers, foreign nationals, patients detained in psychiatric hospitals as a result of their crimes, and those convicted in the previous five years of corrupt or illegal election practices. Remand prisoners, people imprisoned for contempt of court and fine defaulters held in prison are eligible to vote.
- Protocol 1, Article 3 of the European Convention on Human Rights guarantees “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” This guarantee is now

contained in the Human Rights Act, which became part of law throughout the United Kingdom on 2 October 2000.

- In March 2004 the European Court of Human Rights ruled that the UK Government's blanket ban on sentenced prisoners voting was in violation of Protocol 1, Article 3 of the European Convention on Human Rights. The finding was unanimous. The Government is appealing against the Judgment to the Grand Chamber of the Court.
- Many European countries allow all prisoners to vote. Eighteen European countries, including Ireland, the Netherlands and Spain have no ban. Eight other European countries only ban some sentenced prisoners from voting. In France and Germany, courts have the power to impose loss of voting rights as an additional punishment. The UK is one of only nine European countries automatically disenfranchising all sentenced prisoners, the others being: Armenia, Bulgaria, Czech Republic, Estonia, Hungary, Luxembourg, Romania and Russia.

### **The Barred From Voting campaign**

In March 2004 the Prison Reform Trust and Unlock, the National Association of Ex-offenders, launched a campaign to review the 135 year old law which means that when people are sentenced to prison, they are also stripped of their voting rights. The disenfranchisement of sentenced prisoners is a relic from the nineteenth century which dates back to the Forfeiture Act of 1870. The origins of the ban are rooted in a notion of civic

death, a punishment entailing the withdrawal of citizenship rights.

The campaign has received cross party support and is backed by a wide coalition including the Bishops of Prisons for the Anglican and Catholic churches, the current and former Chief Inspectors of Prisons, the President of the Prison Governors Association, the civil liberties group Liberty, The Aire Centre and the 50 members of the Penal Affairs Consortium.

An Early Day Motion, posted by the Liberal Democrats Shadow Home Secretary, Mark Oaten, on the day of the launch, calls on the Government to review the merits of the ban. It has been signed by 42 MPs who agree that:

*'the ban does not enhance security, punishment, or act as a deterrent... it impedes the rehabilitative objectives of the Prison Service by failing to encourage prisoners to be active responsible citizens on release.'*

The EDM also states that: 'the Government has embarked on an ambitious programme of civic renewal to improve community cohesion and that the notion of civic death undermines this agenda by excluding those who are already on the margins of society and encouraging them to be seen as alien to the communities to which they will return to live.'<sup>1</sup>

In a recent television interview the Leader of the Liberal Democrats, Charles Kennedy, said he fully supported the campaign to win prisoners the right to vote. Asked whether or not notorious offenders such as Ian Huntley should be granted a vote Mr Kennedy said: 'If you take the view as we do in principle that an individual citizen is an individual citizen, that means you have entitlements that go with it in terms of voting.'<sup>2</sup>

The Barred from Voting campaign follows on from legal cases attempting to overturn the ban through UK Courts.

## Judgment of the High Court

In April 2001, three sentenced prisoners took a case to the High Court stating that the ban on their voting was incompatible with the Human Rights Act (Pearson & Martinez vs Home Secretary and others; Hirst vs Attorney General). Edward Fitzgerald QC (acting for Pearson & Martinez) argued that it was both "illegitimate and illogical to use disqualification from the vote as a punishment."<sup>3</sup>

The High Court dismissed the case, ruling that:

*"there is a broad spectrum of approaches among democratic societies [to the question of prisoners voting], and the United Kingdom falls into the middle of the spectrum. In the course of time, this position may move, either by way of fine tuning, as was done recently in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament, not for the courts."*<sup>4</sup>

Explaining the Court's decision, Lord Justice Kennedy said that:

*"in deference to the legislature, courts should not easily be persuaded to condemn what has been done, especially when it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime."*<sup>5</sup>

However, Parliament has not given detailed consideration to the question of whether prisoners

should have the vote. The issue was discussed at greater length in the two-day High Court hearing than at any stage in Parliament's history. John Hirst, one of the three applicants, subsequently decided to appeal to the European Court of Human Rights.

## The European Court of Human Rights: Hirst vs United Kingdom judgment

In March 2004 the European Court of Human Rights considered the case of John Hirst. It unanimously found that the UK Government was in violation of Article 3 of Protocol 1 of the European Convention on Human Rights, which guarantees "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." The panel of Judges that considered the case included Sir Nicolas Bratza, a British judge. The UK Government is required to comply with this judgment and change its automatic and blanket restriction on sentenced prisoners' right to vote.

The Court reaffirmed that: "*the fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention*" and argued that the right to vote must be acknowledged as: "*the indispensable foundation of a democratic system*".<sup>6</sup>

During the hearing, the UK Government stated that the restriction on the right to vote pursued two legitimate aims: to prevent crime and punish offenders; and to enhance civic responsibility and respect for the law. However, the Court: "*found no evidence to support the claim that disenfranchisement deterred crime and considered that the imposition of a blanket punishment on all prisoners regardless of their crime or individual circumstances indicated no rational link between the punishment and the offender.*"

The Court also maintained that: "*removal of the vote in fact runs counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power.*"

The Court was particularly concerned by the indiscriminate way in which a large category of people are disenfranchised in the UK. It noted that the ban on voting applies to all sentenced prisoners irrespective of the length of their sentence or the nature or gravity of their offence, and observed that its actual effect depends arbitrarily on the period during which the prisoner happens to serve their sentence. It observed that: "*there is no evidence that the legislature in the United Kingdom has ever sought to... assess the proportionality of the ban as it affects convicted prisoners.*" It criticised countries where restrictions on the right to vote derive essentially from unquestioning and passive adherence to a historical tradition, which can be seen to be the case in the UK.

## The Government's response

The Government is seeking to overturn the judgment and has appealed to the Grand Chamber of the

<sup>1</sup> Early Day Motion 729

<sup>2</sup> Daily Mail, 3rd March, 2005

<sup>3</sup> Levenson, J. (2001) Barred from Voting, Prison Reform Trust

<sup>4</sup> England and Wales High Court (Administrative Court) Decisions (4th April 2001) Pearson & Martinez vs Home Secretary and others; Hirst vs Attorney General BAILLI Database EWHC Admin 239

<sup>5</sup> England and Wales High Court (Administrative Court) Decisions (4th April 2001) Pearson & Martinez vs Home Secretary and others; Hirst vs Attorney General (Cases CO/31/01 and CO/448/01)

<sup>6</sup> European Court of Human Rights (30 March 2004) Judgment in the Case of Hirst vs The United Kingdom (No.2) (Application no.74025/01)

European Court, which considers cases that raise serious questions relating to the interpretation and application of the European Convention on Human Rights. Lord Filkin, the Parliamentary Under-Secretary of State at the Department for Constitutional Affairs told Parliament that this action had been taken because:

*“It has been the view of successive Governments, including this Government, that persons who have committed crimes serious enough to warrant a custodial sentence should forfeit the right to have a say in how the country is governed while they are detained. The judgment of the European Court of Human Rights in the Hirst case challenges this position. We wish to ensure that the issues in relation to this important and long-standing policy are fully considered...”*

*One of the central arguments given by the court was the recognition of a large measure of discretion for nation states in this respect. While recognizing that, the judgment did not appear to apply that test to its own judgment. It did not in any way indicate the limits of the discretion that the court thought would be appropriate...*

*For many years it has been part of our society’s tradition that, when people are imprisoned, they lose a range of rights, one of which is the right to participate in elections.”<sup>7</sup>*

The Grand Chamber has agreed to consider the case, and a hearing is taking place on 27th April 2005, with a judgment due six months to a year later.

### John Hirst’s response

John Hirst has hailed the Court verdict a victory, and calls on the Government to fulfil its obligations to secure the right to vote. He argues that: *“the case has laid the foundation stone on which to build a democratic future in prison to replace the authoritarian rule which currently exists”*.<sup>8</sup>

Mr. Hirst says that he hopes that the ballot box would finally force MPs to take issues about prison welfare seriously:

*“That was the reason I took the case. Until now there have been no votes in jails and so MPs did nothing about penal reform. I hope it will force politicians to talk to prisoners. They will have to go knocking on our doors like they do other people.”<sup>9</sup>*

### The case for reform

The case for reform is powerful. It rests on the view that voting should not be a privilege; it is a basic human right. This entitlement is not a selective reward for those who have been judged morally decent by a Government.

### The ban perpetuates social exclusion and the notion of ‘civic death’.

Social exclusion is a major cause of crime and reoffending. Removing the right to vote increases social exclusion by signalling to serving prisoners that, at least for the duration of their sentence, they are dead to society.

<sup>7</sup> Hansard House of Lords 14 July 2004

<sup>8</sup> Hirst, J. (2004) Building a Democratic Future Inside Time June 2004

<sup>9</sup> Hirst, J. cited in Rozenberg, J. and Born, M. (31/03/04) Euro Court backs prisoner over voting rights Telegraph

The Right Reverend Dr Peter Selby, Bishop of Worcester and Bishop to HM Prisons states that:

*“Denying convicted prisoners the right to vote serves no purpose of deterrence or reform. What it does is to state in the clearest terms society’s belief that once convicted you are a non-person, one who should have no say in how our society is to develop, whose opinion is to count for nothing. It is making someone an ‘outlaw’, and as such has no place in expressing a civilised attitude towards those in prison”<sup>10</sup>*

### The notion of civic death is applied selectively.

People serving a sentence of any length continue to contribute financially to society from within prison. They pay tax on their savings, capital gains and any earnings that they receive during their sentence. If they are civically alive when it comes to financial contributions, they should be treated in the same way when it comes to basic human rights.

**Minority ethnic groups are disproportionately affected.** Black men are eight times more likely to be barred from voting than their white counterparts due to their over-representation in the prison population. In 2002 there were more African Caribbean entrants to prison (over 11,500) than there were to UK universities (around 8,000)<sup>11</sup>. This situation does significant damage to their political representation.

### The ban militates against ideas of resettlement and civic responsibility.

The UK Government is pursuing an ambitious programme of civic renewal aimed to improve community cohesion. The notion of civic death works against this policy by excluding those who are already on the margins of society and further isolating them from the communities to which they will return on release. Many senior managers in the Prison Service believe that voting rights and representation form part of the process of preparing prisoners for resettlement in their communities. Peter Bottomley, Conservative MP and former Minister, notes that:

*“Ex-offenders and ex-prisoners should be active, responsible citizens. Voting in prison can be a useful first step to engaging in society.”<sup>12</sup>*

The Catholic Bishops of England and Wales also support the view that prisoners should have the right to vote. Their recently published report ‘A Place of Redemption’ states that:

*“Prison regimes should treat prisoners less as objects, done to by others, and more as subjects who can become authors of their own reform and redemption. In that spirit, the right to vote should be restored to sentenced prisoners.”<sup>13</sup>*

### The ban contributes to the failure of imprisonment.

Reconviction rates show that imprisonment fails to rehabilitate six out of ten offenders<sup>14</sup>. More than half of all jails are currently overcrowded, and the Prison Service faces a cut in its budget for the next financial year. It has already failed to meet nearly half of its performance targets and prisoner suicides have reached a record level. Without the vote,

<sup>10</sup> Prison Reform Trust and Unlock (2 March 2004) Barred From Voting: Coalition calls for prisoners to be given the vote Press Release

<sup>11</sup> HM Prison Service and Commission for Racial Equality (2003) Implementing Race Equality in Prisons – a shared agenda for change, London: HM Prison Service

<sup>12</sup> Prison Reform Trust and Unlock (2 March 2004) Barred From Voting: Coalition calls for prisoners to be given the vote Press Release

<sup>13</sup> Catholic Bishops’ Conference of England and Wales (2004) A Place of Redemption, London: Burns and Oates

<sup>14</sup> Home Office (2004) Offender Management Caseload Statistics England and Wales 2004, London: Home Office

prisoners have no formal, organised and protected right to a voice. This removes one of the pivotal ways of being heard by a Government and leaves prisoners with limited, if any, recourse to challenge their worsening conditions. Former Conservative Home Secretary Lord Hurd states that:

*"If prisoners had the vote then MPs would take a good deal more interest in conditions in prisons."*<sup>15</sup>

**The ban is an unjust additional punishment that achieves nothing.** It does not protect public safety. It is not an effective deterrent. It is not a means to correct offending behaviour or to assist in the rehabilitation of offenders. It is an unjust additional punishment imposed, but not articulated, by the court at the point of sentence and bears no relation to the causes of crime.

## What is the situation in other countries?

Voting by sentenced prisoners works successfully elsewhere, and almost all of our European neighbours have partial or no restrictions on voting - without detrimental social effects. Eighteen out of 51 Council of Europe countries, including Ireland, the Netherlands and Spain have no ban. Many other European countries only ban some sentenced prisoners from voting. For example, in France and Germany, courts have the power to impose loss of voting rights as an additional punishment. The UK is one of only nine Council of Europe countries automatically to disenfranchise sentenced prisoners, the others being Armenia, Bulgaria, Czech Republic, Estonia, Hungary, Luxembourg, Romania and Russia. The Council of Europe is in the process of revising the European Prison Rules, which aim to establish common principles in the area of penal policy. It is anticipated that the new rules may require Member States to enable prisoners to participate in elections, in so far as their right to do so is not restricted by national legislation.

In 2002 the Canadian Supreme Court stated that: *'Denial of the right to vote... undermines the legitimacy of government, the effectiveness of government, and the rule of law... It countermands the message that everyone is equally worthy and entitled to respect under the law.'*<sup>16</sup> It ruled that to ban prisoners serving over two years from voting was too broad.

In South Africa, all prisoners have the right to vote. Handing down a landmark ruling in April 1999, the

Constitutional Court of South Africa declared that: *"The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."*<sup>17</sup>

In Australia and New Zealand, the length of their sentence determines whether or not convicted prisoners retain voting rights.

## How would the right to vote work in practice?

In the UK, people held on custodial remand maintain their voting rights, and are able to vote by post or proxy. They cannot register at the prison address, but the Representation of the People Act was amended in 2000 to enable remand prisoners to register using a declaration of local connection (this means that they use the address where they would be living if they were not on remand or an address where they have lived in the past). A similar procedure could be used for sentenced prisoners.

The Chief Executive of the National Offender Management Service (NOMS), Martin Narey, has said that sentenced prisoners voting: *"poses no problems for the Prison Service"*.<sup>18</sup> Under the new NOMS arrangements, there is scope to re-assess the need for a continuing ban. The ban is outdated and questions have been raised, for example, about the disenfranchisement, or otherwise, of those serving the new sentence of intermittent custody.

## Conclusion

The UK ban on prisoners voting is a relic from the nineteenth century, which is neither a deterrent nor an effective punishment. The right to vote poses no risk to public safety. Giving prisoners the vote would encourage them to take the responsibilities that come with citizenship. It would also encourage politicians to take more of an active interest in prisons, which in turn should raise the level of debate about prisons and penal policy. There is widespread support for the removal of the ban, which the European Court has ruled violates human rights law. The Government should act to restore the right to vote to sentenced prisoners without delay.

<sup>15</sup> Lord Hurd cited in Leech & Shepherd (2003) Prisons Handbook 2003/4 Manchester: MLA Press

<sup>16</sup> Supreme Court of Canada (31 October 2002) Richard Sauvé v Attorney General of Canada and Others 2002 SCC 68

<sup>17</sup> Constitutional Court of South Africa (1 April 1999) August and another v Electoral Commission and Others CCT8/99

<sup>18</sup> Levenson, J. (2001) Barred from Voting, Prison Reform Trust

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