HIRST v. THE UNITED KINGDOM (No. 2) - 74025/01 [2004] ECHR 122 (30 March 2004)

FOURTH SECTION

CASE OF HIRST v. THE UNITED KINGDOM (No. 2)

(Application no. 74025/01)

JUDGMENT

STRASBOURG

30 March 2004

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,

WHICH DELIVERED JUDGMENT IN THE CASE ON

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hirst v. the United Kingdom (no. 2),

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPää, *President*,

Sir Nicolas BRATZA,

Mrs V. STRá NICKá,

Mr R. MARUSTE,

Mr S. PAVLOVSCHI,

Mr L. GARLICKI,

Mr J. BORREGO BORREGO, *judges*,

and Mr M. O BOYLE, *Section Registrar*,

Having deliberated in private on 16 December 2003 and on 9 March 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 74025/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) by a United Kingdom national, Mr John **Hirst** (the applicant), on 5 July 2001.

2. The applicant, who had been granted legal aid, was represented by Mr E. Abrahamson, a solicitor practising in Liverpool. The United Kingdom Government (the Government) were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office, London.

3. The applicant complained that as a convicted prisoner he was subject to a blanket ban on voting in elections. He invoked Article 3 of Protocol No. 1 alone and in conjunction with Article 14, as well as Article 10 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 8 July 2003, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 December 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. GRAINGER, *Agent*,

Ms N. PITTAM,

Mr M. RAWLINGS,

Ms E. WILLMOTT, *Advisers*;

(b) *for the applicant*

Ms F. KRAUSE, *Counsel*,

Mr E. ABRAHAMSON, *Solicitor*.

The Court heard addresses by Mr Grainger and Ms Krause.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1950 and is currently serving a sentence of imprisonment in HM Prison Rye Hill, Warwickshire.

9. On 11 February 1980, the applicant pleaded guilty to manslaughter on ground of diminished responsibility. His plea of guilty was accepted on the basis of medical evidence that the applicant was a man with a gross personality disorder to such a degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

10. The applicant s tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention is based on considerations relating to risk and dangerousness, the Parole Board considering that he continues to present a risk of serious harm to the public.

11. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, issued proceedings in the High Court under section 4 of the Human Rights Act 1998, seeking a declaration that this provision was incompatible with the European Convention on Human Rights.

12. The applicant s application was heard before the Divisional Court on 21 and 22 March 2001, together with the application for judicial review of two other prisoners, Mr Pearson and Mr Feal-Martinez, who had applied for registration as electors and been refused by the Registration Officer and who also sought a declaration of incompatibility.

13. In its judgment dated 4 April 2001, the Divisional Court noted that in Europe only eight countries, including the United Kingdom, did not give convicted prisoners a vote, while 20 did not disenfranchise prisoners and eight imposed a more restricted disenfranchisement. Reference was made to the United States Supreme Court which had rejected a challenge to the Californian Constitution s disenfranchisement of convicted prisoners (*Richardson v. Ramirez* [1974] 418 US 24); and to Canadian precedents, in particular the Canadian Supreme Court which in the case of *Sauvé v. Canada (No. 1)* ([1992] 2 SCR 438) struck down the disenfranchisement of prisoners as too widely drawn and infringing against the minimum impairment rule and the Federal Court of Appeal which upheld in *Sauvé (No. 2)* ([2000] 2 CF) the subsequent legislative provision which restricted the ban to prisoners serving a sentence of two years or more in a correctional institution. The cases before the European Commission of Human Rights and this Court were also reviewed.

Lord Justice Kennedy concluded:

... I return to what was said by the European Court in paragraph 52 of its judgment in Mathieu-Mohin. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and the free expression of the opinion of the people in the choice of the legislature . If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the

way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.

The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities, those states which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and like McLachlin J in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done 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. That applies even to the hard cases of post-tariff discretionary life sentence prisoners... They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear. ...

If section 3 (1) of the 1983 Act can meet the challenge of Article 3 [of the First Protocol] then Article 14 had nothing to offer, any more than Article 10.

14. The applicant s claims were accordingly rejected as were those of the other prisoners.

15. On 2 May 2001, an application for permission to appeal was filed on behalf of Pearson and Feal-Martinez, together with a 43-page skeleton argument. On 15 May 2001, Lord Justice Buxton considered the application on the papers and refused permission on the grounds that the appeal had no real prospect of success.

16. On 19 May 2001, the applicant filed an application for permission to appeal. On 7 June 2001, his application was considered on the papers by Lord Justice Simon Brown who refused permission for the same reasons as Lord Justice Buxton in relation to the earlier applications. The applicant s renewed application, together with the renewed applications of Pearson and Feal-Martinez, were refused on 18 June 2001, after oral argument, by Lord Justice Simon Brown.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Section 3 of the Representation of the People Act 1983 provides:

(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ...is legally incapable of voting at any parliamentary or local election.

This section re-enacted without debate the provisions of section 4 of the Representation of the People Act 1969, the substance of which back dated to the Forfeiture Act 1870 of the previous century, which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted felon (the so-called civic death of the times of King Edward III).

18. The disqualification does not apply to persons imprisoned for contempt of court (section 3(2)a) or to those imprisoned only for default in, for example, paying a fine (section 3(2)c).

19. During the passage through Parliament of the Representation of the People Act 2000, which permitted remand prisoners and unconvicted mental patients to vote, Mr Howarth MP, speaking for the Government, maintained the view that it should be part of a convicted prisoner s punishment that he loses rights and one of them is the right to vote . The Act was accompanied by a statement of compatibility under the section 19 of the Human Rights Act 1998, namely, a statement that in introducing the measure in Parliament the Secretary of State considered its provisions to be compatible with the Convention.

20. On 22 February 2001, the Secretary of State gave his reasons for maintaining the policy of disenfranchising convicted prisoners:

By committing offences which by themselves or taken with any aggravating circumstances including the offender s character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one s representative.

21. Section 4 of the Human Rights Act 1998 provides:

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

III. RELEVANT INTERNATIONAL MATERIALS

A. International Covenant on Civil and Political Rights (ICCPR)

22. Relevant provisions of the ICCPR provide:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote...

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

23. In the General Comment (No. 25(57)) adopted by the Human Rights Committee under Article 40(4) of the ICCPR dated 27 August 1996, the Committtee stated, *inter alia*, concerning the right guaranteed under Article 25:

14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

B. European Prison Rules (1987, Recommendation R(87)3 Council of Europe)

64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.

C. Code of Good Practice in Electoral Matters

24. This document adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002 includes the Commission s guidelines as to the circumstances in which there may be deprivation of the right to vote or to be elected:

d. ...

i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions;

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for disenfranchising individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

D. Sauvé v. the Attorney General of Canada (No. 2)

25. Following the decision of the Administrative Court in the present case, the Supreme Court of Canada on 31 October 2002 held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional, i.e., infringing Articles 1 and 3 of the Canadian Charter of Rights and Freedoms:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

26. The majority opinion given by McLachlin C.J. is summarised as follows in the headnote:

To justify the infringement of a Charter right under s. 1, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified. The government s argument that denying the right to vote to penitentiary inmates requires deference because it is a matter of social and political philosophy is rejected. While deference may be appropriate on a decision involving competing social and political policies, it is not appropriate on a decision to limit fundamental rights. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. The framers of the Charter signalled the special importance of this right not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33 s notwithstanding clause. The argument that the philosophically-based or symbolic nature of the objectives in itself commands deference is also rejected. Parliament cannot use lofty objectives to shield legislation from Charter scrutiny. Here, s. 51 (e) is not justified under s. 1 of the Charter.

The government has failed to identify particular problems that require denying the right to vote, making it hard to conclude that the denial is directed at a pressing and substantial purpose. In the absence of a specific problem, the government asserts two broad objectives for s. 51(e): (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment or enhance the general purposes of the criminal sanction . Vague and symbolic objectives, however, make the justification analysis difficult. The first objective could be asserted of virtually every criminal law and many non-criminal measures. Concerning the second objective, nothing in the record discloses precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed. Nevertheless, rather than dismissing the government s objectives outright, prudence suggests that we proceed to the proportionality inquiry.

Section 51(e) does not meet the proportionality test. In particular, the government fails to establish a rational connection between s. 51(e) s denial of the right to vote and its stated

objectives. With respect to the first objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility. The government s novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the Charter permits. Moreover, the argument that only those who respect the law should participate in the political process cannot be accepted. Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter. It also runs counter to the plain words of s. 3 of the Charter, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern.

With respect to the second objective of imposing appropriate punishment, the government offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. Denying the right to vote does not comply with the requirements for legitimate punishment - namely, that punishment must not be arbitrary and must serve a valid criminal law purpose. Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender. Section 51(e) *qua* punishment bears little relation to the offender s particular crime. As to a legitimate penal purpose, neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. By imposing a blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct, s. 51(e) does not meet the requirements of denunciatory, retributive punishment, and is not rationally connected to the government s stated goal.

The impugned provision does not minimally impair the right to vote. Section 51(e) is too broad, catching many people who, on the government s own theory, should not be caught. Section 51(e) cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise.

Lastly, the negative effects of denying citizens the right to vote would greatly outweigh the tenuous benefits that might ensue. Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration. In light of the disproportionate number of Aboriginal people in penitentiaries, the negative effects of s. 51(e) upon prisoners have a disproportionate impact on Canada s already disadvantaged Aboriginal population. ...

27. The minority opinion given by Gonthier J. is summarised, in extract, as follows:

...In this case, while it has been conceded that s. 51(e) of the Canada Elections Act infringes s. 3 of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society. The objectives of s. 51(e) are pressing and substantial. Both objectives are based upon a reasonable and rational social or political philosophy. The first objective, that of enhancing civic responsibility and respect for the rule of law, relates to the

promotion of good citizenship. The social rejection of serious crime reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community. The promotion of civic responsibility may be abstract or symbolic, but symbolic or abstract purposes can be valid of their own accord and must not be downplayed simply for the reason of their being symbolic. The second objective is the enhancement of the general purposes of the criminal sanction. Section 51(e) clearly has a punitive aspect with a retributive function. It is a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime. The disenfranchisement is a civil disability arising from the criminal conviction.

Section 51(e) meets the proportionality tests. First, the impugned legislation is rationally connected to the objectives. While a causal relationship between disenfranchising prisoners and the objectives is not empirically demonstrable, reason, logic and common sense, as well as extensive expert evidence, support a conclusion that there is a rational connection between disenfranchising offenders incarcerated for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction. ... Further, the disenfranchisement of serious criminal offenders serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. Society may choose to curtail temporarily the availability of the vote to serious criminals to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation. With respect to the second objective, the disenfranchisement is carefully tailored to apply to perpetrators of serious crimes, and there is evidence in the record indicating that the denial of the right to vote is perceived as meaningful by the prisoners themselves and can therefore contribute to the rehabilitation of prisoners. Lastly, many other democracies have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement.

Second, the impairment of the Charter right is minimal. ... Only serious offenders , as determined by Parliament, are subject to disenfranchisement. Since Parliament has drawn a two-year cut off line which identifies which incarcerated offenders have committed serious enough crimes to warrant being deprived of the vote, any alternative line will not be of equal effectiveness. ... The provision is reasonably tailored insofar as disenfranchisement reflects the length of the sentence and actual incarceration, which, in turn, reflect the seriousness of the crime perpetrated and the intended progress towards the ultimate goals of rehabilitation and reintegration. Section 51(e) is not arbitrary: it is related directly to particular categories of conduct. The two-year cut off line also reflects several practical considerations. Further, since this Court gave the impression that it was up to a Parliament to do exactly this after the first *Sauvé* case..., there is a need for deference to Parliament in its drawing of a line. The analysis of social and political philosophies and the accommodation of values in the context of the Charter must be sensitive to the fact that there may be many possible reasonable and rational balances. Line drawing, amongst a range of acceptable alternatives, is for Parliament, ...

Third, when the objective and the salutary effects are viewed in the totality of the context, they outweigh the temporary disenfranchisement of the serious criminal offender. The enactment of the measure is itself a salutary effect. The legislation intrinsically expresses societal values in relation to serious criminal behaviour and the right to vote in our society. Value emerges from the signal or message that those who commit serious crimes will temporarily lose one aspect of the political equality of citizens. Furthermore, the temporary

disenfranchisement is perceived as meaningful by the offenders themselves and could have an ongoing positive rehabilitative effect. ... The statistical data mentioned by the Federal Court of Appeal indicate that the provision catches serious and repeat offenders and that most prisoners will only be deprived of participation in one election. Because the duration of the disenfranchisement is directly related to the duration of incarceration, a serious criminal offender may never actually be denied the opportunity to vote if there is no election during the time he is incarcerated. In light of the special context of this case - that the justification advanced by Parliament is rooted in a social or political philosophy that is not susceptible to proof in the traditional sense - deference is appropriate since the impugned provision raises questions of penal philosophy and policy. ...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1

28. The applicant complains that he has been disenfranchised, invoking Article 3 of Protocol No. 1 which provides:

The High Contracting Parties undertake to hold 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.

A. The parties submissions

1. The applicant

29. The applicant submitted that the right to vote was one of the most fundamental rights which underpinned a truly democratic society. It was not a privilege, contrary to the view expressed by the Secretary of State in February 2001. The restriction in voting rights, which did not apply to unconvicted prisoners, did not pursue any legitimate aim. Little thought had in fact been given to the disenfranchisement of prisoners at all by the legislature, the 1983 Act being a consolidating act adopted without debate on the point.

30. The reason given by the Government was that the disenfranchisement of a convicted prisoner was considered as part of his punishment and that it aimed to enhance civic responsibility. The applicant however disputed that punishment could legitimately remove fundamental rights other than the deprivation of liberty and argued that this was inconsistent with the stated rehabilitative aim of prison. There was not any evidence that the ban pursued the purported aims nor any link shown between the removal of the vote and the prevention of crime or respect for the rule of law. Most courts and citizens were totally unaware that loss of voting rights accompanied the imposition of a sentence of imprisonment. Indeed the applicant argued that the ban took away civic responsibility and eroded respect for the rule of law, serving to alienate prisoners further from society.

31. The blanket ban was also disproportionate, arbitrary and impaired the essence of the right. It was unrelated to the nature or seriousness of the offence and varied in its effects on prisoners depending on whether their imprisonment coincided with an election. It potentially deprived a significant proportion of the population (some 74,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them. In addition, the applicant submitted that, as a post-tariff prisoner, the punishment element of his sentence had expired

and he was held on grounds of risk in which case no alleged justification of punishment could remain either. He referred to a trend in Canada (with particular emphasis on the decision of the Supreme Court in *Sauvé No. 2* holding to be unconstitutional a bar imposed on prisoners sentenced to two years imprisonment or more), South Africa and other European states to enfranchise prisoners, claiming that 19 countries operated no ban while eight had a partial or specific ban. He concluded that there was no convincing reason, beyond punishment, to remove the vote from convicted prisoners and that this additional sanction was not in keeping with the idea that the punishment of imprisonment was the deprivation of liberty and that the prisoner did not thereby forfeit any other of his fundamental rights save in so far as this was necessitated by considerations of security etc.

2. The Government

32. The Government submitted that under Article 3 of Protocol No. 1 the right to vote was not absolute and that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised. A wide margin should be accorded as the decision to impose limits was that of the legislature which deserved to be given particular weight and as an extensive variation in practice existed between Contracting States in relation to convicted prisoners some 18 countries imposed no restriction, 13 prohibited all prisoners from voting, with some restrictions imposable in another 12. A variety of approaches was also taken by democratic states outside Europe. Insofar as the applicant relied on the Canadian case, *Sauvé No. 2*, they pointed out that it was a narrow decision by five votes to four, with a strong dissenting judgment referring to the diverse practice in Europe and that it concerned a differently framed domestic human rights instrument to which the margin of appreciation was not applicable.

33. The Government stated that the policy has been adhered to over many years with the explicit approval of Parliament, most recently in the Representation of the People Act 2000, which was accompanied by a statement of compatibility under the Human Rights Act, indicating that the Secretary of State considered it to be compatible with the Convention. They argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law, by depriving those who have breached the basic rules of society of the right to have a say in the way such rules are made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country. These aims were accepted as legitimate in the case-law of the Commission.

34. The measure was also proportionate as it only affected those who had been convicted of crimes sufficiently serious, in the individual circumstances, to warrant an immediate custodial sentence, excluding those subject to fines, suspended sentences, community service or detention for contempt of court as well as fine defaulters and remand prisoners. Moreover as soon as prisoners ceased to be detained the legal incapacity was removed. The duration was fixed by the court at the time of sentencing. It thus did not completely bar voting for life save for a small category of the most serious offenders and should be regarded as a restriction on the right to vote which did not impair the essence of the right, which was to allow the free expression of the opinion of the people in a general election.

35. As regards the allegedly arbitrary effects, the Government argued that, unless the Court were to hold that there was no margin of appreciation at all in this context, it had to be

accepted that a line must be drawn somewhere. Finally, the impact on this particular applicant was not disproportionate since he was imprisoned for life and would not, in any event, have benefited from a more tailored ban, such as that in Austria, affecting those sentenced for over one year.

B. The Court s assessment

1. General principles

36. While Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people, the Court s case-law establishes that it guarantees individual rights, including the right to vote and to stand for election. Although those rights are central to democracy and the rule of law, they are not absolute and may be subject to limitations. The Contracting States have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 52; and more recently, *Matthews v. United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II).

2. Application in the present case

37. The Court recalls that pursuant to section 3 of the Representation of the People Act 1983 the applicant is prevented from voting at any parliamentary or local election as he is serving a prison sentence, in his case, a life sentence. Local elections falling outside the scope of Article 3 of Protocol No. 1, the Court s examination has focussed on whether this bar on the exercise of the applicant s right to vote in parliamentary elections complies with the requirements identified above.

38. It observes that there have been few recent or directly relevant cases on this type of disenfranchisement. In the case of *M.D.U. v. Italy* (no. 58540/00, decision of 28 January 2003) the Fourth Section rejected complaints of a judge-imposed bar on voting under Article 3 of Protocol No. 1 where the applicant had been convicted of fiscal fraud offences and sentenced to three years imprisonment, with the additional penalty of prohibition of exercising public functions for two years. In two old cases, predating the judgment in *Mathieu-Mohin*, the Commission considered that it was open to the legislature to remove political rights from persons convicted of uncitizenlike conduct (gross abuse in their exercise of public life during the Second World War) and from a person sentenced to eight months imprisonment for refusing to report for military service, where reference was made to the notion of dishonour that certain convictions carried with them for a specific period and which might be taken into account by the legislature in respect of the exercise of political rights (no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 245). In *Patrick Holland v. Ireland* (no. 24927/94, Commission decision of 14 April 1998, DR 93, p. 15), where, since there was no provision permitting a serving prisoner to vote in prison, the applicant, who was sentenced to seven years for possessing explosives, was *de facto* deprived

of the vote, the Commission found that the suspension of the right to vote did not thwart the free expression of the opinion of the people in the choice of the legislature and could not be considered arbitrary in the circumstances of the case. The Court would observe that the Commission in that case, by confining itself to the question of whether the bar was arbitrary, omitted to give attention to elements of the test laid down in *Mathieu-Mohin*, namely, the legitimacy of the aim and the proportionality of the measure.

39. The Court therefore considers that it must look afresh at the issues arising from an automatic statutory bar on voting imposed on convicted prisoners.

40. As a preliminary remark, concerning the margin of appreciation, it notes the divergences existing in the law and practice within Contracting States. At one end of the spectrum, there are some 18 countries in which no restrictions are imposed on prisoners rights to vote; in some 13 countries prisoners are not able to vote, due to operation of law or lack of enabling provisions; and between these extremes in the remainder of Contracting States loss of voting rights is tailored to specific offences or categories of offences or a discretion is left to the sentencing court. This lack of clear consensus underlines the importance of the margin of appreciation afforded to national legislatures in laying down conditions governing the right of franchise (see, *mutatis mutandis*, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, § 58).

41. That said however, the Court does not consider that a Contracting State may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition. The Court has had occasion in many cases to underline the importance, in the interpretation and application of Convention rights, of democratic values (for example, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 87), including the crucial role played by elected representatives in defending the interests of the electorate (for example, *Jerusalem v. Austria*, no. 26958/95, ECHR 2001-I, § 36; see also *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X, concerning the legitimate measures of protection which attach to the performance of parliamentary functions). The right to vote for those elected representatives must also be acknowledged as being the indispensable foundation of a democratic system. Any devaluation or weakening of that right threatens to undermine that system and it should not be lightly or casually removed.

(a) Legitimate aim

42. Turning first to the question of whether the restriction in this case pursues a legitimate aim, the Court recalls that the Government have asserted that there are two aims: the first is to prevent crime and punish offenders; the other is to enhance civil responsibility and respect for the rule of law by depriving those who have seriously breached the basic rules of society of the right to have a say in the way such rules are made for the duration of their sentence . The former aim was reflected in the statement made by the Parliamentary Under-Secretary of State for Northern Ireland when the Representation of the People Act 2000 was under consideration (paragraph 19 above).

43. In this context, the Court has found that the Canadian Supreme Court judgment in *Sauvé No. 2* provides a detailed, and helpful, examination of the purposes pursued by prisoner disenfranchisement (see paragraphs 24-26 above) While, as the Government pointed out, the

decision was taken by five votes to four, it may be noted that this was in relation to a less restrictive bar imposed on prisoners (those sentenced to two years or more) and that in the first *Sauvé* case, concerning a blanket bar on all convicted prisoners, the decision was unanimous. Taking due account of the difference in text and structure of the Canadian Charter, the Court nonetheless finds that substance of the reasoning may be regarded as apposite in the present case.

44. As regards the purpose of preventing crime and punishing offenders by imposing the additional punishment of removal of the right to vote, the Convention organs have emphasised in a number of different contexts 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, even though the enjoyment of those rights must inevitably be tempered by the requirements of his situation. The mere fact of imprisonment has not been found sufficient to justify the imposition of blanket restrictions on the right of a prisoner to correspond (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A, no. 61), to have effective access to a lawyer or to court (*Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A, no. 80; *Golder v. the United Kingdom*, 21 February 1975, Series A, no. 18), to have access to his family (*X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113), to practise his religion (*Poltoratskiy v. Ukraine*, no. 38812/97, ECHR 2003-..., §§ 167-171), to exercise freedom of expression (*T. v. the United Kingdom*, no. 8231/78, Commission report, 12 October 1983, DR 49, p. 5, §§ 44-84) or to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission report, 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission report, 10 July 1980, DR 24, p. 72).

45. It may be noted that the loss of the right to vote plays no overt role in the sentencing process in criminal cases in the United Kingdom. The majority in the *Sauvé* case also 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.

46. As regards the purpose of enhancing civic responsibility and respect for the rule of law, there is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or uncitizen-like but whose crime is not met by such a consequence. There is much force in the arguments of the majority in *Sauvé* 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.

47. Notwithstanding its doubts as to the validity of either aim in the modern day however, the Court notes the varying political and penal philosophies and policies that may be invoked in this context and for the purposes of the present case would refrain from ruling that these aims cannot be regarded as legitimate, even on an abstract or symbolic plane. It leaves the question open as it is unnecessary to decide it in the present case, for the reasons set out below.

(b) Proportionality

48. The Court notes that the restriction as applied in the United Kingdom does distinguish between different reasons for detention and varying types of crime and may be regarded as less draconian than the regime applying in certain other jurisdictions; it affects only those convicted of crimes sufficiently serious to warrant an immediate custodial sentence; it does not apply to prisoners on remand, those imprisoned for default in paying fines or those detained for contempt of court. Furthermore the incapacity is removed as soon as the prisoner ceases to be detained.

49. Nonetheless, the provision strips of their Convention right to vote a large category of persons (over 70,000) in a manner which is indiscriminate. It imposes a blanket restriction on all convicted prisoners. It applies automatically to all such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence. As pointed out in the Canadian courts, the actual effect on an individual prisoner s right to vote will depend, somewhat arbitrarily, on the period during which he happens to serve his sentence. A prisoner sentenced to a week s imprisonment for a minor infraction may lose the right to vote if detained over election day whereas a prisoner serving several years for a more serious crime may, by chance, avoid missing an election. An additional anomaly arises in this case, where the applicant, serving a life sentence, has completed that part of sentence relating to punishment and continues to be detained only on grounds of his continuing danger to society. Insofar as a disqualification from voting is to be seen as part of a prisoner s punishment, there is no logical justification for it to continue in the case of the present applicant. The justification offered by the Government is that such prisoners may properly be denied a vote while they remain detained because of the danger which they present. The Court does not find this a convincing argument, in particular as it has not been explained how this falls under the aims advanced by the Government.

50. The Government have argued, in effect relying on the margin of appreciation, that it must be permissible for the legislature to draw the line at some point concerning prisoners and that, in any event, this applicant, who has committed a very serious offence and received a life sentence, has not suffered any detriment as he would have lost his right to vote under a more narrowly defined restriction.

51. The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. The applicant in the present case lost his right to vote as the result of the imposition of an automatic and blanket restriction on convicted prisoners franchise and may therefore claim to be a victim of the measure. The Court cannot speculate as to whether the applicant would still have been deprived of the vote even if a more limited restriction on the right to prisoners to vote had been imposed, which was such as to comply with the requirements of Article 3 of Protocol No. 1.

52. The Court concludes that there has been a breach of Article 3 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

53. The applicant complains that he is discriminated against as a convicted prisoner, invoking Article 14 which provides:

> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

54. Having regard to the conclusion above under Article 3 of Protocol No. 1 of the Convention, the Court considers that no separate issue arises under Article 14 and makes no separate finding.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

55. The applicant complains that the disenfranchisement prevents him from exercising his freedom of expression through voting, invoking Article 10 of the Convention which provides as relevant:

> 1. Everyone has the right to freedom of expression. ...
>
> 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.

56. The Court considers that Article 3 of Protocol No. 1 may be regarded as the *lex specialis* as regards the exercise of the right to vote and finds, given its conclusion as to violation of that provision above, that no separate issue arises under Article 10 in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

A. Damage

58. The applicant claimed 200 pounds sterling (GBP) as out of pocket expenses (the cost of telephone calls and letters) to his legal representatives and GBP 5,000 for suffering and distress caused by the violation.

59. The Government were of the view that any finding of a violation should in itself constitute just satisfaction for the applicant. If alternatively the Court were to make an award, it considered the amount should not be more than GBP 1,000.

60. The Court has considered below the applicant s claims for his own costs in the proceedings. As regards non-pecuniary damage, the Court notes that it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with this judgment. In the circumstances, it considers that this may be regarded as providing the applicant with just satisfaction for the breach in this case.

B. Costs and expenses

61. The applicant claimed the costs incurred in the High Court and Court of Appeal in seeking redress in the domestic system in relation to the breach of his rights, namely his solicitors and counsels fees and expenses in the High Court of GBP 26,115.82 and in the Court of Appeal of GBP 13,203.64. He claimed GBP 18,212.50 in respect of fees and expenses in the proceedings before this Court. This made a total of GBP 62,731.96, inclusive of value-added tax (VAT).

62. The Government submitted that, as the applicant was legally aided during the domestic proceedings, he did not actually incur any costs. To the extent that the applicant appears to be claiming that further sums should be awarded that were not covered by legal aid, they submitted that any such further costs should not be regarded as necessarily incurred or reasonable as to quantum and that they should be disallowed. As regards the costs in Strasbourg the Government considered that the rate of GBP 300 per hour for 20 hours preparation was excessive, as were the costs and number of days (three) claimed for attendance at the hearing. As not all the applicant s complaints were declared admissible, they invited the Court to reduce the costs accordingly.

63. The Court recalls that that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom (just satisfaction)*, nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom* (*Article 41*), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). Since however in the present case the costs of the applicant s legal representation in his application to the High Court and Court of Appeal contesting his disenfranchisement were paid by the legal aid authorities, it cannot be said that he incurred those expenses and he has not shown that he was required, or remains liable, to pay his representatives any further sums in that regard. This application before the Court cannot be used as a retrospective opportunity to charge fees above the rates allowed by domestic legal aid scales.

64. As regards the costs claimed for the proceedings in Strasbourg, the Court notes the Government s objections and finds that the claims may be regarded as unduly high, in particular as regards the claim for three days for a hearing which lasted one morning and the lack of itemisation of work done by the solicitor. While some complaints were declared inadmissible, the applicant s essential concern and the bulk of the argument centred on the

bar on his right to vote, on which point he was successful under Article 3 of Protocol No. 1. No deduction has therefore been made on that account. Taking into account the amount of legal aid paid by the Council of Europe and in light of the circumstances of the case, the Court awards 12,000 euros (EUR) inclusive of VAT for legal costs and expenses. In respect of the applicant s own claim for expenses in pursuing his application, the Court notes the lack of any itemisation but accepts that some costs have been occurred by him. It awards to the applicant himself EUR 144.

C. Default interest

65. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of Protocol No. 1;

2. *Holds* that no separate issue arises under Article 14 of the Convention;

3. *Holds* that no separate issue arises under Article 10 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement;

(i) EUR 12,000 (twelve thousand euros) in respect of costs and expenses incurred by the applicant s legal representatives;

(ii) EUR 144 (one hundred and forty four euros) in respect of the applicant s costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant s claim for just satisfaction.

Done in English, and notified in writing on 30 March 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O BOYLE Matti PELLONPää

Registrar President

[Context] [Hide Context]

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