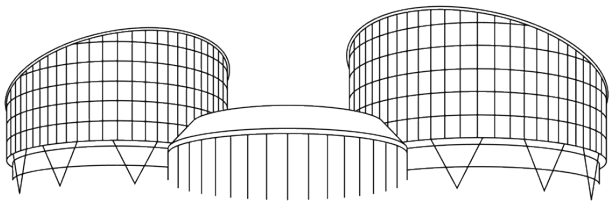

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GREENS and M.T. v. THE UNITED KINGDOM

(Applications nos. 60041/08 and 60054/08)

JUDGMENT

STRASBOURG

23 November 2010

FINAL

11/04/2011

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the cases of Greens and M.T. v. the United Kingdom**,**

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

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi,
Vincent Anthony de Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 16 November 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 60041/08 and 60054/08) 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 two British nationals, Mr Robert Greens and M.T. ("the applicants"), on 14 November 2008. The President of the Chamber acceded to M.T.'s request, following communication of the case, not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr T. Kelly, a solicitor practising in Coatbridge. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott, of the Foreign and Commonwealth Office.

3. The applicants alleged a violation of Article 3 of Protocol No. 1 to the Convention as a result of the refusal to enrol them on the electoral register for domestic elections and for elections to the European Parliament. They further complained under Article 13 that they did not have an effective remedy.

4. On 25 and 28 August 2009 respectively the President of the Chamber decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

5. The Equality and Human Rights Commission was granted leave to intervene in the proceedings as a third party pursuant to Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court.

6. On 6 July 2010 the Chamber decided to notify the parties that it was considering the suitability of applying the pilot judgment procedure in the

cases. Written comments on the suitability of the pilot judgment procedure were received from both parties.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Mr Greens, was serving a determinate sentence of imprisonment at HM Prison Peterhead at the time his application was lodged with the Court. He was eligible for release on parole from 29 May 2010. It is not known whether he has been released on parole. The second applicant, M.T., is currently serving a determinate sentence of imprisonment at HM Prison Peterhead. According to information provided by the Government, he is scheduled to be released in November 2010.

8. On 23 June 2008 the applicants posted voter registration forms to the Electoral Registration Officer ("ERO") for Grampian. They sought registration on the electoral register at their address in HM Prison Peterhead.

9. On 3 July 2008, the ERO replied referring to previous applications for registration which were refused in 2007 under sections 3 and 4 of the Representation of the People Act 1983, as amended, (see paragraph 19 and 21 below) on the basis of the applicants' status as convicted persons currently detained. The ERO requested clarification of whether there had been a change in circumstances in the applicants' cases.

10. On 5 August 2008 the applicants wrote to the ERO arguing that following the Court's decision in *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX, and the declaration of incompatibility made by the Registration Appeal Court in the case of *Smith v. Scott* (see paragraphs 27-30 below), the ERO was obliged to add their names to the electoral register.

11. On 12 August 2008, the ERO refused the applicants' registration applications on the basis of their status as convicted persons detained in a penal institution.

12. By letter of 14 August 2008 the applicants informed the ERO of their wish to appeal to the Sheriff Court against the refusal.

13. On 12 September 2008 the Sheriff considered the applicants' appeals together with appeals in a number of other similar cases and ordered written representations to be lodged.

14. On 25 September 2008 the applicants wrote to the court summarising their position. They provided further submissions on 1 October 2008. The applicants alleged that legal aid was not available for the proceedings and they therefore represented themselves.

15. On 10 November 2008 the applicants' appeals were refused.

16. On 20 November 2008 another serving prisoner whose appeal was also refused on 10 November 2008, Mr Beggs, applied to Aberdeen Sheriff Court to request that it state a case for the opinion of the Registration Appeal Court (see paragraph 22 below). On 30 December 2008, the Sheriff refused to state a case. Mr Beggs subsequently applied to the Court of Session for an order requiring the Sheriff to state a case, on the ground that the Sheriff had erred in law in refusing to do so. The most recent information available to the Court was that those proceedings were pending. It is not clear whether that remains the case.

17. On 4 June 2009, elections to the European Parliament took place. The applicants were ineligible to vote.

18. On 6 May 2010 a general election took place in the United Kingdom. The applicants were ineligible to vote.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Electoral legislation

1. The Representation of the People Act 1983

19. Section 3 of the Representation of the People Act 1983 ("the 1983 Act") 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."

20. 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)).

21. Section 4 of the 1983 Act provides:

> "(1) A person is entitled to be registered in the register of parliamentary electors for any constituency or part of a constituency if on the relevant date he–
>
> (a) is resident in the constituency or that part of it;
>
> (b) is not subject to any legal incapacity to vote (age apart);
>
> ...
>
> (3) A person is entitled to be registered in the register of local government electors for any electoral area if on the relevant date he–
>
> (a) is resident in that area;

(b) is not subject to any legal incapacity to vote (age apart);

...”

22. Sections 56-57 set out that there is a right of appeal against a decision of the registration officer. In Scotland, a further appeal lies on any point of law from a decision of the Sheriff to a court of three judges of the Court of Session (known as the “Registration Appeal Court”).

2. The European Parliamentary Elections Act 2002

23. Section 8(1) of the European Parliamentary Elections Act 2002 (“the 2002 Act”) provides that a person is entitled to vote at an election to the European Parliament if he is within any of subsections (2) to (5) of section 8. These subsections provide, in so far as relevant, as follows:

“(2) A person is within this subsection if on the day of the poll he would be entitled to vote as an elector at a parliamentary election ...

...

(5) A person is within this subsection if he is entitled to vote in the electoral region by virtue of the European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001 (S.I. 2001/1184) (citizens of the European Union other than Commonwealth and Republic of Ireland citizens).”

B. The Human Rights Act

24. Section 3 of the Human Rights Act 1998 (“the Human Rights Act”) provides as follows:

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

...”

25. Section 4 of the Act 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.

...”

26. Finally, section 6(1) of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(2) clarifies that:

> "Subsection (1) does not apply to an act if–
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

C. Legal challenges to the ban on prisoners voting

1. Proceedings in Scotland

a. *Smith v. Scott* 2007 SLT 137

27. In *Smith v. Scott*, the Registration Appeal Court considered the refusal of the ERO for Clackmannanshire, Falkirk and Stirling to enrol a convicted prisoner on the electoral register on the basis of sections 3 and 4 of the 1983 Act, in anticipation of elections to the Scottish Parliament. The Secretary of State conceded in the proceedings that in light of the judgment of this Court in *Hirst* section 3(1) of the 1983 Act was incompatible with Article 3 of Protocol No. 1 to the Convention and that the appellant's rights under that Article had been violated. He also accepted that for the purposes of Article 3 of Protocol No. 1 the Scottish Parliament was a legislature. The court, handing down its judgment on 24 January 2007, summarised the matters for examination in the following terms:

> "1. Since section 3(1) of the 1983 Act, giving the words of that provision their ordinary meaning, was incompatible with Article 3 of the First Protocol, the Court should consider whether it was possible, in terms of section 3(1) of the Human Rights Act, to read it down in such a way as to make it compatible. If that was possible, it should be done and the appeal should be allowed.
>
> 2. If, however, that was not possible, then the appeal would be refused but the Court should consider whether it could and should make a declaration of incompatibility in respect of section 3(1) of the 1983 Act in terms of the Human Rights Act section 4(2). If that could be done, it should be.
>
> 3. If the Court did not take that course, it should consider, in the context of the requirement in terms of section 6 of the Human Rights Act for the Court not to act in a manner incompatible with the appellant's Convention rights, whether by refusing the appeal and providing the appellant with no remedy it would be acting in breach of that statutory requirement. If it would, then the Court was obliged to give such remedy as

was open to it within its powers at common law or under any statute. Such a remedy would include granting a declarator that the appellant's rights under Article 3 of the First Protocol of the Convention had been violated. It was open to the Court in the exercise of its inherent jurisdiction to grant such a declarator."

28. Counsel for the appellant argued that if there was some "possible" interpretation (or "reading down") of section 3(1) of the 1983 Act which would remove the incompatibility identified by this Court in *Hirst*, the Registration Appeal Court should adopt it. He considered that insertion of words to the effect that any ban on prisoner voting "would apply at the discretion of the sentencing judge" would qualify, but not contradict, the "grain of the legislation" and that the case should accordingly be resolved along those lines. Counsel for the respondent submitted that while section 3 of the Human Rights Act empowered the court to interpret legislation, where possible, in a certain way, it did not entitle the court to amend or reverse clear legislative provisions, nor otherwise to usurp the legislative function of Parliament. The court summarised counsel's argument as follows:

"26. ... section 3(1) of the 1983 Act clearly provided for a blanket ban on voting which applied to all convicted prisoners serving custodial sentences. There was thus no 'grain of the legislation' which could properly serve as a starting point for any interpretation designed to clothe some or all of such prisoners with voting rights. Over and above that, it was necessary to recognise the complexity of the issues which had been opened up by the decision of the European Court of Human Rights in *Hirst*, and the extensive consultation which would have to be undertaken before the Government could form a view as to the appropriate way forward. Since the Convention rights conferred by Article 3 of the First Protocol were in no way absolute, there were many possible levels at which the line might be drawn for the enfranchisement or disenfranchisement of convicted prisoners in different categories, and it could be no part of this Court's function to make an uninformed choice among such alternatives."

29. The court continued:

"27. Against that background, we are clearly of the opinion that the appellant's submission must be rejected and we decline to 'read down' section 3(1) of the 1983 Act in the manner proposed ... In our opinion to read down section 3(1) of the 1983 Act as providing for full or partial enfranchisement of convicted prisoners serving custodial sentences would be ... to depart substantially from a fundamental feature of the legislation. Without the benefit of consultation or advice, this Court would, in a real sense, be legislating on its own account, especially in view of the wide range of policy alternatives from which a 'possible' solution would require to be selected ..."

30. The court, however, made a declaration of incompatibility in respect of section 3(1) of the 1983 Act.

b. *Traynor and another v. Secretary of State for Scotland* [2007] CSOH 78

31. On 20 April 2007, the Outer House of the Court of Session considered the disenfranchisement of prisoners in judicial review proceedings challenging the legality of an order made by the Secretary of State for Scotland regarding the organisation of the elections to the Scottish

Parliament in May 2007 and the involvement of the Scottish Executive in those elections. The challenge was based on the provisions of the Scotland Act 1998 and in particular the requirement that Scottish legislation and acts of the Scottish Executive be compatible with the Convention. Lord Malcolm rejected the claim for interdict (injunction), emphasising that it was for Parliament to decide whether to remove the incompatibility between domestic legislation and the Convention.

32. On the question of declaratory relief, he added:

> "11. I should record that I was asked to repeat the declarator of incompatibility pronounced in *Smith*. There is no dispute in these petitions as to the incompatibility between section 3 of the 1983 Act and article 3 of the first protocol. The discussion focused on other matters. That incompatibility has been authoritatively determined in *Smith*. I am satisfied that a further declarator in these proceedings is unnecessary and inappropriate ..."

2. Proceedings in Northern Ireland

a. *R v. Secretary of State, ex parte Toner and Walsh* [2007] NIQB 18

33. In the case of *Toner and Walsh*, two convicted prisoners sought, in light of *Hirst*, a declaration that the disqualification of convicted prisoners from voting did not apply to elections to the Northern Ireland Assembly. After careful consideration of the judgment of this Court in *Hirst* and the decision of the Registration Appeal Court in *Scott v. Smith*, Gillen J held:

> "9(iv). I consider that the [Strasbourg] court has deliberately left the method of compliance in the hands of the Contracting States subject to the overriding veto of the court ... Accordingly I see nothing intrinsically objectionable about the various options being explored by the Government proposals contained in the consultation paper of 14/12/06 which makes up its response to the *Hirst* decision. The consequence of this is that not only is Mr Sweeney [Deputy Director, Rights and International Relations in the Political Directorate at the Northern Ireland Office] entitled to say ... that the Government is unlikely to propose that prisoners serving sentences as long as those of the applicants should become entitled to vote whilst detained, but I am left singularly unconvinced that the applicants are currently or will ever be able to lay claim to a right to vote. I reject the argument of Mr Larkin [for the applicants] that because a blanket prohibition on prisoners is incompatible with the Convention that somehow converts into the proposition that all prisoners are currently entitled to vote until the vacuum is filled. In my view that conforms neither with principle nor logic and certainly does not find any authority in *Hirst* which expressly recognises that restraints on Article 3 Protocol 1 are justifiable provided they pursue a legitimate aim and are proportionate."

3. Proceedings in England

a. *Chester v. Secretary of State for Justice and another* [2009] EWHC 2923 (Admin)

34. In judicial review proceedings brought in the High Court in *Chester v. Secretary of State for Justice and another*, the claimant, a prisoner, argued that his disqualification from voting in the then pending June 2009 European Parliament elections breached his rights under Article 3 of Protocol No. 1 and under European Union law. He was granted permission to bring his claim on 27 March 2009. At the hearing before Burton J, he argued that section 8 of the 2002 (see paragraph 23 above) Act should be "read down" in order to enable him to vote or, in the alternative, a declaration of incompatibility as regards section 3 of the 1983 Act and section 8 of the 2002 Act should be made. He accepted that no argument could be mounted that a "reading down" of section 3 of the 1983 Act would be feasible, within the parameters of the Human Rights Act.

35. The claim was dismissed by Burton J on 28 October 2009. As to the possibility of "reading down" section 8, Burton J held:

> "29. ... I am being asked effectively to draft fresh legislation by bolting on to existing legislation additional words which not only dramatically change its nature, but are imminently to be considered by the Legislature. Two competing alternatives are presented to me for consideration. One of these affects the franchise by allowing all convicted prisoners to vote. The other amends the statute so as to allow one particular category of convicted prisoners, the post-tariff lifers, to vote, while still retaining a bar on all other prisoners, including those only serving very short terms of imprisonment, to whom it seems, on any basis, the Government is proposing that the franchise should be extended; and to make such differentiation simply because the claimant in this case happens to be one of the category in whose favour the statute would now be amended.
>
> 30. The first proposal is not acceptable, not least for the same reasons as were enunciated by Gillen J in paragraph 9(iv) of his judgment [in *Toner and Walsh*], which I have cited earlier. Enfranchisement of all prisoners, including those with a minimum term/tariff of life which may or may not be what the legislature after full consultation and discussion of all the issues may consider, but it would be a dramatic change, was not, as Gillen J points out, required by *Hirst*. As for the alternative, selection of one particular category of prisoner simply because one of that category happens to be the Claimant, to effect what would in fact be a substantial amendment of the legislation, but only as to one category of convicted prisoner, cannot be an appropriate exercise of this jurisdiction. It would lead to piecemeal and possibly continuous amendments, without consideration by Parliament, of legislation dealing with matters of important social policy, all depending upon which claimant happened to be before the Court at any one time."

36. Burton J concluded that if and in so far as section 8 of the 2002 Act was incompatible with the Convention or with EU law, reading it down was not an available remedy.

37. As to whether it would be appropriate to make a declaration of incompatibility in respect of section 3 of the 1983 Act, Burton J concluded:

> "34. ... I am content to say that there is no need for any declaration to be made by yet another court, as one has already been made which is binding on the UK Government.
>
> 35. However, towards the end of his submissions, Mr Southey [for the claimant] put forward another basis upon which to support his case for such a declaration. He submitted that, as the grant of a declaration is discretionary, there is no reason why it cannot be made again, if it is made on different grounds. He submits that I can and should make a declaration that s3 of the 1983 Act is incompatible with the ECHR, and do so by reference to the fact that it excludes (together with all other convicted prisoners) post-tariff lifers. Then there would be some point in making the declaration, given that the Government's proposed legislation seems, subject to what may have emerged from the second consultation, to be intended not to make any change in their position. Hence, it would be a declaration as to the incompatibility with regard to the present legislation, but to be made because it does not appear as if there is going to be any amelioration of his client's position by reference to the proposed legislation. This would effectively simply amount to the declaration of incompatibility being a peg upon which Mr Southey can hang his substantive submissions, to which I shall come in a moment. Subject however to that argument ... I reject his suggestion that I should make a declaration of incompatibility."

38. In respect of the application for a declaration of incompatibility as regards section 8 of the 2002 Act, Burton J said:

> "43. I am satisfied that, but for Mr Southey's 'proposed legislation argument', this course is wholly inappropriate as a matter of discretion:
>
> (i) Simply as a matter of context and background, there is no presently intended European election, to which alone s8 would apply ... These proceedings were brought at the time when the June 2009 European elections were still in the future. There will now not be further such elections for 5 years. By that time, whatever the Claimant's personal position may be, new legislation, whatever it may be, will be well in place (and will have been capable of challenge, if appropriate).
>
> (ii) More significantly, it is plain that the challenge to s8 is purely parasitic to the real challenge, which is to s3. S8 merely provides that (with the exceptions discussed) the same people can vote in European elections as can vote in UK elections. When there is new legislation in place of s3, s8 will automatically follow. A declaration has already been made in relation to s3, upon which s8 wholly hangs, and legislation is to be put before Parliament with the intention of curing the contravention of the ECHR.
>
> 44. For the reasons I have given, namely that there is already a declaration of such incompatibility in relation to the governing section, s3, upon which s8 entirely depends, the same reasons drive me to conclude that there is no basis in the exercise of my discretion to grant a declaration of incompatibility in relation to s8, any more than there is to s3 ..."

39. On the need for a further declaration of incompatibility as a result of the apparently limited scope of the proposed legislation, Burton J considered that any declaratory or other relief which was intended to

interfere with the process by which new legislation resulting from the consultation process was put before and debated by Parliament was inappropriate and was not to be granted. In any case, he concluded that the court was:

> "... ill-equipped to decide this issue of social policy, and certainly ill-equipped to legislate and provide for the consequences of any view, plain and obvious or otherwise, as to which category of prisoners ought to be enfranchised as a result of the removal of the absolute ban."

40. The claimant appealed and on 13 May 2010, was granted leave to appeal by the Court of Appeal. The appeal was heard on 3 November 2010 and the judgment is pending.

D. The report of the Joint Committee on Human Rights

41. In its recent report, "Enhancing Parliament's role in relation to human rights judgments", 15th Report of 2009-10, published in March 2010, a parliamentary committee, the Joint Committee on Human Rights, considered domestic developments in the execution of the Grand Chamber's judgment in *Hirst* and noted:

> "108. ... our overriding disappointment is at the lack of progress in this case. We regret that the Government has not yet published the outcome of its second consultation, which closed almost 6 months ago, in September 2009. This appears to show a lack of commitment on the part of the Government to proposing a solution for Parliament to consider.
>
> ...
>
> 116. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK*. The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable.
>
> ...
>
> 117. ... Where a breach of the Convention is identified, individuals are entitled to an effective remedy by Article 13 ECHR. So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation."

E. Recent developments

42. On 2 November 2010 a short debate took place in the House of Commons following a question to the Government regarding their plans to give prisoners the right to vote. In the course of that debate, the Minister

emphasised that the Government were under a legal obligation to change the law following the judgment in *Hirst*. He said that the Government were actively considering how to implement the judgment and that once decisions had been made, legislative proposals would be brought forward.

43. On 3 November 2010, in response to a question in the House of Commons, the Prime Minister also emphasised that the Government were required to come forward with proposals to implement the Court's judgment in *Hirst*.

III. RELEVANT RESOLUTIONS AND DECISIONS OF THE COMMITTEE OF MINISTERS

44. On 3 December 2009, in the context of their supervision of the execution of the Court's judgment in *Hirst*, the Committee of Ministers adopted Interim Resolution CM/ResDH(2009)160, which stated as follows:

> "The Committee of Ministers, ...
>
> Recalling that, in the present judgment, the Court found that the general, automatic and indiscriminate restriction on the right of convicted prisoners in custody to vote, fell outside any acceptable margin of appreciation and was incompatible with Article 3 of Protocol No. 1 to the Convention;
>
> Recalling that the Court, while acknowledging that the rights bestowed by Article 3 of Protocol 1 are not absolute, expressly noted that in the present case the blanket restriction applied automatically to all prisoners, irrespective of the length of their sentence, the nature or gravity of their offence and their individual circumstances;
>
> Recalling further that the Court found 'no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote';
>
> Noting that the blanket restriction imposed by Section 3 of the Representation of the People Act 1983 remains in full force and effect;
>
> Recalling that the United Kingdom authorities, in a revised Action Plan submitted in December 2006, committed to undertaking a two-stage consultation process to determine the measures necessary to implement the judgment of the Court, with a view to introducing the necessary draft legislation before Parliament in May 2008;
>
> Noting that the United Kingdom authorities have provided detailed information as regards the consultation process, and that they are committed to continuing to do so;
>
> Noting however that the second consultation stage ended on 29 September 2009, and the United Kingdom authorities are now undertaking a detailed analysis of the responses thereto, in order to determine how best to implement a system of prisoner enfranchisement based on the length of custodial sentence handed down to prisoners,
>
> EXPRESSES SERIOUS CONCERN that the substantial delay in implementing the judgment has given rise to a significant risk that the next United Kingdom general

election, which must take place by June 2010, will be performed in a way that fails to comply with the Convention;

URGES the respondent state, following the end of the second stage consultation period, to rapidly adopt the measures necessary to implement the judgment of the Court;

..."

45. On 4 March 2010 the Committee of Ministers adopted a decision in which they noted that notwithstanding the Grand Chamber's judgment in *Hirst*, a declaration of incompatibility with the Convention under the Human Rights Act by the highest civil appeal court in Scotland in the case of *Smith v. Scott* and the large number of persons affected, the automatic and indiscriminate restriction on prisoners' voting rights remained in force; reiterated their serious concern that a failure to implement the Court's judgment before the general election and the increasing number of persons potentially affected by the restriction could result in similar violations affecting a significant category of persons, giving rise to a substantial risk of repetitive applications to the European Court; and strongly urged the authorities rapidly to adopt measures, even if of an interim nature, to ensure the execution of the Court's judgment before the then pending general election.

46. On 3 June 2010 the Committee of Ministers adopted a further decision in which they expressed profound regret that despite the repeated calls of the Committee, the United Kingdom general election had been held on 6 May 2010 with the blanket ban on the right of convicted prisoners in custody to vote still in place; and expressed confidence that the new United Kingdom government would adopt general measures to implement the judgment ahead of elections scheduled for 2011 in Scotland, Wales and Northern Ireland, and thereby also prevent further, repetitive applications to the European Court.

47. On 15 September 2010 the Committee of Ministers adopted their most recent decision on the execution of *Hirst*, in the following terms:

"The Deputies,

1. recalled that in the present judgment, delivered on 6 October 2005, the Court found that the general, automatic and indiscriminate restriction of the right of convicted prisoners in custody to vote, fell outside any acceptable margin of appreciation and was incompatible with Article 3 of Protocol No. 1 to the Convention;

2. recalled that since its 1059th meeting (June 2009), the Committee has urged the United Kingdom to prevent future, repetitive applications by adopting general measures to implement the judgment;

3. deeply regretted that despite the Committee's calls to the United Kingdom over the years to implement the judgment, the risk of repetitive applications to the European Court has materialised as the Court has communicated 3 applications to the

government with a view to adopting the pilot judgment procedure and has received over 1 340 applications;

4. noted, that according to the information provided by the United Kingdom authorities during the meeting, the new government is actively considering the best way of implementing the judgment;

5. regretted, however, that no tangible and concrete information was presented to the Committee on how the United Kingdom now intends to abide by the judgment;

6. called upon the United Kingdom, to prioritise implementation of this judgment without any further delay and to inform the Committee of Ministers on the substantive steps taken in this respect;

7. highlighted in this connection that, within the margin of appreciation of the state, the measures to be adopted should ensure that if a restriction is maintained on the right of convicted persons in custody to vote, such a restriction is proportionate with a discernible and sufficient link between the sanction, and the conduct and circumstances of the individual concerned;

..."

IV. RELEVANT EUROPEAN UNION MATERIAL

A. The Treaty on the Functioning of the Union ("TFEU")

48. Article 20(2)(b) TFEU provides:

"2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

...

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

..."

49. Article 22(2) TFEU provides:

"Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

50. Article 223 TFEU provides:

> "1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.
>
> The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions ..."

51. To date, the Council has not adopted an instrument setting out a uniform election procedure. However, certain agreed principles are set out in the 1976 Act (see below).

B. The Act of 20 September 1976 concerning the election of the Members of the European Parliament by direct universal suffrage, as last amended by Council Decision 2002/772/EC ("the 1976 Act")

52. Article 1 of the 1976 Act provides:

> "1. In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.
>
> 2. Member States may authorise voting based on a preferential list system in accordance with the procedure they adopt.
>
> 3. Elections shall be by direct universal suffrage and shall be free and secret."

53. The 1976 Act also contains provisions on, *inter alia*, the allocation of seats, campaign expenses, the term and nature of members' mandates and the organisation of elections.

54. Article 8 clarifies that:

> "Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.
>
> These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system."

C. Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals

55. Article 1 of Directive 93/109/EC stipulates that the directive lays down the detailed arrangements whereby citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as a candidate in elections to the European Parliament.

56. Article 3 provides:

> "Any person who, on the reference date:
>
> (a) is a citizen of the Union ...;
>
> (b) is not a national of the Member State of residence, but satisfies the same conditions in respect of the right to vote and to stand as a candidate as that State imposes by law on its own nationals,
>
> shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence unless deprived of those rights pursuant to Articles 6 and 7."

57. In so far as relevant, Article 9 provides:

> "...
>
> 2. In order to have his name entered on the electoral roll, a Community voter shall produce the same documents as a voter who is a national. He shall also produce a formal declaration ...
>
> 3. The Member State of residence may also require a Community voter to:
>
> (a) state in his declaration under paragraph 2 that he has not been deprived of the right to vote in his home Member State;
>
> ..."

58. Article 6 refers to the right to stand as a candidate. Article 7 allows the State of residence to verify whether a person seeking to exercise his right to vote under the Directive has been deprived of that right in the home State. If the information provided invalidates the content of the declaration made under Article 9, the State of residence is required to take the appropriate steps to prevent the person concerned from voting.

D. The Marleasing principle

59. In a preliminary reference to the European Court of Justice ("ECJ") in case C-106/89 *Marleasing SA v La Comercial Internacional de*

Alimentacion SA, the ECJ was asked to consider the extent to which national courts were required to interpret national law in light of the wording and the purpose of an EC directive which had not been implemented by the Member State in question. The ECJ held that:

> "... the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter ..."

THE LAW

I. ADMISSIBILITY ISSUES

A. The parties' submissions

1. The Government

60. The Government argued that the applicants had failed to exhaust domestic remedies in that following the rejection of their appeals by the Sheriff (see paragraph 15 above), they had not requested that the Sheriff state a case for the consideration of the Registration Appeals Court or, subsequently, applied for an order from the Court of Session that the Sheriff state a case. The Government pointed out that Mr Beggs had taken these steps and that his application was still pending before the Court of Session (see paragraph 16 above).

61. The Government further referred to the judicial review proceedings commenced by Mr Chester in the High Court (see paragraphs 34-40 above). They relied on Mr Chester's claim for sympathetic interpretation of section 8 of the 2002 Act, in respect of which permission to appeal had recently been granted, as evidencing a potential effective remedy which the applicants had not exhausted. They added that the right to vote in European Parliament elections did not depend on the exercise of free movement rights but was guaranteed to all nationals of EU Member States. Accordingly, the applicants could have relied upon their rights under EU law, notwithstanding the fact that they had not exercised any free movement

rights. The Government emphasised that the Scottish courts had not been given the opportunity to examine arguments based on EU law.

62. The Government accepted that applicants were not required to pursue remedies which did not in reality offer any chance of redressing the alleged violation but emphasised that where there was doubt as to the prospects of success of a particular case it should be submitted to the domestic courts for resolution prior to an application being made to the Court. In particular, this Court had had occasion to consider *Hirst* in the recent cases of *Calmanovici v. Romania*, no. 42250/02, 1 July 2008 and *Frodl v. Austria*, no. 20201/04, 8 April 2010; in the Government's view each of those judgments might have had a significant impact upon the approach adopted by the Scottish courts. Accordingly, the Government concluded that the remedies available were potentially effective and therefore required to be exhausted by the applicants.

2. The applicants

63. The applicants disputed that any further remedy was open to them in respect of their complaint. In particular, they pointed out that Mr Beggs was an Irish citizen and that it appeared that his case was based upon the fact that in residing in the United Kingdom he was exercising his right of free movement under European Union law. He therefore sought to argue that he was entitled to rely directly upon his right to vote and stand as a candidate in European Parliament elections in his country of residence, as guaranteed by Article 20(2)(b) of the Treaty on the Functioning of the European Union (see paragraph 48 above). Mr Beggs' position was therefore to be distinguished from that of the applicants, who were both British nationals and were not exercising their free movement rights under EU law. Further, no right derived from EU law existed in respect of national elections. In any event, the judges of the Court of Session, sitting as the Registration Appeals Court in *Smith v. Scott*, had already stated unequivocally that the ERO had acted lawfully in refusing to enrol serving prisoners on the electoral register (see paragraph 29 above). The only possible relief which the applicants could have obtained had they sought to appeal the decision of the Sheriff in their cases was another declaration of incompatibility, which the applicants contended was not a remedy which they were required to exhaust before bringing their complaints to Strasbourg.

64. As to the Government's suggestion that a claim for a sympathetic interpretation of section 8 of the 2002 Act constituted a potential effective remedy which they had failed to exhaust, the applicants first emphasised that even if successful, such a claim would entitle them to vote only in the European elections and would have had no impact on their disenfranchisement in national elections or elections to the Scottish Parliament. Second, the applicants considered the Government's contention fanciful in light of the observations made by the judges of the Court of

Session in *Smith v. Scott* (see paragraph 29 above). These observations made it clear that courts in Scotland would not even consider, let alone uphold, any further argument based on a sympathetic interpretation of unequivocal legislation banning prisoners from voting in any election. Any suggestion that the proceedings in *Chester* should be viewed as evidence that there remained an effective remedy which had not been exhausted was, the applicants contended, simply wrong given that the Scottish legal system remained distinct from the English legal system and that decisions of the English courts were not binding on the Court of Session. The Court of Session had made its own views on the matter clear and the fact that English courts might adopt more sympathetic views was irrelevant.

3. The Equality and Human Rights Commission

65. The Equality and Human Right Commission ("EHRC") noted that a declaration of incompatibility had been made by the Registration Appeal Court in *Smith v. Scott* and were of the view that once one declaration had been made, the courts would generally decline to offer any further relief. They pointed to the judgment of the Court of Session in *Traynor and another* and the High Court judgment in *Chester* (see paragraphs 32 and 37 above). They concluded that there was no possibility for prisoners to bring further applications to court seeking the right to vote.

B. The Court's assessment

66. The Court reiterates that where the Government claims non-exhaustion they must satisfy the Court that the remedy proposed was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; and *Kennedy v. the United Kingdom*, no. 26839/05, § 109, ECHR 2010-...).

67. In the present case, the Government have argued that the applicants could have continued with their challenges to the refusal of the ERO to register their names on the electoral register and could have brought a claim under section 3 of the Human Rights Act seeking the 'reading down' of section 8 of the 2002 Act.

68. As to the former of these two proposed remedies, the Court refers to the judgment of the Registration Appeal Court in *Smith v. Scott*, in which it declined, in firm terms, to "read-down" section 3(1) of the 1983 Act in favour of the appellant in that case. No further appeal from the Registration Appeal Court, which is composed of three judges of the Court of Session, is possible. Even if a declaration of incompatibility were to be considered an

effective remedy, and the Court recalls in this regard that it has recently reiterated that the practice of giving effect to the national courts' declarations of incompatibility by amending offending legislation is not yet sufficiently certain for this to be so (see *Kennedy*, cited above, § 109), the Court emphasises that the Registration Appeal Court in *Smith v. Scott* had already made such a declaration. There was no advantage in obtaining a second one, a point made by the Court of Session in *Traynor and another* and by the High Court in *Chester* (see paragraphs 32 and 37 above). In the circumstances, there was nothing to be achieved by the applicants in pursuing their legal challenges to the decision of the ERO in the hope of obtaining a further declaration of incompatibility.

69. As to the possibility of seeking the "reading down" of section 8 of the 2002 Act by reference to section 3 of the Human Rights Act and obligations arising under EU law, the Court emphasises at the outset that such an application was of interest only in respect of the applicants' complaint that they were prevented from voting in the European Parliament elections of June 2009. Even if successful, it would have had no bearing on the ban in place as regards national elections.

70. On the substance of the proposed remedy, the Court notes that section 8 of the 2002 Act, so far as it applies to the applicants, establishes a right to vote in elections to the European Parliament "if on the day of the poll [a person] would be entitled to vote as an elector at a parliamentary election". Section 4 of the 1983 Act provides that a person is entitled to be registered in the register of parliamentary electors if, *inter alia*, he is not subject to any legal incapacity to vote. Section 3(1) of the same Act stipulates that a convicted person is legally incapable of voting during the time that he is detained in a penal institution in pursuance of his sentence. It is clear that, as Burton J said in *Chester*, a challenge to section 8 of the 2002 Act is "purely parasitic" to the real challenge which is to section 3 of the 1983 Act (see paragraph 38 above). Given the findings of the Registration Appeal Court in *Smith v. Scott* as regards the possibility of reading down section 3 of the 1983 Act (see paragraph 29 above) and the approach of the Outer House to an argument based on the Scotland Act 1998 in *Traynor and another* (see paragraph 31 above), the Court is of the view that the possibility of seeking to circumvent the ban on prisoners voting in European elections by lodging a "parasitic" challenge to section 8 of the 2002 Act did not offer to the applicants reasonable prospects of success. In reaching this conclusion, the Court further refers to, although does not depend on, the opinion of Burton J in the High Court (see paragraphs 35-36 above) and the findings of Gillen J in the High Court of Northern Ireland as to the scope for domestic courts to extend the right to vote to prisoners pending amending legislation (see paragraph 33 above).

71. The Court notes that the claimant in *Chester* has now been granted permission to appeal the judgment of Burton J and that the appeal has been

heard (see paragraph 40 above). The order granting leave has not been provided to the Court and the grounds for granting leave are therefore not clear. In any event, the granting of leave in *Chester* occurred well after the elections to the European Parliament of June 2009 and almost two years after the applicants had lodged their applications with this Court. To the extent that the grant of leave can now be considered to indicate the availability of a potential remedy, it was not foreseeable prior to the 2009 elections that such an argument could offer reasonable prospects of success and was therefore not a remedy that the applicants in the present case were required to exhaust.

72. The Court therefore concludes that the applicants have satisfied the requirements of Article 35 § 1. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

73. The applicants complained that as convicted prisoners in detention they had been subject to a blanket ban on voting in elections and had accordingly been prevented from voting in elections to the European Parliament in June 2009 and in the general election of May 2010 and would potentially be banned from voting in the elections to the Scottish Parliament of May 2011, in violation of their rights guaranteed by Article 3 of Protocol No. 1 to the Convention, which reads as follows:

> "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."

74. The Government accepted that, if the applications were declared admissible, then there had been a violation of Article 3 of Protocol No. 1 in the applicants' cases as a result of their ineligibility to vote in the European and general elections.

75. The EHRC criticised the Government's delay in implementing this Court's judgment in *Hirst*, pointing to the concerns expressed by the Joint Committee on Human Rights regarding the delay (see paragraph 41 above). According to statistics provided by the EHRC, there were approximately 70,000 serving prisoners in the United Kingdom in February 2009. They estimated that more than 100,000 prisoners were likely to have been affected by the ban at one time or another since the Court's judgment in *Hirst*.

76. The Court notes at the outset that the applicants have already been prevented from voting in the European elections of June 2009 and in the

general election of May 2010 as a result of their status as detained prisoners. However, Mr Greens became eligible for release on 29 May 2010 and M.T. is scheduled to be released in November 2010. The Court observes that both dates fall well before the elections to the Scottish Parliament on 5 May 2011. Accordingly, the Court will examine the applicants' complaints of a violation of Article 3 of Protocol No. 1 as a result of their ineligibility to vote in the European elections and the general election only.

77. The Court recalls that in *Hirst*, cited above, it concluded that:

> "82. ... while the Court reiterates that the margin of appreciation [applicable to Article 3 of Protocol No. 1] is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."

78. The legislation in question, namely section 3 of the 1983 Act, has not been amended since *Hirst*. As a result, the present applicants were ineligible to vote in the general election in the United Kingdom in May 2010. The blanket restriction introduced by section 3 of the 1983 Act has been extended to elections to the European Parliament by section 8 of the 2002 Act, which is parasitic upon the former section. As a result, the present applicants were ineligible to vote in the elections of June 2009 to the European Parliament.

79. These considerations are sufficient for the Court to conclude that there has been a violation of Article 3 of Protocol No. 1 to the Convention in both cases.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

80. The applicants further complained that they had no effective remedy to address their complaints under Article 3 of Protocol No. 1, in violation of Article 13 which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

81. The Government contested that argument.

A. The parties' submissions

1. The applicants

82. The applicants referred to a number of cases against Italy decided by the Court in which, they argued, it had found that the absence of an effective remedy to challenge restrictions on undischarged bankrupts which were set out in primary legislation and applied to all those declared bankrupt amounted to a violation of Article 13 (citing, *inter alia*, *Neroni v. Italy*, no. 7503/02, 22 April 2004; *Albanese v. Italy*, no. 77924/01, 23 March 2006; *Campagnano v. Italy*, no. 77955/01, ECHR 2006-IV; and *De Blasi v. Italy*, no. 1595/02, 5 October 2006). They therefore contended that the fact that the violation in the present case arose as a result of primary legislation did not prevent a finding of a violation of Article 13.

83. They concluded that the only remedy available to prisoners complaining about their disqualification from voting was a declaration of incompatibility. The applicants argued that such a declaration did not constitute an effective remedy. In particular, they emphasised that they could not obtain damages for the violation of their Convention rights.

2. The Government

84. The Government contended that it was well-established that Article 13 did not require a remedy to be provided in order to allow individuals to challenge provisions of domestic legislation on the grounds that it was contrary to the Convention (citing *Leander v. Sweden*, 26 March 1987, § 77, Series A no. 116; and *P.M. v. the United Kingdom*, no. 6638/03, §§ 32-34, 19 July 2005). They argued that this was the position in the present case, where the applicants complained of the application of section 8 of the 2002 Act and section 3 of the 1983 Act. No remedy was therefore required under Article 13. The Italian cases could be distinguished as the complaints in those cases concerned individual measures of implementation of domestic legislation, rather than domestic legislation itself, and the key point for the purposes of Article 13 was that there was a means of challenge to the measures but the time limit for invoking the remedy was too short to be effective.

85. Further, notwithstanding the general principle that Article 13 did not require a remedy in cases concerning primary legislation, the Government contended that two remedies were in fact available to the applicants in respect of their complaint regarding their disqualification from voting in the European elections of June 2009, namely the possibility of requesting the domestic courts to "read-down" section 8 of the 2002 Act and the possibility of relying on EU rights in order to challenge the "disproportionate" restriction on their voting rights.

86. In respect of any complaint regarding the non-availability of legal aid for domestic proceedings, the Government submitted that there was no law or policy in place preventing the applicants from seeking legal aid in the circumstances of the present cases, the applicants did not apply for legal aid and, in the event that legal aid had been refused, the applicants could have appealed any such refusal. In any case, the Government argued that even if legal aid had been unavailable, this did not in itself give rise to a breach of Article 13 in the circumstances of the present cases, having regard to what was at stake for the applicants, the complexity of the proceedings and the applicants' capacity to represent themselves effectively. It was clear that the applicants had had the benefit of some legal advice: their appeals to the Sheriff contained cogently-argued legal submissions.

87. In conclusion, the Government invited the Court to find no violation of Article 13 in the applicants' cases.

3. The Equality and Human Rights Commission

88. The EHRC explained that as Article 46 of the Convention, which required Contracting States to abide by the final judgment of the Court in any case to which they were parties, was not included in the rights protected by the Human Rights Act 1998, the domestic courts were unable to enforce it directly due to the dualist nature of the British legal system.

89. In a case where the domestic human-rights challenge was based on a provision of primary legislation which could not be read in a Convention-compliant way, the EHRC considered it problematic that the only remedy available to claimants was a declaration of incompatibility under section 4(2) of the Human Rights Act. They pointed out that the Government was not obliged to reform legislation found to be incompatible and concluded that the mechanism was inadequate to satisfy the guarantees of Article 13.

B. The Court's assessment

90. In *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98, the Court held that Article 13 did not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms. This position has been confirmed in numerous subsequent cases (see, *inter alia*, *Leander*, cited above, § 77 (d); *Willis v. United Kingdom*, no. 36042/97, § 62, ECHR 2002-IV; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X; *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 73, ECHR 2009-... (extracts); *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 135, ECHR 2009-...; and most recently *Kennedy*, cited above, § 197). The Italian cases to which the applicants referred are not authority for the contrary position: as the Government pointed out, these cases were

concerned with the manner of implementation of the relevant legislative provisions and can therefore be distinguished from the present cases.

91. The Court notes that it has found a violation of Article 3 of Protocol No. 1 as a result of section 3 of the 1983 Act and, by its implicit reference to the contents of that section, section 8 of the 2002 Act. Both of these provisions are provisions of primary legislation.

92. The Court accordingly concludes that there has been no violation of Article 13.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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

94. The applicants claimed an unspecified sum in respect of non-pecuniary damage. They noted that although the Court had awarded no damages in the case of *Hirst*, it had subsequently awarded the sum of 1,500 euros (EUR) in seven cases against Italy involving a ban on voting in respect of undischarged bankrupts (citing, *inter alia*, *Bova,* cited above; *Pantuso v. Italy*, no. 21120/02, 24 May 2006; *La Frazia v. Italy*, no. 3653/02, 29 June 2006; and *Pio and Ermelinda Taiani v. Italy*, no. 3641/02, 20 July 2006). Emphasising the continuing failure of the Government to amend the law on prisoners' voting rights in order to comply with the Court's judgment in *Hirst*, the applicants argued that an award of damages would be appropriate.

95. The Government considered that it was not appropriate to award damages in the present cases. They pointed out that the Grand Chamber in *Hirst* had awarded no compensation for non-pecuniary damage, an approach which had been followed in a subsequent case in which a category of persons had been excluded from the right to vote (see *Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V). The Italian cases could be distinguished as the restrictions on bankrupts in those cases were far-reaching and gave rise to serious breaches of the Convention. In particular, and unlike in *Hirst*, the Court held in the Italian cases that the relevant provisions of Italian law did not pursue a legitimate aim. The Government concluded that there was no material difference between the present cases and *Hirst* and invited the Court to conclude that the forthcoming amendment of section 3 of the 1983 Act constituted sufficient just satisfaction. In particular, the delay in

introducing amended legislation was a matter for the Committee of Ministers and was, in the Government's view, irrelevant to the applicants' just satisfaction claims.

96. The Court notes that in *Hirst*, the Grand Chamber endorsed the conclusion of the Chamber on the question of non-pecuniary damage that:

> "... 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."

97. It is a cause for regret and concern that in the five years which have passed since the judgment of the Grand Chamber in *Hirst*, no amending measures have been brought forward by the Government, a matter to which the Court returns below (see paragraphs 103-122). However, as regards non-pecuniary damage, the Court recalls that it has in the past examined claims by applicants for punitive damages to reflect the particular character of the violations suffered by them and to serve as a deterrent in respect of violations of a similar nature by the respondent State, and for aggravated damages to reflect the fact that they were victims of an administrative practice. It has declined to make any such awards (see *Akdivar and Others v. Turkey* (Article 50), 1 April 1998, §§ 35-38, *Reports* 1998-II; *Selçuk and Asker v. Turkey*, 24 April 1998, §§ 116-119, *Reports* 1998-II; *Menteş and Others v. Turkey* (Article 50), 24 July 1998, §§ 18-21, *Reports* 1998-IV; *Hood v. the United Kingdom* [GC], no. 27267/95, §§ 88-89, ECHR 1999-I; and *B.B. v. the United Kingdom*, no. 53760/00, § 36, 10 February 2004). Similarly, the Court does not consider that aggravated or punitive damages are appropriate in the present case.

98. The Court notes the recent decision of the Committee of Ministers, which made reference to the fact that "the new government is actively considering the best way of implementing the judgment" in *Hirst* (see paragraph 47 above). While the Court accepts that the continuing prohibition on voting may give rise to some feelings of frustration in respect of those prisoners who can reasonably expect potentially to benefit from any change in the law, it nonetheless concludes that the finding of a violation, when viewed in tandem with the Court's direction under Article 46 below (see paragraph 115), constitutes sufficient just satisfaction in the present cases.

B. Costs and expenses

99. The applicants also claimed costs and expenses incurred in the proceedings before the Court. Mr Greens claimed the total sum of 6,991.26 pounds sterling (GBP) inclusive of VAT, which was comprised of GBP 2,408.76 in respect of solicitors' fees and GBP 4,582.50 in respect of

counsel's fees (representing one half of the fees charged by counsel in respect of work done for both applicants). M.T. claimed the sum of GBP 1,802.91 in respect of solicitors' fees and GBP 4,582.50 in respect of counsel's fees, amounting to a total of GBP 6,385.41 inclusive of VAT. Both applicants provided a detailed break down of the fees claimed.

100. The Government argued that the costs claimed by the applicants were excessive and unreasonable, pointing out that the cases were follow-ups to *Hirst*. More specifically, the Government considered the rates charged to be unduly high, particularly for a solicitors' firm based outside central London. They contended that no more than GBP 2,000 should be allowed for solicitors' fees in total and that the overall sum claimed in respect of counsel's fees – over GBP 9,000 for 19 hours worked – should be reduced to GBP 3,000 in total.

101. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court agrees that the sums claimed were excessive. In particular, the Court notes that the Government accepted that, if the applications were admissible, there had been a violation of Article 3 of Protocol No. 1. The Court further recalls that it has found no violation of Article 13 in the present cases. In the circumstances, regard being had to the documents in its possession, the Court considers it reasonable to award to the applicants a total sum of EUR 5,000 for the costs of the proceedings before the Court in these two applications.

C. Default interest

102. 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.

V. ARTICLE 46 OF THE CONVENTION

103. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Application of the pilot judgment procedure

104. In July 2010, the parties were advised that the Court was considering the suitability of applying the pilot judgment procedure (see *Broniowski v. Poland* [GC], no. 31443/96, § 189-194, ECHR 2004-V) in the cases. The applicants had no objection to the application of the pilot judgment procedure. The Government submitted that features of the present applications made the effective operation of the pilot judgment procedure difficult. The first difficulty arose as a result of the wide margin of appreciation which, the Government submitted, the Grand Chamber had afforded to the State in *Hirst*. The second difficulty resulted from the recent judgment of the Court in *Frodl*, which the Government considered departed significantly from the principles set out in *Hirst* and which, at the time of the Government's submission, was pending before the panel of the Grand Chamber.

105. The Court observes that on 4 October 2010 the panel of the Grand Chamber declined to accept a referral request from the respondent Government in *Frodl*. The judgment of the Chamber in that case is accordingly final in accordance with Article 44 § 2 (c). The Court considers that notwithstanding the wide margin of appreciation afforded to the respondent State by its judgment in *Hirst*, in light of the lengthy delay in implementing that decision and the significant number of repetitive applications now being received by the Court, it is appropriate to make findings under Article 46 of the Convention in the present cases.

B. General principles

106. The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, 4 December 2008; *Burdov v. Russia (no. 2)*, no. 33509/04, § 125, ECHR 2009-...; and *Olaru and Others v. Moldova*, nos. 476/07, 22539/05, 17911/08 and 13136/07, § 49, 28 July 2009). This obligation was consistently emphasised by the Committee of Ministers in the supervision of the execution of the Court's judgments (see, among many authorities, Interim Resolutions DH(97)336 in cases concerning the length of proceedings in Italy; DH(99)434 in cases concerning the action of the security forces in Turkey; ResDH(2001)65 in the case of *Scozzari and*

Giunta v. Italy; ResDH(2006)1 in the cases of *Ryabykh* and *Volkova*; and ResDH(2007) 75 in cases concerning the length of detention on remand in Poland).

107. In order to facilitate effective implementation of its judgments along these lines, the Court may adopt a pilot judgment procedure allowing it clearly to identify in a judgment the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent state to remedy them (see *Broniowski v. Poland*, cited above, §§ 189-194 and the operative part; and *Hutten-Czapska v. Poland* [GC] no. 35014/97, ECHR 2006-VIII §§ 231-239 and the operative part). This adjudicative approach is however pursued with due respect for the Convention organs' respective functions: it falls to the Committee of Ministers to evaluate the implementation of individual and general measures under Article 46 § 2 of the Convention (see, *mutatis mutandis*, *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, § 42, ECHR 2005-IX, and *Hutten-Czapska v. Poland* (friendly settlement) [GC], no. 35014/97, § 42, 28 April 2008).

108. Another important aim of the pilot judgment procedure is to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system. Indeed, the Court's task, as defined by Article 19, to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" is not necessarily best achieved by repeating the same findings in large series of cases (see *Burdov*, cited above, § 127; and *Olaru*, cited above, § 51). The object of the pilot judgment procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention rights in question in the national legal order (see *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, § 34, ECHR 2007-... (extracts)). While the respondent State's action should primarily aim at the resolution of such a dysfunction and at the introduction, where appropriate, of effective domestic remedies in respect of the violations in question, it may also include *ad hoc* solutions such as friendly settlements with the applicants or unilateral remedial offers in line with the Convention requirements. The Court may decide to adjourn examination of all similar cases, thus giving the respondent State an opportunity to settle them in such various ways (see, *mutatis mutandis*, *Broniowski*, cited above, § 198; and *Xenides-Arestis v. Turkey*, no. 46347/99, § 50, 22 December 2005).

109. However, the Court has previously indicated that if the respondent State fails to adopt such measures following a pilot judgment and continues to violate the Convention, the Court would have no choice but to resume examination of all similar applications pending before it and to take them to

judgment so as to ensure effective observance of the Convention (see *Burdov*, cited above, § 128; and *Olaru*, cited above, § 52).

C. The Court's assessment

1. Indication of specific measures to implement the present judgment

110. The Court recalls the finding of the Grand Chamber in *Hirst* in its judgment of 2005 that the general, automatic and indiscriminate restriction on the right to vote imposed by section 3 of the 1983 Act must be seen as falling outside any acceptable margin of appreciation, however wide that margin may be. It emphasises that the finding of a violation of Article 3 of Protocol No. 1 in the present two cases was the direct result of the failure of the authorities to introduce measures to ensure compliance with the Grand Chamber's judgment in *Hirst* (see paragraphs 78-79 above).

111. One of the fundamental implications of the pilot judgment procedure is that the Court's assessment of the situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicant and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons (see *Broniowski* (friendly settlement), cited above, § 36; and *Hutten-Czapska* (friendly settlement), cited above, § 33). As the Court has already indicated, the prevailing situation has given rise to the lodging of numerous subsequent well-founded applications. There are currently approximately 2,500 applications in which a similar complaint is made, around 1,500 of which have been registered and are awaiting a decision. The number continues to grow, and with each relevant election which passes in the absence of amended legislation there is the potential for numerous new cases to be lodged: according to statistics submitted by EHRC, there are approximately 70,000 serving prisoners in the United Kingdom at any one time (see paragraph 75 above), all of whom are potential applicants. The failure of the respondent State to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193).

112. The Court recalls that in *Hirst*, while finding a violation of the right to vote, the Grand Chamber left to the discretion of the respondent State the decision as to how precisely to secure the rights afforded by the Convention. Pursuant to Article 46 § 2, *Hirst* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-

compliance (see paragraphs 44-47 above). It is not disputed by the Government that general measures at national level are called for in order to ensure the proper execution of the *Hirst* judgment. It is further clear that legislative amendment is required in order to render the electoral law compatible with the requirements of the Convention (see, *inter alia*, paragraphs 42-43 above). In light of the lengthy delay which has already occurred and the results of the delay in terms of follow-up applications, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees. The question therefore arises whether it is now appropriate for the Court to provide the respondent Government with some guidance as to what is required for the proper execution of the present judgment.

113. The Court observes that it was recently held in *Frodl*, cited above, § 32, that, taking into account the particular circumstances, any decision on disenfranchisement should be taken by a judge and there must be a link between the offence committed and issues relating to elections and democratic institutions. On that basis, there was a violation of Article 3 of Protocol No. 1 in that case. However, the Court recalls that the Grand Chamber in *Hirst* declined to provide any detailed guidance as to the steps which the United Kingdom should take to render its regime compatible with Article 3 of Protocol No. 1, despite the Government's contention in that case that such guidance was necessary (see *Hirst*, § 52). As the Court emphasised in *Hirst*, there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (see § 61 of its judgment). The Court recalls that its role in this area is a subsidiary one: the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; and *Sukhovetskyy v. Ukraine*, no. 13716/02, §§ 68-69, ECHR 2006-VI).

114. Like the Registration Appeal Court (see paragraph 29 above) and Burton J in the High Court (see paragraphs 35 and 39 above), the Court considers that a wide range of policy alternatives are available to the Government in the present context. In this regard, the Court observes that the Government of the respondent State have carried out consultations regarding proposed legislative change and are currently actively working on draft proposals (see paragraphs 42-44 and 47 above). Emphasising the wide margin of appreciation in this area (see *Hirst*, § 61), the Court is of the view that it is for the Government, following appropriate consultation, to decide

in the first instance how to achieve compliance with Article 3 of Protocol No. 1 when introducing legislative proposals. Such legislative proposals will be examined in due course by the Committee of Ministers in the context of its supervision of the execution of the *Hirst* judgment. Further, it may fall to the Court at some future point, in the exercise of its supervisory role and in the context of any new application under Article 34 of the Convention, to assess the compatibility of the new regime with the requirements of the Convention.

115. However, while the Court does not consider it appropriate to specify what should be the content of future legislative proposals, it is of the view that the lengthy delay to date has demonstrated the need for a timetable for the introduction of proposals to amend the electoral law to be imposed. Accordingly, the Court concludes that the respondent State must introduce legislative proposals to amend section 3 of the 1983 Act and, if appropriate, section 8 of the 2002 Act, within six months of the date on which the present judgment becomes final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers.

2. Disposal of comparable cases

116. Given the findings in the present judgment and in *Hirst*, it is clear that every comparable case pending before the Court which satisfies the admissibility criteria will give rise to a violation of Article 3 of Protocol No. 1. It is therefore to be regretted that the Government did not act more quickly to rectify the situation before the elections to the European Parliament in 2009 and the general election in 2010. Further, while it is to be hoped that new legislation will be in place as soon as practically possible, it is far from apparent that an appropriate solution will be in place prior to the Scottish elections scheduled to take place in May 2011 and the likely consequence of this failure will be a wave of new applications to the Court from serving prisoners detained at that time who would otherwise be eligible to vote in those elections.

117. The Court has already emphasised the dual nature of the pilot judgment procedure: on the one hand, it is intended to assist respondent States in remedying an identified defect arising from a widespread or systemic problem; on the other, it aims to ensure the effective treatment of follow-up cases (see paragraphs 107-108 above). The question accordingly remains as to how to dispose of the numerous cases already lodged with the Court and how to deal with potential future applications lodged before the electoral law has been amended.

118. The Court observes that the circumstances of the present cases differ from those arising in previous pilot judgment cases. In previous cases the pilot judgment procedure has generally been employed to identify a violation of the Convention and to require the respondent State, usually

within a given time-frame, to introduce some form of remedy or to offer adequate redress to all those affected. In the meantime, all pending applications before the Court were adjourned (see, for example, the approach in *Broniowski*, cited above, § 198; *Burdov*, cited above, § 146; and *Olaru*, cited above, § 61). However, those cases involved property complaints or complaints regarding non-enforcement of domestic judgments. In those circumstances, the benefits of requiring the domestic authorities to introduce a remedy or to offer specific redress in all pending cases were clear. In the present cases, the violation is of an entirely different nature. No individual examination of specific cases is required in order to assess the appropriate redress. Further, no financial compensation is payable: the relief available from this Court is of a declaratory nature. The only relevant remedy is a change in the law, which while no doubt affording satisfaction to all those who have been or may be affected by the current blanket ban is unable to undo past violations of the Convention in respect of particular individuals.

119. The Court recalls the terms of Article 37 § 1, which provides in so far as relevant:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> ...
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

120. In light of the considerations set out above (see paragraphs 116-118) and the six-month deadline fixed by the Court in the present judgment for the bringing forward of legislative proposals, the Court is of the view that the continued examination of every application asserting a violation of Article 3 of Protocol No. 1 as a result of the current blanket ban on voting applicable to serving prisoners is no longer justified. Such applications can be distinguished from cases where some form of individual measure might be necessary in order for any future judgment to be implemented. Examples of the latter type of case include applications complaining of non-enforcement of domestic judgments or length of domestic proceedings, where financial recompense is usually required. The Court emphasises that it has clearly established, both in the present judgment and in its judgment in *Hirst*, that the prevailing situation has given rise and continues to give rise to a violation of Article 3 of Protocol No. 1 in respect of every prisoner who is unable to vote in an election to the legislature and whose ineligibility arises solely by virtue of his status of prisoner. It has further declined to award non-pecuniary damages in respect of this violation. The award made

in respect of costs in the present cases was limited to the proceedings before this Court and reflected the fact that extensive written submissions were lodged. In future follow-up cases, in light of the above considerations, the Court would be likely to consider that legal costs were not reasonably and necessarily incurred and would not, therefore, be likely to award costs under Article 41. As a consequence of the Court's approach to just satisfaction outlined above, an amendment to the electoral law to achieve compliance with the Court's judgment in *Hirst* will also result in compliance with the judgment in the present cases and with any future judgment handed down in any of the comparable cases currently pending before the Court. In these circumstances, the Court considers that it has discharged its obligation under Article 19 of the Convention, "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" and concludes that nothing is to be gained, nor will justice be best served, by the repetition of its findings in a lengthy series of comparable cases, at a significant burden on its own resources and with the resulting impact on its considerable caseload. In particular, such an exercise would not contribute usefully or in any meaningful way to the strengthening of human rights protection under the Convention.

121. The Court accordingly considers it appropriate to discontinue its examination of applications registered prior to the date of delivery of this judgment and raising complaints similar to those in the case of *Hirst* pending compliance by the respondent State with the terms of point 6(a) of the operative part of this judgment. It would propose, in the event of such compliance, to strike out such complaints pursuant to Article 37 § 1 (c), without prejudice to the Court's power to decide, pursuant to Article 37 § 2, to restore such applications to the list should the respondent State fail to enact an amendment to the electoral law to achieve compliance with the Court's judgment in *Hirst* in accordance with point 6(b) of the operative part of this judgment.

122. The Court similarly considers it appropriate to suspend the treatment of any applications not yet registered at the date of delivery of this judgment, as well as future applications, raising such complaints, without prejudice to any decision to recommence the treatment of these cases in the event of any non-compliance with the terms of point 6(a) of the operative part of this judgment or in such other event as may justify such course.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* the applications;

2. *Declares* the applications admissible;

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

4. *Holds* that there has been no violation of Article 13 of the Convention;

5. *Holds* that the above violation has originated in the failure of the respondent State to execute the judgment of this Court in *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX;

6. *Holds* that the respondent State must:
(a) bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant; and
(b) enact the required legislation within any such period as may be determined by the Committee of Ministers;

7. *Holds*
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), inclusive of any tax that may be chargeable, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President