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

GRAND CHAMBER

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

(Application no. 74025/01)

JUDGMENT

STRASBOURG

6 October 2005

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

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr K. TRAJA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mrs L. MIJOVIĆ,
Mr S.E. JEBENS,
Mrs D. JOČIENĖ,
Mr J. ŠIKUTA, *judges*,

and Mr E. FRIBERGH, *Deputy Registrar*,

Having deliberated in private on 27 April and 29 August 2005,

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 British 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 Agents, initially by Mr J. Grainger and subsequently by Ms E. Willmott, both of the Foreign and Commonwealth Office.

3. The applicant alleged that as a convicted prisoner in detention he had been subject to a blanket ban on voting in elections. He relied on Article 3 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention, and on 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). On 8 July 2003 it was declared partly admissible by a Chamber of that Section, composed of Mr M. Pellonpää, President, Sir Nicolas Bratza, Mrs V. Strážnická, Mr R. Maruste, Mr S. Pavlovschi, Mr L. Garlicki, Mr J. Borrego Borrego, judges, and Mr M. O'Boyle, Section Registrar.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 December 2003 (Rule 59 § 3). In its judgment of 30 March 2004 ("the Chamber judgment"), the Chamber held unanimously that there had been a violation of Article 3 of Protocol No. 1 and that no separate issues arose under Articles 14 and 10 of the Convention. It also held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

6. On 23 June 2004 the Government requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

7. On 10 November 2004 a panel of the Grand Chamber decided to accept the request for a referral (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed a memorial. Observations were also received from the AIRE Centre and the Government of Latvia, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties replied to those comments at the hearing mentioned below (Rule 44 § 5).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 April 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms	E. WILLMOTT,	*Agent*,
Mr	R. SINGH QC,	*Counsel*,
Ms	M. HODGSON,	
Mr	M. RAWLINGS,	
Mr	B. DAW,	*Advisers*;

(b) *for the applicant*

Ms	F. KRAUSE,	*Counsel*,
Mr	E. ABRAHAMSON,	*Solicitor.*

The Court heard addresses by Mr Singh and Ms Krause.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1950.

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

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

14. 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.

15. The applicant's application was heard by the Divisional Court on 21 and 22 March 2001, together with an application for judicial review by 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.

16. In the Divisional Court judgment dated 4 April 2001, Lord Justice Kennedy noted that section 3 had a long history and cited the Secretary of State's reasons, given in the proceedings, for maintaining the current policy:

> "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."

Examining the state of practice in other jurisdictions, he observed that in Europe only eight countries, including the United Kingdom, did not give convicted prisoners a vote, while twenty 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 (see *Richardson v. Ramirez* [1974] 418 United States: Supreme Court Reports 24). Some considerable attention was given to Canadian precedents, which were relied on by both parties, in particular that of the Canadian Supreme Court which, in *Sauvé v. Canada (no. 1)* ([1992] 2 Supreme Court

Reports 438), struck down the disenfranchisement of all prisoners as too widely drawn and infringing the minimum impairment rule, and that of the Federal Court of Appeal which, in *Sauvé (no. 2)* ([2000] 2 Federal Court Reports 117), upheld the subsequent legislative provision restricting the ban to prisoners serving a sentence of two years or more in a correctional institution. While it was noted that the Canadian courts were applying a differently phrased provision in their Charter of Rights and Freedoms, the Divisional Court commented that the judgment of Linden JA in the second case in the Federal Court of Appeal contained helpful observations, in particular as regards the danger of the courts usurping the role of Parliament. The cases before the European Commission of Human Rights and this Court were also reviewed, the Divisional Court noting that the Commission had been consistent in its approach in accepting restrictions on persons convicted and detained.

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 has nothing to offer, any more than Article 10."

17. The applicant's claims were accordingly dismissed as were those of the other prisoners.

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

19. 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 Mr Pearson and Mr Feal-Martinez, were refused on 18 June 2001, after oral argument, by Lord Justice Simon Brown.

20. On 25 May 2004 the applicant was released from prison on licence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. 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."

22. This section re-enacted without debate the provisions of section 4 of the Representation of the People Act 1969, the substance of which dated back 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).

23. 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)).

24. During the passage through Parliament of the Representation of the People Act 2000 ("the 2000 Act"), which allowed 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 section 19 of the Human Rights Act 1998, namely, indicating that, in

introducing the measure in Parliament, the Secretary of State considered its provisions to be compatible with the Convention.

25. 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. The International Covenant on Civil and Political Rights

26. The relevant provisions of the International Covenant on Civil and Political Rights 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. ..."

27. In General Comment no. 25(57) adopted by the Human Rights Committee under Article 40 § 4 of the International Covenant on Civil and Political Rights on 12 July 1996, the Committee 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. The European Prison Rules (Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe)

28. These rules set out the minimum standards to be applied to conditions of imprisonment, including the following principle:

"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. Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners

29. This recommendation, adopted on 9 October 2003, noted the increase in life sentences and aimed to give guidance to member States on the management of long-term prisoners.

30. The aims of the management of such prisoners should be:

"2. ...

– to ensure that prisons are safe and secure places for these prisoners ...;

– to counteract the damaging effects of life and long-term imprisonment;

– to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release."

31. General principles included the following:

"3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle).

4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalisation principle).

5. Prisoners should be given opportunities to exercise personal responsibility in daily prison life (responsibility principle)."

D. Code of Good Practice in Electoral Matters

32. 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 a 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 depriving 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."

E. Law and practice in Contracting States

33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, "the former Yugoslav Republic of Macedonia", Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and Ukraine), in thirteen countries all prisoners were barred from voting or unable to vote (Armenia, Belgium [1], Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia[2], Turkey and the United Kingdom), while in twelve countries prisoners' right to vote could be limited in some other way (Austria[3], Bosnia

1. Where the period of disqualification may in fact extend beyond the end of the prison term.
2. There is no bar but no arrangements are made to enable prisoners to vote.
3. The right to vote is removed from prisoners sentenced to terms exceeding one year and if they committed the crime with intent.

and Herzegovina[1], France[2], Greece[3], Italy[4], Luxembourg[5], Malta[6], Norway[7] , Poland[8] , Romania and Spain[9]).

34. Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein.

F. Relevant case-law from other States

1. Canada

35. In 1992 the Canadian Supreme Court unanimously struck down a legislative provision barring all prisoners from voting (see *Sauvé v. Canada (no. 1)*, cited above). Amendments were introduced limiting the ban to prisoners serving a sentence of two years or more. The Federal Court of Appeal upheld the provision. However, following the decision of the Divisional Court in the present case, the Supreme Court on 31 October 2002 in *Sauvé v. the Attorney General of Canada (no. 2)* 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 as it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, which provides:

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

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1. A restriction on voting applies to prisoners accused of serious violations of international law or indicted before the international tribunal.
2. Prisoners may vote if the right is given by the court.
3. Restrictions apply to prisoners sentenced to terms of over ten years, while life imprisonment attracts a permanent deprivation of the right to vote. For terms of one to ten years, courts may also restrict the right to vote for one to five years where a prisoner's conduct shows moral perversity.
4. Serious offenders and bankrupts sentenced to terms of five years or more automatically lose the right to vote, while minor offenders debarred from holding public office lose this right at the discretion of the judge.
5. Unless the sentencing court removes civil rights as part of sentencing.
6. Prisoners convicted of a serious crime lose the right to vote.
7. The right to vote may be revoked by a court, although this is very rare and possibly restricted to treason and national security cases.
8. Prisoners sentenced to terms of three years or more where the crime is blameworthy (very serious) may lose the right to vote.
9. Unless, as occurs only rarely, the sentencing judge expressly removes the right to vote.

> "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."

36. The majority opinion given by McLachlin CJ considered that the right to vote was fundamental to their democracy and the rule of law and could not be lightly set aside. Limits on this right required not deference, but careful examination. The majority found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives.

As regards the objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote was more likely to send messages that undermined respect for the law and democracy than messages that enhanced those values. The legitimacy of the law and the obligation to obey the law flowed directly from the right of every citizen to vote. To deny prisoners the right to vote was to lose an important means of teaching them democratic values and social responsibility and ran counter to democratic principles of inclusiveness, equality, and citizen participation and was inconsistent with the respect for the dignity of every person that lay at the heart of Canadian democracy and the Charter.

With regard to the second objective of imposing appropriate punishment, it was considered that the Government had offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of State punishment. Nor could it be regarded as a legitimate form of punishment as it was arbitrary – it was not tailored to the acts and circumstances of the individual offender and bore little relation to the offender's particular crime – and did not serve a valid criminal-law purpose, as neither the record nor common sense supported the claim that disenfranchisement deterred crime or rehabilitated criminals.

37. The minority opinion given by Gonthier J found that the objectives of the measure were pressing and substantial and 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, related to the promotion of good citizenship. The social rejection of serious crime reflected a moral line which safeguarded the social contract and the rule of law and bolstered the importance of the nexus between individuals and the community. The 'promotion of civic responsibility' might be abstract or symbolic, but symbolic or abstract purposes could be valid of their own accord and should not be downplayed simply for being symbolic. As regards the second objective, that of enhancing the general purposes of the criminal sanction, the measure clearly had a punitive aspect with a retributive function. It was a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime. The

disenfranchisement was a civil disability arising from the criminal conviction. It was also proportionate, as the measure was rationally connected to the objectives and carefully tailored to apply to perpetrators of serious crimes. The disenfranchisement of serious criminal offenders served to deliver a message to both the community and the offenders themselves that serious criminal activity would not be tolerated by the community. Society, on this view, could 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, were prerequisites to democratic participation. The minority referred to the need to respect the limits imposed by Parliament and to be sensitive to the fact that there may be many possible reasonable and rational balances.

2. South Africa

38. On 1 April 1999, in *August and Another v. Electoral Commission and Others* (CCT8/99: 1999 (3) SA 1), the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. It noted that, under the South African Constitution, the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms and it underlined the importance of the right:

> "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."

39. The Constitutional Court found that the right to vote by its very nature imposed positive obligations upon the legislature and the executive and that the Electoral Act must be interpreted in a way that gave effect to constitutional declarations, guarantees and responsibilities. It noted that many democratic societies imposed voting disabilities on some categories of prisoners. Although there were no comparable provisions in the Constitution, it recognised that limitations might be imposed upon the exercise of fundamental rights, provided they were, *inter alia*, reasonable and justifiable. The question whether legislation barring prisoners would be justified under the Constitution was not raised in the proceedings and it emphasised that the judgment was not to be read as preventing Parliament from disenfranchising certain categories of prisoners. In the absence of such legislation, prisoners had the constitutional right to vote and neither the Electoral Commission nor the Constitutional Court had the power to disenfranchise them. It concluded that the Commission was under the obligation to make reasonable arrangements for prisoners to vote.

THE LAW

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

40. The applicant complained that he had been disenfranchised. He relied on 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 Chamber judgment

41. The Chamber found that the exclusion from voting imposed on convicted prisoners in detention was disproportionate. It had regard to the fact that it stripped a large group of people of the vote; that it applied automatically irrespective of the length of the sentence or the gravity of the offence; and that the results were arbitrary and anomalous, depending on the timing of elections. It further noted that, in so far as the disqualification from voting was to be seen as part of a prisoner's punishment, there was no logical justification for the disqualification to continue in the case of the present applicant, who had completed that part of his sentence relating to punishment and deterrence. It concluded at paragraph 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 of prisoners to vote had been imposed, which was such as to comply with the requirements of Article 3 of Protocol No. 1."

B. The parties' submissions

1. The applicant

42. The applicant adopted the terms of the Chamber judgment, submitting that the Government's allegation that it would require the radical revision of the laws of many Contracting States was misconceived as the judgment was based on the specific situation in the United Kingdom and directed at a blanket disenfranchisement of convicted persons which arose not out of a reasoned and properly justified decision following thorough debate but out of adherence to historical tradition. He also rejected the argument that the Chamber had not given appropriate weight to the margin of appreciation, submitting that on the facts of this case the concept had little bearing.

43. The applicant emphasised that there was a presumption in favour of enfranchisement, which was in harmony with the fundamental nature of democracy. It was not a privilege, as was sometimes asserted, even for prisoners, who continued to enjoy their inviolable rights which could only be derogated from in very exceptional circumstances. The restriction on voting rights did not pursue any legitimate aim. Little thought, if any, had in fact been given to the disenfranchisement of prisoners by the legislature, the 1983 Act being a consolidating Act adopted without debate on the point; nor had any thorough debate occurred during the passage of the 2000 Act. The domestic court did not examine the lawfulness of the ban either but decided the applicant's case on the basis of deference to Parliament.

44. The reason relied on in Parliament was that the disenfranchisement of a convicted prisoner was considered part of his punishment. The applicant disputed, however, that punishment could legitimately remove fundamental rights other than the right to liberty and argued that this was inconsistent with the stated rehabilitative aim of prison. There was no evidence that the ban pursued the purported aims nor had any link been shown between the removal of the right to 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. The purported aim of enhancing civic responsibility was raised *ex post facto* and was to be treated with circumspection. 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.

45. 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 (over 48,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them.

In addition, the applicant submitted that, as he was a post-tariff prisoner, the punishment element of his sentence had expired and he was held on grounds of risk, in which case there could no longer be any punishment-based justification. He pointed to the recently introduced sentence of "intermittent" custody, whereby a person was able to vote during periods of release in the community while being unable to vote while in prison, as undermining the alleged aims of preventing other convicted prisoners from voting.

46. He further referred to a trend in Canada, South Africa and various European States to enfranchise prisoners, claiming that nineteen countries operated no ban while eight had only 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, for example, considerations of security. In his view, the ban was simply concerned with moral judgment and it was unacceptable, as tantamount to the elected choosing the electorate, for the right to vote to be made subject to moral judgments imposed by the persons who had been elected.

2. The Government

47. 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. They argued that the Chamber judgment failed to give due weight to this consideration. In their view, it wrongly thought that the law on voting by prisoners was the product of passive adherence to a historic tradition. They asserted that the policy had 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. The Chamber also failed to give due regard to the extensive variation between Contracting States on the issue of voting by convicted prisoners, ranging from no prohibition to bans extending beyond the term of the sentence. In some thirteen countries prisoners were unable to vote. A variety of approaches were also taken by democratic States outside Europe. The Chamber's judgment was inconsistent with the settled approach of the Convention organs and there was no prior hint of any problem with the kind of restriction adopted by the United Kingdom.

48. Furthermore, the matter had been considered fully by the national courts applying the principles of the Convention under the Human Rights Act 1998, yet the Chamber paid little attention to this fact while concentrating on the views of a court in another country (see *Sauvé (no. 2)*,

cited in paragraphs 35-37 above). As regards the Canadian precedent, they pointed out that *Sauvé (no. 2)* was decided by a narrow majority of five votes to four, concerned a law which was different in text and structure and was interpreted by domestic courts to which the doctrine of the margin of appreciation did not apply and that there was a strong dissent which was more in accord with the Convention organs' case-law. The South African case (*August and Another*, cited in paragraphs 38-39 above) was not relevant as it concerned practical obstacles to voting, not a statutory prohibition.

49. The Government also considered that the Chamber had erred in effectively assessing the compatibility of national law *in abstracto*, overlooking that on the facts of this case, if the United Kingdom were to reform the law and only ban those who had committed the most serious offences, the applicant, convicted of an offence of homicide and sentenced to life imprisonment, would still have been barred. Thus, the finding of a violation was a surprising result, and offensive to many people. The Chamber had furthermore misstated the number of prisoners disenfranchised, including those who were on remand and not affected.

50. The Government 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 had breached the basic rules of society of the right to have a say in the way such rules were 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. The Council of Europe recommendation concerning the management of life prisoners relied on by the AIRE Centre in its intervention was not binding and made no reference to voting and in any event the legislation was not incompatible with its principles.

51. 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 accordingly fixed by the court at the time of sentencing.

52. 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 to a term of over one year. They concluded with

their concern that the Chamber had failed to give any explanation as to what steps the United Kingdom would have to take to render its regime compatible with Article 3 of Protocol No. 1 and urged that in the interests of legal certainty Contracting States receive detailed guidance.

3. Third-party interveners

53. The Prison Reform Trust submitted that the disenfranchisement of sentenced prisoners was a relic from the nineteenth century which dated back to the Forfeiture Act 1870, the origins of which were rooted in a notion of civic death. It argued that social exclusion was a major cause of crime and reoffending, and that the ban on voting militated against ideas of rehabilitation and civic responsibility by further excluding those already on the margins of society and further isolating them from the communities to which they would return on release. It neither deterred crime nor acted as an appropriate punishment. Its recently launched campaign for restoring the vote to prisoners had received wide cross-party support and the idea was also backed by the Anglican and Catholic Churches, penal reform groups and the current and former Chief Inspectors of Prisons for England and Wales, the President of the Prison Governors' Association, as well as many senior managers in the Prison Service.

54. The AIRE Centre drew attention to the Council of Europe recommendation on the management by prison administrations of life sentence and other long-term prisoners (see paragraphs 29-31 above), which aimed to give guidance to member States in counteracting the negative effects of long-term imprisonment and preparing prisoners for life in the community on release. It referred to three principles contained in the recommendation: the "normalisation principle", the "responsibility principle" and the "individualisation principle" (see paragraph 31 above). It argued that, although there was no express reference to the right of prisoners to vote, these principles supported the extension of the vote to prisoners by fostering their connection with society, increasing awareness of their stake in society and taking into account their personal circumstances and characteristics.

55. The Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections. They submitted that, in this area, States should be afforded a wide margin of appreciation, in particular taking into account the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy. In their view, the Chamber had failed to pay enough attention to the preventive aspect of the voting ban, namely in the general sense of combating criminality and in avoiding the situation whereby those who had committed serious offences could participate in decision-making that might

result in bringing to power individuals or groups that were in some way related to criminal structures. Moreover, the Chamber had failed to appreciate that in modern systems of criminal justice imprisonment was used as a last resort and that although the voting ban was automatic it still related to the assessment of the crime itself and the convict's personality.

B. The Court's assessment

1. General principles

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it 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 rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (ibid., § 50).

58. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see also the importance of these rights as recognised internationally in "Relevant international materials", paragraphs 26-39 above).

59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 51, citing *X v. Germany*, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 52, and, more recently, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; see also *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). 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.

62. It is, however, 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*, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V).

2. Prisoners

63. The present case highlights the status of the right to vote of convicted prisoners who are detained.

64. The case-law of the Convention organs has, in the past, accepted various restrictions on certain convicted persons.

65. In some early cases, the Commission considered that it was open to the legislature to remove political rights from persons convicted of

"uncitizen-like 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 (see *X v. the Netherlands*, no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and *H. v. the Netherlands*, no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 246). In *Patrick Holland v. Ireland* (no. 24827/94, Commission decision of 14 April 1998, DR 93-A, 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 right to 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.

66. The Court itself rejected complaints about a judge-imposed bar on voting on a member of Parliament convicted of fiscal fraud offences and sentenced to three years' imprisonment with the additional penalty of being barred from exercising public functions for two years (see *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003).

67. The Government argued that the Chamber judgment finding a violation in respect of the bar on this applicant, a prisoner sentenced to life imprisonment, was an unexpected reversal of the tenor of the above cases.

68. This is, however, the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners. It would note that in *Patrick Holland* (cited above), the case closest to the facts of the present application, the Commission confined itself to the question of whether the bar was arbitrary and omitted to give attention to other elements of the test laid down by the Court in *Mathieu-Mohin and Clerfayt* (cited above), namely, the legitimacy of the aim and the proportionality of the measure. In consequence, the Court cannot attach decisive weight to the decision. The Chamber's finding of a violation did not, therefore, contradict a previous judgment of the Court; on the contrary, the Chamber sought to apply the precedent of *Mathieu-Mohin and Clerfayt* to the facts before it.

69. In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention (see, among many authorities, *Kalashnikov v. Russia*,

no. 47095/99, ECHR 2002-VI, and *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Płoski v. Poland*, no. 26761/95, 12 November 2002, and *X v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113); the right to freedom of expression (*Yankov v. Bulgaria*, no. 39084/97, §§ 126-45, ECHR 2003-XII, and *T. v. the United Kingdom*, no. 8231/78, Commission's report of 12 October 1983, DR 49, p. 5, §§ 44-84); the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-71, ECHR 2003-V); the right of effective access to a lawyer or to a court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, and *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18); the right to respect for correspondence (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61); and the right to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission's report of 13 December 1979, DR 24, p. 5, and *Draper v. the United Kingdom*, no. 8186/78, Commission's report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver and Others*, cited above, pp. 38-41, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8, but the stopping of specific letters containing threats or other objectionable references was justifiable in the interests of the prevention of disorder or crime).

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see, for example, *X v. the Netherlands*, cited above, and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187, where the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and

xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision (see paragraph 32 above). As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.

3. Application in the present case

72. Turning to this application, the Court observes that the applicant, sentenced to life imprisonment for manslaughter, was disenfranchised during his period of detention by section 3 of the 1983 Act which applied to persons convicted and serving a custodial sentence. The Government argued that the Chamber had erred in its approach, claiming that it had assessed the compatibility of the legislation with the Convention in the abstract without consideration of whether removal of the right to vote from the applicant as a person convicted of a serious offence and sentenced to life imprisonment disclosed a violation. The Court does not accept this criticism. The applicant's complaint was in no sense an *actio popularis*. He was directly and immediately affected by the legislative provision of which he complained, and in these circumstances the Chamber was justified in examining the compatibility with the Convention of such a measure, without regard to the question whether, had the measure been drafted differently and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote. The Divisional Court similarly examined the compatibility with the Convention of the measure in question. It would not in any event be right for the Court to assume that, if Parliament were to amend the current law, restrictions on the right to vote would necessarily still apply to post-tariff life prisoners or to conclude that such an amendment would necessarily be compatible with Article 3 of Protocol No. 1.

73. The Court will therefore determine whether the measure in question pursued a legitimate aim in a proportionate manner having regard to the principles identified above.

(a) Legitimate aim

74. The Court points out that Article 3 of Protocol No. 1 does not, like other provisions of the Convention, specify or limit the aims which a restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see, for example, *Podkolzina*, cited above, § 34). The Government have submitted that the measure pursues the aim of preventing crime by sanctioning the conduct of convicted prisoners and also

of enhancing civic responsibility and respect for the rule of law. The Court notes that, at the time of the passage of the latest legislation, the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. This was also the position espoused by the Secretary of State in the domestic proceedings brought by the applicant. While the primary emphasis at the domestic level may have been the idea of punishment, it may nevertheless be considered as implied in the references to the forfeiting of rights that the measure is meant to act as an incentive for citizen-like conduct.

75. Although rejecting the notion that imprisonment after conviction involves the forfeiture of rights beyond the right to liberty, and especially the assertion that voting is a privilege not a right (see paragraph 59 above), the Court accepts that section 3 may be regarded as pursuing the aims identified by the Government. It observes that, in its judgment, the Chamber expressed reservations as to the validity of these aims, citing the majority opinion of the Canadian Supreme Court in *Sauvé (no. 2)* (see paragraphs 44-47 of the Chamber judgment). However, whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1.

(b) Proportionality

76. The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired.

77. The Government have argued that the measure was proportionate, pointing out, *inter alia*, that it only affected some 48,000 prisoners (not the 70,000 stated in the Chamber judgment which omitted to take into account that prisoners on remand were no longer under any ban) and submitting that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and did not apply to those detained on remand, for contempt of court or for default in payment of fines. On the latter point, the Latvian Government have also placed emphasis on the fact that, in Contracting States, imprisonment is the last resort of criminal justice (see paragraph 55 above). Firstly, the Court does not regard the difference in numbers identified above to be decisive. The fact remains that it is a significant figure and it cannot be claimed that the bar is negligible in its effects. Secondly, while it is true that there are categories of detained persons unaffected by the bar, it nonetheless concerns a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Further, the

Court observes that, even in the case of offenders whose offences are sufficiently serious to attract an immediate custodial sentence, whether the offender is in fact deprived of the right to vote will depend on whether the sentencing judge imposes such a sentence or opts for some other form of sanction, such as a community sentence. In this regard, it may be noted that, when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote.

78. The breadth of the margin of appreciation has been emphasised by the Government who argued that, where the legislature and domestic courts have considered the matter and there is no clear consensus among Contracting States, it must be within the range of possible approaches to remove the right to vote from any person whose conduct was so serious as to merit imprisonment.

79. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is 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. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the working party which recommended the amendment to the law to allow unconvicted prisoners to vote recorded that successive governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

80. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself. It may also be noted that the court found support in the decision of the Federal Court of Appeal in *Sauvé (no. 2)*, which was later overturned by the Canadian Supreme Court.

81. As regards the existence or not of any consensus among Contracting States, the Court notes that, although there is some disagreement about the legal position in certain States, it is undisputed that the United Kingdom is

not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even according to the Government's own figures, the number of such States does not exceed thirteen. Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.

82. Therefore, while the Court reiterates that the margin of appreciation 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.

83. Turning to the Government's comments concerning the lack of guidance from the Chamber as to what, if any, restrictions on the right of convicted prisoners to vote would be compatible with the Convention, the Court notes that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II, and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). In cases where a systemic violation has been found the Court has, with a view to assisting the respondent State in fulfilling its obligations under Article 46, indicated the type of measure that might be taken to put an end to the situation found to exist (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, §§ 193-94, ECHR 2004-V). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze,* cited above, § 202).

84. In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1 (see, for example, the cases concerning procedures governing the continued detention of life prisoners, where Court case-law and domestic legislation have evolved progressively: *Thynne, Wilson and Gunnell v. the United Kingdom*, judgment of 25 October 1990, Series A no. 190-A; *Singh v. the United Kingdom*, judgment of 21 February 1996, *Reports* 1996-I; and *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV).

85. The Court concludes that there has been a violation of Article 3 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

86. The applicant complained that he had been discriminated against as a convicted prisoner, relying on Article 14 of the Convention 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."

87. Having regard to the conclusion above under Article 3 of Protocol No. 1, the Grand Chamber, like the Chamber, considers that no separate issue arises under Article 14 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

88. The applicant complained that the disenfranchisement prevented him from exercising his right to freedom of expression through voting, relying on Article 10 of the Convention, the relevant parts of which provide:

> "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."

89. The Court considers that Article 3 of Protocol No. 1 is to be seen as the *lex specialis* as regards the exercise of the right to vote and, like the

Chamber, finds that no separate issue arises under Article 10 of the Convention in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicant claimed 5,000 pounds sterling (GBP) for suffering and distress caused by the violation.

92. The Government were of the view that any finding of a violation would in itself constitute just satisfaction for the applicant. In the alternative, they considered that, if the Court were to make an award, the amount should not be more than GBP 1,000.

93. The Chamber found as follows (see paragraph 60 of the Chamber judgment):

> "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."

94. Like the Chamber, the Grand Chamber does not make any award under this head.

B. Costs and expenses

95. 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 counsel's fees and expenses in the High Court of GBP 26,115.82 and in the Court of Appeal of GBP 13,203.64. For costs in Strasbourg, the applicant had claimed before the Chamber GBP 18,212.50 for solicitors' and counsel's fees and expenses. For proceedings before the Grand Chamber since the Chamber judgment, the applicant claimed additional reimbursement of GBP 20,503.75 for his solicitors' and counsel's fees and expenses broken down as GBP 7,800 for twenty-six hours of work (at GBP 300 an hour), GBP 1,650 for fifty-five letters and phone calls (at GBP 30 each), GBP 1,653.75 for value-added tax

(VAT), GBP 8,000 for counsel's fees during two days in connection with the hearing and twenty hours of work plus GBP 1,400 for value-added tax. He also claimed GBP 300 as out of pocket expenses (the cost of telephone calls etc.).

96. The Government submitted that, as the applicant had received legal aid during the domestic proceedings, he did not actually incur any costs. To the extent that the applicant appeared 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 additional costs claimed for the Grand Chamber proceedings in Strasbourg, the Government submitted that the hourly rate (GBP 300) charged by the solicitor was excessive, as was the flat rate for correspondence. No more than GBP 4,000 should be awarded in respect of solicitors' fees. As regards counsel's fees, the hourly rate was also excessive, as was the number of hours charged for the preparation of a very short pleading. No more than GBP 3,000 should be recoverable.

97. The Chamber found as follows (see paragraphs 63 and 64 of the Chamber judgment):

> "The Court reiterates 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, § 79, ECHR 1999-II, 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. and Others v. the United Kingdom* (just satisfaction), 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.
>
> 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 incurred by him. It awards to the applicant himself EUR 144."

98. The Court maintains the Chamber's finding that no award for costs in domestic proceedings is appropriate. Although significant work was necessarily involved in preparation for and attendance at the Grand Chamber hearing, it finds the amount claimed for the period after the Chamber judgment excessive and unreasonable as to quantum. Taking into account the amount paid by way of legal aid by the Council of Europe, it increases the award for legal costs and expenses to a total of 23,000 euros (EUR), inclusive of VAT. For the applicant's own out of pocket expenses, which are largely unitemised, it awards EUR 200.

C. Default interest

99. 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

1. *Holds* by twelve votes to five that there has been a violation of Article 3 of Protocol No. 1;

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

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

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

5. *Holds* by twelve votes to five
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
      (i) EUR 23,000 **(**twenty three thousand euros) in respect of costs and expenses incurred by the applicant's legal representatives in the Strasbourg proceedings;
      (ii) EUR 200 (two hundred euros) in respect of his own 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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 October 2005.

Luzius WILDHABER
President

Erik FRIBERGH
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Caflisch;

(b) joint concurring opinion of Mrs Tulkens and Mr Zagrebelsky;

(c) joint dissenting opinion of Mr Wildhaber, Mr Costa, Mr Lorenzen, Mr Kovler and Mr Jebens;

(d) dissenting opinion of Mr Costa.

L.W.
E.F.

CONCURRING OPINION OF JUDGE CAFLISCH

1. On the whole I agree with both the Court's finding and its reasoning. I should like, however, to comment on some of the arguments made by the respondent State and by one of the third-party interveners. I shall add a few words on what restrictions may or may not be imposed on the individual rights secured by Article 3 of Additional Protocol No. 1.

2. There may well be, in contemporary democratic States, a presumption of universal suffrage. This does not mean, however, that the State is unable to restrict the right to vote, to elect and to stand for election, and it may well be that the Contracting States enjoy a "wide" margin of appreciation in this respect – although this expression carries little meaning, except to suggest that States have some leeway. There must, however, be limits to those restrictions; and it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction is compatible with the individual right to vote, to elect and to stand for election. To make this determination, the Court will rely on the legitimate aim pursued by the measure of exclusion and on the proportionality of the latter (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 52). In other, more general words, more would have been said by asserting that measures of exclusion must be "reasonable" than by referring to a "wide" margin of appreciation.

3. This has not, it seems, been fully appreciated by the respondent State and even less by the Latvian Government as a third-party intervener. The United Kingdom Government argued that the Chamber's judgment was inconsistent with the Convention organs' settled approach and that there was no prior hint of any problem with the kind of restrictions adopted by the United Kingdom (see paragraph 47 of the present judgment); they also pointed out that the matter had been fully considered by the domestic courts applying Convention principles under the Human Rights Act 1998. Accordingly, they criticised the Chamber for having drawn its own conclusions instead of relying on national traditions or the views of the national courts. This argument was taken up and carried one step further by the Latvian Government who asserted (see paragraph 55 of the judgment) that this Court was not entitled to replace the views of a democratic country by its own view as to what was in the best interests of democracy. This assertion calls for two comments. Firstly, the question to be answered here is one of law, not of "best interests". Secondly, and more importantly, the Latvian thesis, if accepted, would suggest that all this Court may do is to follow in the footsteps of the national authorities. This is a suggestion I cannot and do not accept. Contracting States' margin of appreciation in matters relating to Article 3 may indeed, as has been contended, be relatively wide; but the determination of its limits cannot be virtually

abandoned to the State concerned and must be subject to "European control".

4. The United Kingdom Government also suggested that the policy behind the relevant legislation rested on a tradition explicitly supported by Parliament, most recently in the Representation of the People Act 2000. They criticised the Chamber for having assessed that legislation *in abstracto* without taking account of the facts of the case: even if the United Kingdom were to reform the law and limit its application to those who have committed the most serious crimes, the applicant, as he had been convicted of homicide and sentenced to life imprisonment, would still be disenfranchised. Accordingly, concluded the Government, the finding of a violation would be a surprise and offensive to many (see paragraphs 47 and 49 of the judgment). That may well be so, but the decisions taken by this Court are not made to please or displease members of the public, but to uphold human rights principles.

5. The United Kingdom Government further contended that disenfranchisement in the present case was in harmony with the objectives of preventing crime and punishing offenders, thereby enhancing civic responsibility (see paragraph 50 of the judgment). I doubt that very much. I believe, on the contrary, that participation in the democratic process may serve as a first step towards reintegrating offenders into society.

6. Finally, there is the argument that the situation in the United Kingdom was substantially improved by the passage of the Representation of the People Act 2000, especially because that Act enables remand prisoners to vote (see paragraph 51 of the judgment). This argument seems wrong. Detainees on remand enjoy the presumption of innocence under Article 6 § 1 of the Convention. To destroy that presumption by depriving detainees on remand of their voting rights amounts to a violation of that provision. All that the new legislation achieved in this respect was to remove a potential for violations of the presumption of innocence.

7. It might have been useful if the Court, in addition to finding a violation of Article 3 of Protocol No. 1, had indicated some of the parameters to be respected by democratic States when limiting the right to participate in votes or elections. These parameters should, in my view, include the following elements.

(a) The measures of disenfranchisement that may be taken must be prescribed by law.

(b) The latter cannot be a blanket law: it may not, simply, disenfranchise the author of every offence punished by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its Code of Good Practice in Electoral Matters (see paragraph 32 of the judgment). It cannot simply be assumed that whoever serves a sentence has breached the social contract.

(c) The legislation in question must provide that disenfranchisement, as a complementary punishment, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.

(d) Finally – and this may be the essential point for the present case – in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner's release, the disenfranchisement must remain confined to the punitive part and not be extended to the remainder of the sentence. In the instant case, this would indeed seem to be confirmed by the fact that retribution is one of the reasons adduced by the United Kingdom legislator for enacting the legislation discussed here, and certainly a central one. This reason is no longer relevant, therefore, as soon as a person ceases to be detained for punitive purposes. This is, in my view, a major argument for holding that Article 3 of Protocol No. 1 was breached.

8. Two out of the above four elements are contained in the Code of Good Practice of the Venice Commission: I say this not because I consider that Code to be binding but because, in the subject matter considered here, these elements make eminent sense.

JOINT CONCURRING OPINION OF JUDGES TULKENS AND ZAGREBELSKY

We share the view of the majority of the Court that the applicant's disenfranchisement as a result of his serving a prison sentence constitutes a violation of Article 3 of Protocol No. 1. We agree entirely with the general principles set out in the judgment, which make a fundamental contribution to the question of the right of convicted prisoners to vote (see paragraphs 56-71 of the judgment). However, as regards the application of these principles in the present case, to some extent our reasoning differs from the one developed in the judgment.

At the time the applicant was deprived of his right to vote, the law provided for all prisoners to lose the right to vote. It was not until the 2000 reform that remand prisoners (and mental patients who had not been convicted) were allowed to vote. Since 2000 all convicted prisoners are banned from voting for as long as they remain in prison, irrespective of the offence they have been convicted of, with the minor exceptions of persons imprisoned for contempt of court or for defaulting on fines.

In our view, the real reason for this provision is the fact that the person is in prison. This was obvious before the 2000 reform, when even the question of conviction was irrelevant. But even after that reform the extremely wide range of criminal offences for which prisoners may be banned from voting, irrespective of the gravity or nature of the offence, shows that the rationale for their disqualification is the fact that they are serving a prison sentence. They would not lose the right to vote if they were not in prison.

We admit that a prison sentence may reflect a judge's negative evaluation of the offence and the offender's character, which may in turn exceptionally justify an additional penalty such as the loss of the right to vote. However, the reasons for not handing down an immediate custodial sentence may vary. A defendant's age, health or family situation may result in his or her receiving a suspended sentence. Thus the same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence. In our view this, in addition to the failure to take into consideration the nature and gravity of the offence, demonstrates that the real reason for the ban is the fact that the person is in prison.

This is not an acceptable reason. There are no practical grounds for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote, there is no room in the Convention for the old idea of "civic death" that lies behind the ban on convicted prisoners' voting.

We would conclude, therefore, that the failure of the United Kingdom legal system to take into consideration the gravity and nature of the offence of which the prisoner has been convicted is only one of the aspects to be

taken into account. The fact that by law a convicted person's imprisonment is the ground for his or her disenfranchisement is, in our view, conclusive. The lack of a rational basis for that provision is a sufficient reason for finding a violation of the Convention, without there being any need to conduct a detailed examination of the question of proportionality.

The different approach taken by the majority of the Court is, in our view, open to some of the criticism mentioned by Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in their separate opinion. In particular, we note that the discussion about proportionality has led the Court to evaluate not only the law and its consequences, but also the parliamentary debate (see paragraph 79 of the judgment). This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is a difficult and slippery terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be allowed to the Contracting States.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, COSTA, LORENZEN, KOVLER AND JEBENS

1. We are not able to agree with the conclusion of the majority that there has been a violation of Article 3 of Protocol No. 1 because convicted prisoners, under the legislation of the United Kingdom, are prevented from voting while serving their sentence. Our reasons for not finding a violation are as follows.

2. In accordance with Article 3 of Protocol No. 1, the Contracting States are obliged "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". The wording of this Article is different from nearly all other substantive clauses in the Convention and its Protocols in that it does not directly grant individual rights and contains no other conditions for the elections, including in relation to the scope of a right to vote, than the requirement that "the free expression of the opinion of the people" must be ensured. This indicates that the guarantee of a proper functioning of the democratic process was considered to be of primary importance. This is also why the Commission in its early case-law did not consider that the Article granted individual rights (see *X v. Germany*, no. 530/59, decision of 4 January 1960, Collection 2, and *X v. Belgium*, no. 1028/61, decision of 18 September 1961, Collection 6, p. 78). The Commission then changed its approach, and the Court subsequently held that the Article does grant individual rights, including the right to vote, while at the same time recognising that such individual rights are not absolute but are open to "implied limitations" leaving the Contracting States "a wide margin of appreciation", which is nonetheless subject to the Court's scrutiny. The Court must therefore satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see, firstly, *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 52, and, more recently, *Py v. France*, no. 66289/01, §§ 45-47, ECHR 2005-I). Even though Article 3 of Protocol No. 1 contains no clause stating the conditions for restrictions, such as can be found, for example, in the second paragraphs of Articles 8 to 11 of the Convention, the Court has further held that any restriction must pursue a legitimate aim and that the means employed must not be disproportionate. Like the majority, we will limit our examination to these two conditions, thus implicitly accepting that the United Kingdom legislation does not in itself impair the very essence of the right to vote and deprive it of its effectiveness, as was found in *Aziz v. Cyprus* (no. 69949/01, §§ 29-30, ECHR 2004-V), where an ethnic minority of the Cypriot population was barred from voting.

3. As Article 3 of Protocol No. 1 does not prescribe what aims may justify restrictions of the protected rights, such restrictions cannot in our opinion be limited to the lists set out in the second paragraphs of Articles 8 to 11. Furthermore, we would point out that the Convention institutions in their case-law have to date been very careful not to challenge the aims relied on by the respondent Government to justify the restriction of a right under the Convention or its Protocols. This has also been the case in respect of restrictions on the right to vote. Thus, in its decision of 4 July 1983 in *H. v. the Netherlands* (no. 9914/82, Decisions and Reports 33, p. 246) the Commission found that such a restriction concerning persons sentenced to a term of imprisonment exceeding one year could be explained "by the notion of dishonour that certain convictions carry with them for a specific period, which may be taken into consideration by legislation in respect of the exercise of political rights". In *M.D.U. v. Italy* ((dec.), no. 58540/00, 28 January 2003) the Court accepted that a ban on voting for a two-year period imposed in connection with a conviction for tax fraud served "the proper functioning and preservation of the democratic regime". Accordingly, we have no difficulty in accepting that the restriction of prisoners' right to vote under the United Kingdom legislation was legitimate for the purposes of preventing crime, punishing offenders and enhancing civic responsibility and respect for the rule of law, as submitted by the respondent Government. However, since, unlike the Chamber, which left the question open, the majority accept that the restriction in question served legitimate aims, there is no need for us to pursue this question any further.

4. As stated above, the Court has consistently held in its case-law that the Contracting States have a wide margin of appreciation in this sphere. The Court has furthermore accepted that the relevant criteria may vary according to historical and political factors peculiar to each State. In the recent *Py v. France* judgment (cited above, § 46) the Court thus stated:

> "Contracting States have a wide margin of appreciation, given that their legislation on elections varies from place to place and from time to time. The rules on granting the right to vote, reflecting the need to ensure both citizen participation and knowledge of the particular situation of the region in question, vary according to the historical and political factors peculiar to each State. The number of situations provided for in the legislation on elections in many member States of the Council of Europe shows the diversity of possible choice on the subject. However, none of these criteria should in principle be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another."

In the light of such considerations, Article 3 of Protocol No. 1 cannot be considered to preclude restrictions on the right to vote that are of a general character, provided that they are not arbitrary and do not affect "the free

expression of the opinion of the people", examples being conditions concerning age, nationality**,** or residence (see, for example, *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI, and *Py*, cited above). Unlike the majority, we do not find that a general restriction on prisoners' right to vote should in principle be judged differently, and the case-law of the Convention institutions to date does not support any other conclusion, as appears from the analysis set out in the majority's opinion (see paragraphs 65-69 of the judgment). Nor do we find that such a decision needs to be taken by a judge in each individual case. On the contrary, it is obviously compatible with the guarantee of the right to vote to let the legislature decide such issues in the abstract.

5. The majority have reaffirmed that the margin of appreciation in this area is wide, and have rightly paid attention to the numerous ways of organising and running electoral systems and the wealth of differences in this field in terms of, *inter alia*, historical development, cultural diversity and political thought within Europe. Nonetheless, the majority have concluded that a general restriction on voting for persons serving a prison sentence "must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be" (see paragraph 82 of the judgment). In our opinion, this categorical finding is difficult to reconcile with the declared intention to adhere to the Court's consistent case-law to the effect that Article 3 of Protocol No. 1 leaves a wide margin of appreciation to the Contracting States in determining their electoral system. In any event, the lack of precision in the wording of that Article and the sensitive political assessments involved call for caution. Unless restrictions impair the very essence of the right to vote or are arbitrary, national legislation on voting rights should be declared incompatible with Article 3 only if weighty reasons justify such a finding. We are unable to agree that such reasons have been adduced.

6. It has been part of the Court's reasoning in some cases in recent years to emphasise its role in developing human rights and the necessity to maintain a dynamic and evolutive approach in its interpretation of the Convention and its Protocols in order to make reforms or improvements possible (see, for example, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI). The majority have not made reference to this case-law, but that does not in our opinion change the reality of the situation that their conclusion is in fact based on a "dynamic and evolutive" interpretation of Article 3 of Protocol No 1.

We do not dispute that it is an important task for the Court to ensure that the rights guaranteed by the Convention system comply with "present-day conditions", and that accordingly a "dynamic and evolutive" approach may in certain situations be justified. However, it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative

functions. An "evolutive" or "dynamic" interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case.

The majority submit that "it is a minority of Contracting States in which a blanket restriction on the right of serving prisoners to vote is imposed or in which there is no provision allowing prisoners to vote" (see paragraph 81 of the judgment). The judgment of the Grand Chamber – which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa – unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States.

According to the information available to the Court, some eighteen countries out of the forty-five Contracting States have no restrictions on prisoners' right to vote (see paragraph 33 of the judgment). On the other hand, in some thirteen States prisoners are not able to vote either because of a ban in their legislation or *de facto* because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least thirteen other countries more or less far-reaching restrictions on prisoners' right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention (see paragraph 83), the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.

Our conclusion is that the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard.

7. Furthermore, the majority attach importance to an alleged lack of evidence that the Parliament of the United Kingdom "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" (see paragraph 79 of the judgment). It is, however, undisputed that a multi-party Speaker's Conference on Electoral Law in 1968 unanimously recommended that a convicted person should not be entitled to vote. We also note that the

Government's proposal to amend the Representation of the People Act 2000 to permit remand prisoners and unconvicted mental patients to vote was based on the opinion that it should be part of a convicted prisoner's punishment to lose, *inter alia*, the right to vote. Had a majority of the members of Parliament disagreed with this opinion, it would have been open to them to decide otherwise. The majority of the Court have held – as did the Chamber – that no importance could be attached to this as "it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards" (see paragraph 79 of the judgment). We disagree with this objection as it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions. It must be assumed that section 3 of the Representation of the People Act 2000 reflects political, social and cultural values in the United Kingdom.

8. Regarding in particular the requirement that any restrictions must not be disproportionate, we consider it essential to underline that the severity of the punishment not only reflects the seriousness of the crime committed, but also the relevance and weight of the aims relied on by the respondent Government when limiting voting rights for convicted persons. We do not rule out the possibility that restrictions may be disproportionate in respect of minor offences and/or very short sentences. However, there is no need to enter into this question in the circumstances of the present case. The Court has consistently held in its case-law that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. It is, in our opinion, difficult to see in what circumstances restrictions on voting rights would be acceptable, if not in the case of persons sentenced to life imprisonment. Generally speaking, the Court's judgment concentrates above all on finding the British legislation incompatible with the Convention *in abstracto*. We regret that despite this focus it gives the States little or no guidance as to what would be Convention-compatible solutions. Since restrictions on the right to vote continue to be compatible, it would seem obvious that the deprivation of the right to vote for the most serious offences such as murder or manslaughter, is not excluded in the future. Either the majority are of the view that deprivations for the post-tariff period are excluded, or else they think that a judge has to order such deprivations in each individual case. We think that it would have been desirable to indicate the correct answer.

9. Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. Taking into account the sensitive political character of this issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, we are not able to accept that it is for the Court to impose on national legal systems an

obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.

DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. I voted the same way as my colleagues Judges Wildhaber, Lorenzen, Kovler and Jebens and readily subscribe to their opinion, which is therefore our joint opinion.

2. I should, however, like to add one or two brief comments of my own to their reasoning, with which I concur.

3. Firstly, while I readily agree with my colleagues (see point 3 in our joint opinion) that there is no need to pursue the question of whether the statutory restriction on the right of prisoners to vote served a "legitimate aim" any further, I confess to having doubts about the legitimacy – or rationality – of that aim. It is perfectly conceivable, for example, that a person who has been convicted of electoral fraud, of exceeding the maximum permitted amount of electoral expenditure or even of corruption should be deprived for a time of his or her rights to vote and to stand for election. The reason for this is that there exists a logical and perhaps even a natural connection between the impugned act and the aim of the penalty (which, though ancillary, is important) that serves as punishment for such acts and as a deterrent to others. The same does not hold true, at least not in any obvious way, of a ban on voting and/or standing for election that is imposed for *any* offence that leads to a prison sentence.

4. However, I do not propose to press this point, firstly, because, in common with the other dissenting judges and, indeed, those in the majority, I consider that when applying Article 3 of Protocol No. 1, which, unlike Articles 8 to 11 of the Convention, does not contain an exhaustive list of "legitimate aims", it is necessary to make an exception to the general rule and to construe such aims broadly. Secondly, limiting the States' room to manoeuvre in this sphere as regards the *aims* they are free to pursue in their legislation could, paradoxically, lead me to rejoin the majority by another route (indeed, I have to admit that on reading the careful concurring opinion of my colleague Judge Caflisch, I was tempted to follow a similar path).

5. However, once I had rejected that approach and accepted that the States have a wide margin of appreciation to decide on the aims of any restriction, limitation or even outright ban on the right to vote (and/or the right to stand for election), how could I, without being inconsistent, reduce that margin when it came to assessing the proportionality of the measure restricting universal suffrage (a concept which, of course, remains the democratic ideal)?

6. How would I be able to approve of the *Py v. France* judgment of 11 January 2005 (which I am all the more at liberty to cite in that I did not

sit in the case)[1]? In that judgment, the Court unanimously (as indeed the United Nations Human Rights Committee had done in its Views dated 15 July 2002, which were cited under the section on "Relevant domestic law and international case-law" and in paragraph 63) held that the minimum ten-year-residence qualifying period for being eligible to vote in elections to Congress in New Caledonia did not impair the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, and that there had been no violation of that provision. How, then, could I approve of that judgment and at the same time agree with the judgment in the present case when it states in paragraph 82: "while ... the margin of appreciation is wide, it is not all-embracing", which in practice means that a prisoner sentenced to a discretionary life sentence would have the right to vote under Article 3 of Protocol No. 1 (but when would the right become effective?). Are there not two "standards"?

7. It might perhaps be objected that the *Py* judgment took into account "local requirements", within the meaning of Article 56 § 3 of the Convention. That is true. But what of the decision in *Hilbe v. Lichtenstein* (7 September 1999, ECHR 1999-IV)? In holding that a Lichtenstein national who was resident in Switzerland did not have the right to vote in Liechtenstein parliamentary elections (Article 56 was not, as far as I am aware, applicable in the case), the Court noted: "the Contracting States have a wide margin of appreciation to make the right to vote subject to conditions" before going on simply to conclude that the residence requirement "cannot be regarded as unreasonable or arbitrary or, therefore, as incompatible with Article 3 of Protocol No. 1".

8. As stated in point 4 of our joint opinion, the Court's case-law permits restrictions on the right to vote that are of a general character, such as conditions concerning age, nationality, or residence (provided they are not arbitrary and do not affect the free expression of the opinion of the people). With due respect, I see no convincing arguments in the majority's reasoning that could persuade me that the measure to which the applicant was subject was arbitrary, or even that it affected the free expression of the opinion of the people.

9. The point is that one must avoid confusing *the ideal* to be attained and which I support – which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious crimes, and to prepare for their reintegration into society and citizenship – and the *reality* of *Hirst (no. 2)*, which on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that

1. No. 66289/01, ECHR 2005-I.

right, thereby depriving the State of all margin and all means of appreciation.