CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 74025/01
by John HIRST
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 8 July 2003 as a Chamber 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*,

Having regard to the above application lodged on 5 July 2001,

Having regard to the observations submitted by the respondent Government,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr John Hirst, is a United Kingdom national, who was born in 1950 and is currently serving a sentence of imprisonment in HM Prison Rye Hill, Warwickshire. He is represented before the Court by Mr E. Abrahamson, a solicitor practising in Liverpool.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a prisoner serving a discretionary life sentence for manslaughter. On 11 February 1980, he pleaded guilty to manslaughter on ground of diminished responsibility. His plea of guilty was accepted on the basis of medical evidence that the applicant was a man with a gross personality disorder to such a degree that he was amoral.

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

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.

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

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

institution. The cases before the European Commission of Human Rights and this Court were also reviewed.

Lord Justice Kennedy concluded:

> "... I return to what was said by the European Court in paragraph 52 of its judgment in Mathieu-Mohin. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and 'the free expression of the opinion of the people in the choice of the legislature'. If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.
>
> The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities, those states which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and like McLachlin J in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the 'hard cases' of post-tariff discretionary life sentence prisoners... They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear. ...
>
> If section 3 (1) of the 1983 Act can meet the challenge of Article 3 [of the First Protocol] then Article 14 had nothing to offer, any more than Article 10."

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

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

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

B. Relevant domestic law and practice

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

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

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).

During the parliamentary debates concerning the Representation of the People Act 2000, which permitted remand prisoners and unconvicted mental patients to vote, Mr Howarth MP, speaking for the Government, maintained the view that "it should be part of a convicted prisoner's punishment that he loses rights and one of them is the right to vote".

On 22 February 2001, the Secretary of State gave his reasons for maintaining that 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."

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."

C. Relevant international texts and materials

1. International Covenant on Civil and Political Rights

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."

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

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

COMPLAINTS

The applicant complains under Article 3 of Protocol No. 1 that he is barred from voting.

The applicant complains under Article 10 of the Convention that his disenfranchisement prevents him from exercising voting as a form of expression which is fundamental to a functioning democracy.

The applicant invokes Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1, complaining that he is discriminated against as a convicted prisoner in the enjoyment of the right to vote.

The applicant complains under Article 13 of the Convention that he had no effective remedy for his complaints. Judicial review is limited to reviewing decisions alleged to be irrational, improper or illegal and does not provide a review of the merits.

Finally, the applicant complains under Articles 6 and 13 of the Convention that the same Court of Appeal judge considered the application for permission to appeal on the papers as well as renewed application, when the judge would have already formed a definite view. Furthermore, this judge was a Lord Justice, who was in fact less senior than the judge, also a Lord Justice, who gave the judgment of the Divisional Court. He argues that an appeal process whereby the judge who considers the merits of an appeal is of the same level (or lower) than the judge who made the decision appealed against is ineffective and unlawful.

THE LAW

1. The applicant complains that as a convicted prisoner he is ineligible to vote. He invokes Article 3 of Protocol No. 1 alone and in conjunction with Article 14 and Article 10 of the Convention.

Article 3 of Protocol No. 1 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."

Article 14 of the Convention 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."

Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

The Government submit that under Article 3 of Protocol No. 1 the right to vote is not absolute and that a wide margin of appreciation is to be allowed to Contracting States in determining the conditions under which the right to vote shall be exercised. An extensive variation in practice exists between Contracting States in relation to convicted prisoners and there is also a variety of approaches outside Europe.

The Government argue that the disqualification in this case pursues a number of intertwined legitimate aims. It aims to prevent crime and punish offenders and to enhance civic responsibility and respect for the rule of law, by depriving those who have breached the basic rules of society of the right to have a say in the way such rules are made for the duration of their sentence. Convicted prisoners have breached the social contract and so can legitimately be regarded as (temporarily) forfeiting the right to take part in the government of the country. The measure is also proportionate as it only affects those who have been convicted of crimes sufficiently serious, in the individual circumstances, to warrant a custodial sentence and as soon as prisoners cease to be detained the legal incapacity is removed.

As regards Article 14 of the Convention, the Government submit that there is objective and reasonable justification for disenfranchising convicted prisoners for the duration of their prison term. They refer to their arguments above as regards the legitimate aims and proportionality of the measure. In so far as the applicant seeks to compare himself to a determinate sentence prisoner who has been released from prison and is entitled to vote, the applicant, even though his tariff expires, remains in prison as he remains a danger to society and Parliament is entitled to take the view that a convicted prisoner who remains in prison for the protection of society should not have the right to take part in the process by which society makes its rules.

Concerning Article 13 of the Convention, the Government submit that the applicant was able to have his complaints considered by the courts, whose examination was not limited as alleged by the applicant. The courts were under a duty to decide whether section 3 of the 1983 Act was compatible with the Convention and consequently took into account the aims pursued and issues of proportionality. If the Divisional Court had found the provision incompatible with the Convention it would have had the power to grant a declaration to that effect and a Minister of the Crown would have had the power to remedy the incompatibility by using a special fast-track procedure (section 10 of the 1998 Act). In so far as the applicant complains that the appeal procedures were ineffective, the Government argue that the merits of the appeal were considered on the papers, which included a full skeleton argument. They consider that there was nothing inappropriate in the fact that Lord Justice Simon Brown, who was

acquainted with the papers in the case, heard the renewed application at an oral hearing.

The applicant submits that the right to vote is one of the most fundamental rights which underpin a truly democratic society. The restriction in voting rights, which does not apply to unconvicted prisoners, does not pursue any legitimate aim as the only reason for disenfranchisement of a convicted prisoner is that it is considered as part of his punishment. The blanket ban is also disproportionate and impairs the essence of the right. In addition, he argues that as a post-tariff prisoner, the punishment element of his sentence has expired and he is held on grounds of risk in which case no alleged justification of punishment can remain either. He refers to a trend in Canada, South Africa and other European states to enfranchise prisoners, submitting that there is no convincing reason, beyond punishment, to remove the vote from convicted prisoners and that this additional sanction is not in keeping with the idea that the punishment of imprisonment is the deprivation of liberty and that the prisoner does not thereby forfeit any other of his fundamental rights save in so far as this is necessitated by considerations of security etc.

The applicant further submits that the removal of his right to vote constitutes discrimination contrary to Article 14. In his view, there is no legitimate aim and the measure is disproportionate. In particular, given his status as post-tariff discretionary life prisoner, the punishment element of his sentence is completed and the fact that he continues to be detained due to a perceived risk to the public does not furnish any objective or reasonable justification for the restriction on voting.

B. The Court's assessment

The Court finds that serious issues of fact and law arise under the Convention which should be examined on the merits. This part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and no other grounds for declaring it inadmissible have been established.

2. The applicant complains of defects in the appeal procedure, invoking Article 6 of the Convention, which provides as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Court recalls that Article 6 § 1 of the Convention does not apply to electoral rights, such rights falling outside the scope of "civil rights" (see *Pierre-Bloch v. France*, judgment of 21 October 1997, *Reports* 1997-VI, §§ 49-51). The applicant's complaints about the proceedings before the Court of Appeal which concerned the effect on his right to vote of the

Representation of the People Act 1983 are incompatible *ratione materiae* and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains also that he did not have an effective remedy for his complaints, as the judicial review procedure did not allow courts to concern themselves with evidence or the merits of a decision and since there were defects in the appeal procedure. He invokes Article 13 of the Convention which provides:

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

However, the Court recalls that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention (see *James and others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 85; *A. v. the United Kingdom*, no. 35373/97, § 112, ECHR 2002-IX). The applicant's complaints related to the bar on voting imposed by section 3 of the Representation of the People Act 1983. It follows that this aspect of the application concerned is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the applicant's complaints about the scope of judicial review and alleged defects in the appeal procedure inadmissible;

Declares the remainder of the application admissible, without prejudging the merits of the case.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President