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Consultation Response by the Law Society of Scotland

Prisoner Voting

March 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Government Consultation on Prisoner Voting. The Sub-committee has the following comments to put forward for consideration.

General Comments

The European Court of Human Rights (ECtHR) ruled in *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 that the blanket ban on British prisoners exercising the right to vote was contrary to the ECHR Article 3 of Protocol 1.

The applicant, John Hirst, served a sentence of life imprisonment for manslaughter until 25 May 2004, when he was released from prison on licence. His tariff (the part of his sentence relating to retribution and deterrence) expired on 25 June 1994. However, he remained in detention, as the Parole Board considered that he continued to present a risk of serious harm to the public.

As a convicted prisoner, the applicant was barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections. He issued proceedings in the High Court, under section 4 of the Human Rights Act 1998, seeking a declaration that section 3 was incompatible with the European Convention on Human Rights. On 21 and 22 March 2001 his application was heard before the Divisional Court; but his claim and subsequent appeal were both rejected.

The applicant alleged that, as a convicted prisoner in detention, he was subject to a blanket ban on voting in elections. He relied on Article 3 of Protocol No. 1, – the right to free elections. Article 14, as well as Article 10 of the Convention

The body responsible for enforcing judgments of the ECtHR, the Council of Europe's Committee of Ministers, has twice called upon the UK to respond to the ECtHR's judgment.

The *Hirst (No 2) v United Kingdom* judgment is very contentious. It has illustrated the relationship between the European Court of Human Rights and the courts and constitutional order in the UK. As Graeme Cowie has explained:

Reconciling judgments that declare one or more provisions of primary legislation to have been incompatible with our obligations as a High Contracting party requires Parliament to legislate to remedy the breach. Under the principle of the legislative supremacy of Parliament, no Court, domestic or international, can unilaterally override an Act of Parliament.

Despite their concerted efforts to demand that the “blanket” ban on the right to vote for prisoners otherwise than those on remand be overturned, the Strasbourg Court has ultimately proved unable to “compel” the United Kingdom to comply. This remains the case despite it having issued a pilot judgment in late 2010 (*Greens and MT v United Kingdom*) that threatened to recommence proceedings for some 2000 applicants against the UK, potentially giving rise to costly damages in just satisfaction. If any progress is to be made in the law being changed, so as not to constitute a “disproportionate” interference with Article 3 Protocol 1 of the Convention (A3P1), it must come through the active consent and initiative of the Houses of Commons and Lords. In the absence of that, the only recourse a domestic court has is to exercise its discretion to make a Declaration of Incompatibility under section 4 of the Human Rights Act. It can provide no mandatory or pecuniary relief to a prisoner deprived of the right to vote.

In the case of *Smith v. KD Scott Electoral Registration Officer* 2007 SC 345 the petitioner claimed that his right to vote had not been re-instated despite a year having passed since the European Court of Human Rights had found that the withdrawal of that right for prisoners was an infringement.

It was held by the Court of Session that it was not possible to strike out the provision of the Representation of the People Act 1983 but a declaration of incompatibility was necessary which the Court could make. The Representation of the People Act 2000 had already restored the rights of prisoners held on remand, but more was required.

Two consultations were held by the Labour Government in the 2005-10 Parliament; but no changes to the law. In December 2010 the Government announced that, in response to the judgment in *Hirst*, it would bring forward legislation to allow those offenders sentenced to a custodial sentence of less than four years the right to vote in UK Parliamentary and European Parliament elections, unless the sentencing judge considered this inappropriate. No timetable was announced for this proposed legislation.

The Coalition Government allowed a debate in 2011 and the House of Commons Political and Constitutional Reform Committee produced a Report, *Voting by convicted prisoners: summary of evidence*, HC 776 in February 2011 ahead of a debate in the House of Commons on *Voting by Prisoners*.

The motion in the debate was proposed by David Davis MP as follows:

That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty

obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand (10 Feb 2011 : Column 493).

The House of Commons Library Note SN/PC/0174 provides detail about the events concerning this issue. On 1 March 2011 the Government referred the latest ECtHR ruling on the issue, the Greens and MT judgement, to the Grand Chamber of the European Court of Human Rights. This in effect appealed the Court's decision that the UK had six months to introduce legislation to lift the blanket ban. On 11 April 2011 this request for an appeal hearing was dismissed and the Court gave the UK Government a deadline of six months from this date to introduce legislative proposals.

On 6 September 2011 the Government announced that it had requested an extension to this deadline to take account of the referral of *Scoppola v Italy (No 3)* (a case similar to that of Greens and MT) to the Grand Chamber. The Court granted an extension of six months from the date of the judgment in the case. The United Kingdom Government made submissions to the Grand Chamber as a third party intervener in the case. The Grand Chamber's judgment in the case of *Scoppola v Italy (No 3)* was announced on 22 May 2012. The Grand Chamber confirmed the judgment in the case of *Hirst (no 2)* (which held that a general and automatic disenfranchisement of all serving prisoners was incompatible with Article 3 of Protocol No 1); but it accepted the UK Government's argument that member states should have a wide discretion (or 'margin of appreciation') in how they regulate a ban on prisoners voting. The delivery of the judgement in the *Scoppola* case meant that the UK Government had six months from 22 May 2012 to bring forward legislative proposals to amend the law.

On 22 November 2012 the Government published a draft Bill, the Voting Eligibility (Prisoners) Bill, for pre-legislative scrutiny by a Joint Committee of both Houses. The Committee published its report on 18 December 2013 and recommended that the Government should introduce legislation to allow all prisoners serving sentences of 12 months or less to vote in all UK Parliamentary, local and European elections. The Lord Chancellor and Justice Secretary, Chris Grayling, made a brief response to the Committee's report on 25 February 2014; but the Government did not bring forward a Bill with the 2014 Queen's Speech.

On 16 October 2013 the UK Supreme Court dismissed the appeals of George McGeoch and Peter Chester, both prisoners serving life sentences for murder, who had brought domestic law proceedings in 2010 challenging the ban. The Supreme Court rejected a separate head of claim that the blanket ban was incompatible with European Union law. However, the Supreme Court also maintained the position determined in Strasbourg that the UK's blanket ban was contrary to the European Convention on Human Rights; although it refused to make a further 'declaration of incompatibility' with the Human Rights Act 1998, considering that it was unnecessary in the circumstances.

In two recent judgments in August 2014 and February 2015 (*Frith and others v UK* and *McHugh and others v UK*) relating to a large number of outstanding claims by prisoners, the European Court of Human Rights noted the continuing violation of Article 3 to Protocol No. 1 to the Convention, but did not award the applicants any compensation or legal expenses.

In December 2014, the Government announced that prisoners would not be enfranchised prior to the General Election of 2015. That is the current position.

The issue arose again during the passage of the Scottish Independence Referendum (Franchise) Act 2013 ("the Franchise Act"). In our memorandum on the bill we stated that:

This provision might be challenged -- some solicitors are quoted as being ready to act on behalf of aggrieved clients presumably on the basis that the exclusion of prisoner voting is contrary to the spirit of the European Convention on Human Rights (ECHR). In order to be competent under the Scotland Act 1998 the bill must comply with ECHR Prisoner voting cases have all been based on alleged breaches of ECHR Article 3 Protocol 1 (A3P1) which states,

'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.'

A3P1 does not govern voting in referendums but only in elections for the 'choice of the legislature'. Accordingly the European Court of Human Rights jurisprudence relating to prisoner voting rights, *Hirst v United Kingdom (No.2)* [2006] 42 EHRR 41, *Greens & MT v United Kingdom* [2012] ECHR 1826 and the domestic law applying under the Human Rights Act 1998 e.g. in *Smith v Scott* 2007 SC 345 do not apply to the referendum.

The right to vote in referendums has been considered by the European Commission on Human Rights in 1975 in the case of *X v UK* App No 7096/75. The Commission came to the view that the UK referendum on continued membership of the EEC did not fall within the scope of A3P1 because the referendum did not concern the choice of a legislature. Accordingly it follows that the right to vote in the referendum could not be derived from A3P1 either and that a prohibition on voting by prisoners in the referendum was not contrary to the Protocol 1. A similar result was reached in 1996 in the case of *Bader v Austria* (1996) 22 EHRR CD 213 and *Neidzwiedz v Poland* (2008) 1345/06.

Section 3 appears to be on the basis of the case law case law compliant with the Convention. That, of course does not mean to say that the Section may not attract a challenge but such a challenge on the basis of the current law is unlikely to be successful.

The Supreme Courts' note on *Moohan and Another (Appellants) v The Lord Advocate (Respondents)* [2014] UKSC 67 provides a good summary of the decision. Under the Scottish Independence Referendum (Franchise) Act 2013 ("the Franchise Act"), convicted prisoners were not eligible to vote in the Scottish independence referendum on 18 September 2014. Two Scottish prisoners Leslie Moohan and Andrew Gillon challenged that exclusion through judicial review proceedings. They relied on case law establishing that a general and automatic prohibition that bars prisoners from participating in general elections violates article 3 of Protocol 1 ("A3P1") of the European Convention on Human Rights ("ECHR").

The judicial review applications were refused by Lord Glennie in the Outer House of the Court of Session on 19 December 2013. The First Division of the Inner House of the Court of Session refused a reclaiming

motion on 2 July 2014. The Supreme Court heard and decided the appellants' appeal on 24 July 2014, in advance of the referendum.

The Supreme Court dismissed the appeal by a majority of five to two. It held that the statutory disenfranchisement of convicted prisoners from voting in the Scottish referendum was lawful.

Lord Hodge gave the substantive judgment of the majority (Lord Hodge, Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed). In their view, the words of A3P1 on their ordinary meaning refer to an obligation to hold periodic elections to a democratically elected legislature. However, the requirement that such elections take place "at reasonable intervals" suggests that the drafters did not have referendums in mind. There is unequivocal case law from the European Court of Human Rights ("ECtHR") to show that the reach of A3P1 is limited to periodic general elections to the legislature. Four cases were cited as examples of referendums not covered by A3P1: the UK's 1975 referendum on whether to remain in the EEC in *X v United Kingdom* (Application No 7096/75, 3 October 1975); referendums on accession to the EU by Latvia (*Ž v Latvia* (Application No 14755/03, 26 January 2006)) and Poland (*Niedźwiedz v Poland* (2008) 47 EHRR SE6); and the UK's nationwide referendum on the alternative vote (*McLean & Cole v United Kingdom* (2013) 57 EHRR SE95). Although the Supreme Court is not bound to follow ECtHR authority, it did so because there is a "clear and constant line of decisions" delineating the scope of a Convention right. These cases also show that the political importance of a democratic decision is not the criterion for its inclusion within A3P1.

The appellants advanced several arguments as to why the Franchise Act was unlawful, which were not accepted by the Court. The reasons why the prohibition does not breach EU law were: (i) the outcome of the referendum would not in itself have been determinative of voters' EU citizenship; and (ii) EU law does not incorporate any right to vote. The appellants relied on Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), which protects the right to participate in referendums on self-determination, both as an aid to interpreting A3P1 and as a free-standing international law obligation. Neither point succeeded. Article 25 ICCPR is different in wording and scope from and does not inform the interpretation of A3P1. The ICCPR is not incorporated into UK domestic law and therefore Article 25 does not affect the legislative competence of the Scottish Parliament. The right to vote is a basic or constitutional right but the common law has not developed so as to recognise a right of universal and equal suffrage from which any derogation must be provided for by law and proportionate. Neither is the right to vote inherent in the rule of law on a separate basis from a statutory franchise.

Lord Kerr and Lord Wilson dissented from the majority. Lord Kerr, with whom Lord Wilson agrees, considered that the natural meaning of the words of A3P1 not only encompassed elections to the legislature but also elections that will determine the form of the legislature. The ECHR is a living instrument and A3P1 may apply to situations which were not in the contemplation of its original drafters. A fundamental purpose of the ECHR is to guarantee an effective political democracy; that purpose would be frustrated by preventing the safeguards applicable to ordinary legislative elections from applying to this most fundamental of votes. The requirement to hold elections at "regular intervals" is secondary to the primary aim of A3P1 which is to ensure that citizens should have a full participative role in the selection of those who will govern them. The ECtHR case law has not, so far, considered a referendum that will

determine the type of legislature that a country's people will have. Lord Wilson added that the words "ensure the free expression of the opinion of the people in the choice of the legislature" are dominant in A3P1 (and particularly apt to describe the Scottish independence referendum) while the words "at regular intervals" are subservient and must not be interpreted to contrary effect to the object and purpose of the provision. The ECtHR authorities on referendums are not directly on point and it is open to the Supreme Court to go further than the Strasbourg case law in developing a Convention right.

The outcome of the case means that the law on this matter is settled.

It is a matter for Parliament to change the law on prisoner voting in elections. It would also be a matter for Parliament to decide the franchise in any future referendum.

In that connection there should also be a mechanism to balance voting rights for prisoners who are initially sentenced below the proposed threshold and those who commit a serious crime but have served a sentence which is subsequently reduced to below the proposed threshold.

Consultation Questions

Question 1: Do you think that prisoners' right to vote in Scottish Parliament and Local Government elections should be linked to the length of their sentence?

This is a matter for Parliament but the case law suggests that such an approach would be compliant with ECHR.

Question 2: If your answer to Question 1 is 'no', what would be your preferred approach to extending prisoners' voting rights?

Not applicable.

Question 3: If your answer to Question 1 is 'yes', what length of sentence would be appropriate as the eligibility threshold for prisoner voting rights?

The length of sentence is a matter for Parliament to determine. However taking into consideration the new presumption against prison sentences of a year or less, the proposals for a six or 12 month cut off would likely have a much smaller impact than estimated in the consultation paper.

If a 'short-term sentence' is considered something less than four years, perhaps that would be the right reference point.

Question 4: If your answer to the above is 'another duration', please specify this here.

Not applicable.

Question 5: Do you have any comments on the practicalities of prisoner voting?

It is important to ensure the postal voting and proxy procedure have the proper mechanisms in place to allow voting in secret, free from intimidation and to manage spoilt ballots.

The Scottish Government would benefit from further researching case studies where disenfranchisement has been applied to crimes against the state as an additional penalty in some EU countries.

Question 6: Do you have any other comments that have not been captured in the responses you have provided above?

See our general comments.



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