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CASE AND COMMENT

THE REQUIREMENTS OF PRISONER VOTING RIGHTS: MIXED MESSAGES FROM STRASBOURG

THE Grand Chamber of the European Court of Human Rights ruled six years ago, in *Hirst* v. *United Kingdom (No 2)* 74025/01 [2005] ECHR 2260, (2006) 42 E.H.R.R. 41 that section 3(1) of the Representation of the People Act 1983, which provides a near total ban on prisoners voting, is incompatible with Article 3 of the First Protocol to the European Convention on Human Rights, under which 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." The Government's laggardly response to the *Hirst* judgment provoked the opprobrium of the Committee of Ministers and allegations within Parliament of deliberate procrastination. It also prompted several thousand prisoners to issue claims in Strasbourg. Three recent chamber judgments add to the pressure for legislative change, but render unclear, through their differing interpretations of *Hirst*, what degree of reform will satisfy the Strasbourg Court.

In *Frodl* v. *Austria* 20201/04 [2010] ECHR 508 the Court (First Section) was concerned with a provision of Austrian law which disenfranchises prisoners convicted of offences committed with the mens rea of intent and sentenced to a term of imprisonment of one year or more. The Court concluded this provision was incompatible with Article 3 of the First Protocol, purportedly relying on the Grand Chamber decision in *Hirst*: "under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and

democratic institutions" (at [34]). The Court further stated that "the essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners" (at [35]). The *Frodl* judgment became final on 4 October 2010 when the Grand Chamber refused the Austrian Government's request for a referral. By Article 43(2) of the Convention, this refusal signified that, in the opinion of a panel of the Grand Chamber, no "serious question" affecting the interpretation or application of the First Protocol and no "serious issue of general importance" arose.

The reasoning in *Frodl* was followed by the Court (Second Section) in *Scopolla* v. *Italy (No 3)* 126/05: disenfranchisement of prisoners sentenced to terms of imprisonment of three years or more was found to violate Article 3 of the First Protocol. The Court's complaint was that disenfranchisement followed "automatically" from the conviction without distinct judicial consideration of whether the suffrage sanction was merited.

In *Greens and M.T.* v. *United Kingdom* 60041/08 and 60054/08 [2010] ECHR 1826 the Court (Fourth Section) considered the Government's ongoing non-compliance with *Hirst* and, for a second time, the Convention compatibility of section 3(1) of the Representation of the People Act 1983. The Government's non-compliance was held to fall foul of its undertaking under Article 46 of the Convention to abide by judgments to which it is a party, and, unsurprisingly, the Court found a further violation of Article 3 of the First Protocol. However, the Court declined to endorse the view expressed in *Frodl* that only prisoners convicted of electoral or "anti-democratic" offences may be disenfranchised, and only upon judicial say-so. The Court emphasised instead that "the Grand Chamber in *Hirst* declined to provide any detailed guidance as to the steps which the United Kingdom should take to render its regime compatible with Article 3 of Protocol No. 1" (at [113]) and made clear that, in its view, "a wide range of policy alternatives are available to the Government" (at [114]). It was careful to highlight the subsidiary role of the Strasbourg Court and the wide margin of appreciation that the Grand Chamber in *Hirst* had ascribed to member states.

The Fourth Section in *Greens* directed the Government under Article 46 to introduce amending legislation (of unspecified form) within 6 months of the judgment becoming final and to enact the legislation within a period to be determined by the Committee of Ministers (at [115]). Adopting a pilot judgment procedure (the first time such a procedure has been used against the United Kingdom), it declared that all comparable prisoner voting complaints would be "frozen" pending compliance by the Government with this Article 46 direction, in anticipation of striking these cases out under

Article 37(1)(c) upon compliance. The Court made clear that it retained power to restore the suspended cases to its list in the event of its directions not being followed.

The judgment in *Greens* became final on 11 April 2011 upon the refusal of both parties' referral requests.

In terms of strict interpretation of *Hirst*, the Fourth Section in *Greens* was correct to distance itself from the judgment of the First Section in *Frodl*. Disenfranchisement by judicial not legislative act was described by the Grand Chamber as at most a desirable, not an obligatory feature of prisoner disenfranchisement (at [71]). The need for "a discernable and sufficient link between the sanction and the conduct and circumstances of the individual concerned" was stipulated by the Grand Chamber, but it did not find that it is only between disenfranchisement and electoral crimes that the link is sufficient. Nor was this conclusion to be inferred, since it was implied that the length of sentence and the gravity of the offence (as well as its nature) were relevant variables for attaining proportionality (at [82]).

However, the dictum of the First Section in *Frodl*, that prisoner disenfranchisement should be exceptional, is the logical conclusion of the application of the principle, firmly established in Strasbourg case law, that prisoners retain, so far as these are not inevitably curtailed by the fact of incarceration, all their Convention rights and freedoms save for the right to liberty (*cf*. the similar approach at common law, as per Lord Wilberforce in *Raymond* v. *Honey* [1983] 1 A.C. 1 at 10: "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication"). It also reflects concerns, articulated in the dissenting judgment of Judge Costa in *Hirst*, about the apparent lack of rational connection between any of the Government's stated aims (promoting civic duty and respect for the rule of law; discouraging crime), and disenfranchisement. The empirical evidence that disenfranchisement helps to achieve any of these aims is, at best, slight.

The differing approaches of the First and Fourth Sections in *Frodl* and *Greens* can be viewed as part of a broader debate concerning the extent to which the Strasbourg Court is competent to prescribe domestic legislative provisions necessary for state compliance with Convention obligations. A prescriptive approach fits uneasily with the Court's lack of jurisdiction to annul or amend domestic legislation, but may be an efficient way by which the Court can interpret its judgments and ensure the observance of Contracting States therewith, pursuant to its Article 46 and Article 19 jurisdiction. *Greens* will be welcomed by those who fear that the Strasbourg Court steps outside its jurisdictional and institutional competence when it indicates specific legislative remedies, while others complain that it merely invites further challenges

to any amending legislation which may be introduced. The political reality is that the Government is reluctant to introduce any amending legislation. Were it to do so, challenges are particularly likely if its legislative proposals fall short of *Frodl's* interpretation of *Hirst*: the six month timetable may merely have postponed the need to clarify the Convention's requirements.

SOPHIE BRIANT

NO LONGER A PRIVILEGED FEW: EXPENSE CLAIMS, PROSECUTION AND PARLIAMENTARY PRIVILEGE

THE publication of the expenses claims of Members of Parliament by the *Daily Telegraph* in 2009 revealed false claims made by MPs for costs incurred in the performance of their Parliamentary duties. David Chaytor, James Devine, and Elliot Morley, three MPs, were subsequently charged with false accounting, under section 17(1)(b) of the Theft Act 1968, for claiming non-existent expenses. The MPs argued that the criminal courts did not have jurisdiction to try their cases because they were protected by parliamentary privilege. This contention was rejected in the Crown Court and the Court of Appeal. The Lord Chief Justice, giving judgment for the Court of Appeal (*R* v. *Chaytor (and others)* [2010] EWCA Crim 1910), concluded "parliamentary privilege…has never ever attached to ordinary criminal activities by members of Parliament" (at [81]).

The Supreme Court in *R* v. *Chaytor (and others)* [2010] UKSC 52, [2010] 3 W.L.R. 1707 unanimously decided that expense claims are not protected by parliamentary privilege within the meaning of article 9 of the Bill of Rights 1689, nor are they a matter within the exclusive jurisdiction of Parliament. The Supreme Court's decision clarifies several issues. First, the Supreme Court was clear that the issue in question was whether parliamentary privilege attached to the claiming of MPs expenses – a question that must be determined independently of whether or not such claims were dishonest (at [25]). It was inappropriate for the Court of Appeal to have examined the question on the premise that the claims were dishonest as "[p]rivilege from criminal prosecution would be nugatory if it did not apply to criminal conduct" (at [24]).

Second, the court distinguished between two bases of parliamentary privilege (at [12]–[13]). The first originates from article 9 of the Bill of Rights, which provides that "freedom of speech and debates" or "proceedings in Parliament" cannot be questioned in court. In the leading judgment, Lord Phillips clarified that whether a matter can be