(Commencement No 8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950). The House was damning in its description of these complex provisions: "opaque", "ill-drafted", "leaving much to be desired". (It is astonishing that no-one picked up some very obvious drafting errors: for example, the Order speaks of the Crime and Disorder Act *1988*!). The House unanimously held that the result for which the Home Secretary contended was "a surprising one, unlikely to have been intended by the legislation. And if it were intended, one would expect it to have been enacted in the clearest of terms. So far from that being the case here, all the indications are … strongly to the contrary" (Lord Brown, at [45]). The result meant that 16 prisoners were wrongly in prison, for breaches of licence conditions which should not have been imposed, and another 60 people were on licence subject to unlawful licence conditions.

The European Union is heading towards a Framework Decision which will result in sentenced prisoners being transferred home to their country of residence. A great deal of thought will have to be invested in developing clear and non-discriminatory early release and recall rules.

NICOLA PADFIELD

PRISONER VOTING RIGHTS AND THE EFFECT OF *HIRST* v. *UNITED KINGDOM (No. 2)* ON NATIONAL LAW

IN *Smith* v. *Scott* [2007] C.S.I.H. 9, the thorny issue of the disenfranchisement of convicted prisoners came before the Registration Appeal Court of Scotland. Mr Smith, a convicted and serving prisoner, wished to vote in the 2003 election for the Scottish Parliament. Relying on section 3(1) of the Representation of the People Act 1983, the Electoral Registration Officer refused to include Smith's name in the Register of Electors. Section 3(1) provides that: "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 government election."

The central issue before the Court concerned the effect of the decision of the Grand Chamber of the European Court of Human Rights in *Hirst* v. *United Kingdom (No. 2)* (2006) 42 E.H.R.R. 41 (Application no. 74025/01) on national law. In *Hirst*, the Grand Chamber concluded that section 3(1) of the 1983 Act is incompatible with Article 3 of the First Protocol to the European Convention on Human Rights. The Grand Chamber affirmed its earlier jurisprudence that Article 3 guarantees individual rights including the right to vote

and to stand for election. Limitations may be imposed on Article 3 rights provided such limitations do not impair the "very essence" of those rights and pursue a legitimate aim and are proportionate to that aim. Whilst the Grand Chamber was willing to accept that section 3 of the 1983 Act pursued the UK Government's legitimate aims of preventing crime and of enhancing civic responsibility and respect for the rule of law, the measure was disproportionate. As a "general, automatic and indiscriminate" restriction which applied to all convicted prisoners irrespective of the length of their sentence or the nature or gravity of their offence, the restriction fell "outside any acceptable margin of appreciation" (*Hirst* at [82]).

In examining the effect of *Hirst* on national law, the Registration Appeal Court in *Smith* v. *Scott* first considered whether under section 3(1) of the Human Rights Act 1998 it was possible to read section 3(1) of the 1983 Act in a manner compatible with Article 3 of the First Protocol to the Convention. Relying on decisions of the House of Lords, such as *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, counsel for Smith asserted that section 3(1) of the 1983 Act could be rendered Convention-compliant by the Court inserting words "to the effect that any ban on prisoner voting would apply at the discretion of the sentencing judge". Not surprisingly, the submission was rejected by the Court. Such an addition to the section would amount to the Court "legislating on its own account" (at [27]). The Court would go beyond interpreting the section to choosing "among multiple policy alternatives". To interpret the section so as to provide for the full or partial enfranchisement of convicted prisoners serving custodial sentences would be "to depart substantially from a fundamental feature of the legislation". The Court appeared critical of the House of Lords' approach in *Ghaidan* to "reading down" legislation. Such an approach could give rise to "significant difficulties in the consistent interpretation of legislation" (at [28]). The Court reserved its opinion as to the extent to which this aspect of *Ghaidan* might be followed and applied in Scottish courts.

Secondly, should the Court make a declaration of the incompatibility of section 3(1) with Article 3 of the First Protocol to the Convention? As a preliminary issue, the Court held that it was competent to make such a declaration, arguing, for example, that on a "generous and purposive construction", the reference to "Court of Session" in section 4(5) of the Human Rights Act could extend to the Registration Appeal Court (at [36]). In deciding to exercise its discretion and issue a declaration of incompatibility, the Court referred to the considerable delay and "slippage" in the implementation of the Government's "Action Plan" developed in response to *Hirst*. Although the Grand Chamber delivered its judgment on 6

October 2005, it was not until 14 December 2006 that the Government published its consultation paper on *Hirst* which identified possible legislative responses. Moreover, the Action Plan failed to take into account the Scottish parliamentary election in May 2007. As it was now impossible to pass amending legislation prior to the Scottish election, that election would not take place in a Convention-compliant manner. In light of these factors, the Court determined that, notwithstanding the Government's acceptance of the ECtHR's decision in *Hirst*, it should exercise its discretion and make a formal declaration as to the incompatibility of section 3(1) with the Convention.

It is not the reasoning of the Court in *Smith* v. *Scott*, but the issue of the voting rights of convicted prisoners, which is controversial. The Government's consultation paper, *Voting Rights of Convicted Prisoners Detained within the United Kingdom* (Consultation Paper, CP29/06), seeks responses to the following approaches: retaining the ban on voting for all convicted prisoners (whilst the Grand Chamber held blanket disenfranchisement to be outside of the margin of appreciation, the Government will take into account views on total disenfranchisement in deciding the extent of any reform to the current position); enfranchising prisoners sentenced to less than a specified term; and finally, allowing sentencers to decide on the withdrawal of the franchise. The enfranchisement of all convicted prisoners is not considered as an option. In recent times, however, certain international human rights bodies, such as the United Nations Human Rights Committee, have questioned the legitimacy of the disenfranchisement of prisoners. Significantly, at the Chamber level in *Hirst*, the ECtHR expressed doubt as to the validity "in the modern day" of the UK Government's aims in disenfranchising convicted prisoners: (2004) 38 E.H.R.R. 40, at [47]. It is also notable that in *Hirst*, the Grand Chamber emphasised that the right to vote is precisely that—a right and not a privilege. It appears that the issue of the voting rights of convicted prisoners will be occupying governments and courts for some time to come.

ALISON KESBY

VOLUNTARY INTOXICATION, SEXUAL ASSAULT AND THE FUTURE OF MAJEWSKI

IN *R* v. *Heard* [2007] EWCA Crim 125 the appellant had been convicted of sexual assault contrary to section 3 of the Sexual Offences Act 2003 ("SOA"). He had rubbed his penis up and down the thigh of a police officer, but later said that he had no recollection of the event because he was intoxicated.