Michaelmas Term
[2013] UKSC 63
On appeal from: [2010] EWCA Civ 1439; [2011] CSIH 67

JUDGMENT

R (on the application of Chester) (Appellant) *v* Secretary of State for Justice (Respondent)

McGeoch (AP) (Appellant) *v* The Lord President of the Council and another (Respondents) (Scotland)

before

Lady Hale, Deputy President
Lord Hope
Lord Mance
Lord Kerr
Lord Clarke
Lord Sumption
Lord Hughes

JUDGMENT GIVEN ON

16 October 2013

Heard on 10 and 11 June 2013

Appellant (Chester)
Hugh Southey QC
Richard Reynolds

(Instructed by Chivers)

Respondent
HM Attorney General
James Eadie QC
Jason Coppel QC
Tristan Jones
(Instructed by Treasury Solicitors)

Appellant (McGeoch)
Aidan O'Neill QC
Christopher Brown
Tony Kelly

(Instructed by Taylor & Kelly)

Respondent
HM Attorney General
James Eadie QC
Ruth Crawford QC
Jason Coppel QC
(Instructed by Office of the Advocate General of Scotland)

LORD MANCE (with whom Lord Hope, Lord Hughes and Lord Kerr agree)

Summary

1. Two appeals are before the Court by prisoners who were convicted of murder and sentenced to life imprisonment. In the case of the appellant Peter Chester, the tariff period fixed by the sentencing judge expired on 29 October 1997, but he has not yet satisfied the Parole Board that it is no longer necessary for the protection of the public that he should be confined. In the case of the appellant George McGeoch, the sentencing judge fixed a punishment part of 13 years which expired on 7 October 2011, but he has committed various intervening offences including violently escaping from lawful custody in 2008 for which he received a seven and a half year consecutive sentence. The result is that the earliest date on which McGeoch could be considered for parole is July 2015.

2. Both the appellants claim that their rights have been and are being infringed by reason of their disenfranchisement from voting. Chester's claim for judicial review was issued in December 2008 and relates to voting in United Kingdom and European Parliamentary elections. It relies on Article 3 of Protocol No 1 ("A3P1") as incorporated into domestic law by the Human Rights Act 1998 and directly on European Union law. Burton J and the Court of Appeal (Lord Neuberger MR, Laws and Carnwath LJJ), [2010] EWCA Civ 1439, [2011] 1 WLR 14346, dismissed Chester's claim. They held that it was not the court's role to sanction the government for continuing delay in implementing the European Court of Human Rights' decision in *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849 or to repeat the declaration of incompatibility issued by the Scottish Registration Appeal Court in *Smith v Scott* 2007 SC 345 or issue advice as to the form which compatible legislation might take. They held that European Union law raises no separate issue.

3. McGeoch's claim for judicial review was issued in February 2011 and related to voting in local municipal and Scottish Parliamentary elections. It relies solely on European Union law. The Extra Division dismissed the petition on the ground that European Union law only conferred a right to vote in municipal elections in a Member State on European Union citizens residing in a Member State of which they were not nationals. It also considered that Scottish Parliamentary elections were not for this purpose municipal elections. Before the Extra Division McGeoch was refused permission to amend to include a complaint relating to voting in European Parliamentary elections, but a corresponding amendment was permitted by the Supreme Court by order of 15 October 2012.

4. The following summarises my conclusions:

(A) Human Rights Act

In respect of Chester's claim under the Human Rights Act, which only relates to elections to the European and United Kingdom Parliaments (para 2), I would decline the Attorney General's invitation to this Court not to apply the principles in *Hirst v United Kingdom* (No 2) (2005) 42 EHRR 849 ("*Hirst (No 2)*") and *Scoppola v Italy (No 3)* (2012) 56 EHRR (paras 34-35) ("*Scoppola*"), but also decline to make any further declaration of incompatibility with the Convention rights (paras 39 - 42).

(B) European law

a. In respect of McGeoch's and Chester's claims under European law, which can at most relate to elections to the European Parliament and municipal authorities (paras 9, 45 and 46), I conclude that European law does not incorporate any right to vote paralleling that recognised by the European Court of Human Rights in its case-law or any other individual right to vote which is engaged or upon which, if engaged, they are able to rely (paras 46-47, 58, 59, 63-64 and 68).

b. Had European law conferred any right to vote on which McGeoch and Chester can rely:

i. the only relief that might have been considered would have been a generally phrased declaration that the legislative provisions governing eligibility to vote in European Parliamentary and municipal elections in the United Kingdom were inconsistent with European Community or Union law but that would not have appeared appropriate in the particular cases of Chester and McGeoch (para 72);

ii. the general ban on voting in European Parliamentary and municipal elections could not have been disapplied as a whole (para 73);

iii. it would not have been possible to read the RPA section 3 or EPEA section 8 compatibly with European law (para 74);

iv. the Supreme Court could not itself devise a scheme or arrangements that would or might pass muster with European law; that would be for Parliament (para 74);

v. neither of the appellants could have had any arguable claim for damages in respect of any breach of European law which may be involved in RPA section 3 and/or EPEA section 8 (paras 82-83).

(C) European Court of Justice

The resolution of these appeals does not necessitate a reference to the European Court of Justice. In so far as it raises issues of European law for determination, they are either not open to reasonable doubt or involve the application by this Court to the facts of established principles of European law (para 84).

(D) Both appeals fall therefore, in my opinion, to be dismissed (para 85).

Legislation

5. Entitlement to vote in parliamentary and local government elections in the United Kingdom is governed by the Representation of the People Act 1983 ("RPA"). Section 1, as substituted by section 1 of the Representation of the People Act 2000, provides that:

> "(1) A person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he-
>
> (a) is registered in the register of parliamentary electors for that constituency;
>
> (b) is not subject to any legal incapacity to vote (age apart);
>
> (c) is either a Commonwealth citizen or a citizen of the Republic of Ireland; and
>
> (d) is of voting age (that is, 18 years or over)…."

Section 2 provides in similar terms in relation to local government elections, but with the addition in (c) of the words "or a relevant citizen of the Union", to meet the requirements of what is now article 22(1) TFEU.

6. Section 3 of the Act, as amended by section 24 of and paragraph 1 of Schedule 4 to the Representation of the People Act 1985, disenfranchises serving prisoners, providing:

> "*Disfranchisement of offenders in prison etc*
>
> (1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election.
>
> (2) For this purpose--
>
> (a) 'convicted person' means any person found guilty of an offence (whether under the law of the United Kingdom or not), ….., but not including a person dealt with by committal or other summary process for contempt of court; …
>
> (c) a person detained for default in complying with his sentence shall not be treated as detained in pursuance of the sentence…"

The effect of the last words of section 3(2)(a) and of section 3(2)(c) is to exclude persons imprisoned for contempt of court or default in paying a fine.

7. Entitlement to vote in European Parliamentary elections is provided domestically by the European Parliamentary Elections Act 2002 ("EPEA"). For present purposes section 8(2) and (3) are relevant, and they confer such entitlement on a person:

> "(2) ….. if on the day of the poll he would be entitled to vote as an elector at a parliamentary election in a parliamentary constituency wholly or partly comprised in the electoral region, and—

> (a) the address in respect of which he is registered in the relevant register of parliamentary electors is within the electoral region, or
>
> (b) his registration in the relevant register of parliamentary electors results from an overseas elector's declaration which specifies an address within the electoral region."

The disenfranchisement enacted by RPA section 3 is thus extended to apply to European Parliamentary elections.

8. Under the Scotland Act 1998, section 11(1), the persons entitled to vote as electors at an election for membership of the Scottish Parliament in any constituency are those who on the day of the poll would be entitled to vote as electors at a local government election in an electoral area falling wholly or partly within the constituency. In effect, RPA section 3 is extended to Scottish Parliamentary elections.

9. A3P1 reads:

> "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 European Parliament is for this purpose a legislature within the meaning of A3P1: see *Matthews v United Kingdom* (1999) 28 EHRR 361. So too is clearly the Scottish Parliament, under the devolution arrangements instituted by the Scotland Act, giving it wide-ranging legislative authority. Lord Hope described as such in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 46:

> "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence."

The conclusion that the Scottish Parliament is a legislature within A3P1 was a conclusion implicitly accepted by the European Court of Human Rights in *McLean and Cole v United Kingdom* (Application Nos 12626/13 and 2522/12) (unreported) given 11 June 2013, and was shared by Lord Reed in the Extra Division in the present case (para 29 of his judgment). Conversely, a local government body or municipal authority is not part of a legislature in the United Kingdom within A3P1: *McLean and Cole v United Kingdom*.

10. Under European Union law, as it stands since 1 December 2009 when the Treaty of Lisbon came into force, a wide range of provisions is potentially relevant. Articles 6, 10 and 14 TEU provide:

> "COMMON PROVISIONS
>
> …..
>
> 6.1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII [Articles 51–54] of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."
>
> ….
>
> 6.3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.
>
> ….

PROVISIONS ON DEMOCRATIC PRINCIPLES

….

10. 1. The functioning of the Union shall be founded on representative democracy.

10.2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

10.3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

10.4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

….

PROVISIONS ON THE INSTITUTIONS

….

14.3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot."

11. The pre-Lisbon Treaty predecessor of article 14.3 was article 190.1 and 190.4, reading:

> "190.1 The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.
>
> ….
>
> 4 The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States."

12. To give effect to article 190.4 the Council of Ministers agreed the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (0J 1976 L 278, p 1), as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ 2002 L 283, p 1) ("the 1976 Act"), which continues to apply in the post-Lisbon Treaty era. The 1976 Act provides inter alia by what is now article 7:

> "Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.
>
> These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system."

13. Voting in European Parliamentary and municipal elections is dealt with more specifically by Articles 20 and 22 TFEU in a Part headed "Non-discrimination and Citizenship of the Union":

> "20.1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

….

22.1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a Candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

14. Article 52 of the Charter of Fundamental Rights ("CFR") deals with the Charter's scope and interpretation:

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
>
> 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
>
> 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
>
> 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
>
> 6. Full account shall be taken of national laws and practices as specified in this Charter.
>
> 7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

15. The CFR includes the following provisions:

> "*Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament*
>
> 1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
>
> 2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.
>
> *Article 40 - Right to vote and to stand as a candidate at municipal elections*
>
> Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State."

16. The Explanations relating to the CFR, referred to in article 6.1 TEU, state that article 39 CFR:

> "applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) [TFEU] (cf. also the legal base in Article 22 [TFEU] for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) [TEU]. Article 39(2) takes over the basic principles of the electoral system in a democratic state."

The Explanations state further that article 40 CFR:

> "…corresponds to the right guaranteed by Article 20(2) [TFEU] (cf. also the legal base in Article 22 [TFEU] for the adoption of detailed arrangements for the exercise of that right). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these Articles in the Treaties."

European Convention on Human Rights

17. The general significance of A3P1 was summarised by Lord Collins in a judgment with which all members of the Court agreed in *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464, para 52. I need only to set out parts of his summary, omitting also some of the case references:

> "53. First, article 3 of the First Protocol enshrines a characteristic principle of an effective democracy. ….
>
> 54. Second, although article 3 is phrased in terms of the obligation of the contracting states to hold elections which ensure the free expression of the opinion of the people rather than in terms of individual rights, article 3 guarantees individual rights, including the right to vote and the right to stand for election ….
>
> 55. Third, there is room for 'implied limitations' on the rights enshrined in article 3, and contracting states must be given a wide margin of appreciation in this sphere: *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1, para 52; *Yumak v Turkey* (2008) 48 EHRR 61, para 109(ii).
>
> 56. Fourth, the content of the obligation under article 3 varies in accordance with the historical and political factors specific to each state; …..
>
> 57. Fifth, article 3 is not (by contrast with some other Convention rights, such as those enumerated in articles 8 to 11) subject to a specific list of legitimate limitations, and the contracting states are therefore free to rely in general in justifying a limitation on aims which are proved to be compatible with the principle of the rule of law and the general objectives of the Convention: *Yumak*, para 109 (iii); *Tanase v Moldova* (Application No 7/08) (unreported) given 18 November 2008, para 105.
>
> 58. Sixth, limitations on the exercise of the right to vote or stand for election must be imposed in pursuit of a legitimate aim, must not be arbitrary or disproportionate, and must not interfere with the free expression of the opinion of the people in the choice of the legislature: *Yumak*, para 109(iii) to (iv).

> 59. Seventh, such limitations must not curtail the rights under article 3 to such an extent as to impair their very essence, and deprive them of their effectiveness. 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. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature and the laws which it promulgates: *Mathieu-Mohin*, para 52; *Yumak*, para 109(iv)."

18. The European Court of Human Rights has expressed its attitude to the exclusion or limitation of prisoners' voting rights in well-known decisions. *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849 and *Scoppola v Italy (No 3)* (2012) 56 EHRR 663 each came first before a simple Chamber of seven judges and then before a Grand Chamber composed of 17 judges. *Hirst (No 2)* was a claim regarding his disenfranchisement from voting in United Kingdom Parliamentary and local elections brought by a prisoner serving a life sentence in England for manslaughter on the ground of diminished responsibility, whose tariff period had expired without his release. *Scoppola* was a claim relating to disenfranchisement under Italian law brought by a prisoner serving a sentence of 30 years imprisonment for murder, attempted murder and other offences. In between these two decisions came *Greens and MT v United Kingdom* (2010) 53 EHRR 710, in which a simple Chamber applied the principles in *Hirst (No 2)* to complaints of ineligibility to vote in both European and United Kingdom Parliamentary elections. More recently simple Chambers have applied the principles in *Hirst (No 2)* and *Scoppola* in *Anchugov and Gladkov v Russia* (Application Nos 11157/04 and 15162/05) (unreported), 4 July 2013, and *Söyler v Turkey* (Application No 29411/07) (unreported), 17 September 2013.

19. In *Greens* the Strasbourg Court gave the United Kingdom six months to introduce legislative proposals to amend RPA section 3, a period subsequently extended first pending the decision in *Scoppola* and then to six months after the Grand Chamber decision in *Scoppola*, delivered 22 May 2012. A draft Bill was published for pre-legislative scrutiny on 22 November 2012 (Cm 8499) and a joint select committee was established to undertake this and to report by 31 October 2013. As envisaged in *Hirst (No 2)*, para 83, the United Kingdom government has continued in this regard to liaise with the Committee of Ministers of the Council of Europe, which has on 6 December 2012 accepted the draft bill and the establishment of the committee as a legitimate means of implementing the judgment in *Greens*, and at its meeting on 26 September 2013, noted with interest that the pre-legislative scrutiny by the committee was now due to be completed by 31 October 2013, underlined the urgency of bringing the legislative process to a conclusion, urged the United Kingdom authorities to provide information on the proposed legislative timescale without further delay and decided to resume

examination of the progress made at a meeting in December 2013. This ongoing process was in June 2013 noted by the Strasbourg Court in its judgment in *McLean and Cole*, paras 36-37, where the Court concluded that, in its light, there was "nothing to be gained from examining applications concerning future elections at this time" (para 37).

20. In *Hirst (No 2)*, *Greens* and *Scoppola* the European Court of Human Rights acknowledged the width of the margin of appreciation, or the "wide range of policy alternatives", which States enjoy in relation to voting rights (*Hirst (No 2)*, para 78, *Greens*, para 114 and *Scoppola*, para 83). In both *Hirst (No 2)* and *Scoppola* the Grand Chamber acknowledged that disenfranchisement of convicted serving prisoners "may be considered to pursue the aims of preventing crime and enhancing civic responsibility and respect for the rule of law" (*Hirst (No 2)*, paras 74-75 and *Scoppola*, para 90). In *Hirst (No 2)* the Grand Chamber (upholding the earlier Chamber) held that the United Kingdom's ban on prisoner voting was a "general, automatic and indiscriminate restriction on a vitally important Convention right" which fell "outside any acceptable margin of appreciation" and was incompatible with A3P1 (para 82).

21. A powerfully constituted minority of the Grand Chamber (including its President and future President) dissented. It took as its test whether the restrictions on prisoner voting "impair the very essence of the right to vote or are arbitrary" (para O-III5), and it pointed out that the Court should be very careful not to assume legislative functions and that there was little consensus in Europe about whether or not prisoners should have the vote (para O-III6). It noted that a multi-party Speakers Conference on Electoral Law in 1968 had unanimously recommended that convicted persons should not be entitled to vote, and that the RPA had been amended in 2000 only to permit remand prisoners and unconvicted mental patients to vote. As to the majority comment that there was no evidence of substantive debate in Parliament about the ban on convicted prisoners voting, the minority disagreed, on the basis that it was "not for the Court to prescribe the way in which national legislatures carry out their legislative functions", and it must be assumed that the RPA "reflects political, social and cultural values in the United Kingdom" (para O-III7)

22. In *Scoppola* the United Kingdom intervened and the Attorney General appeared before the Grand Chamber to ask that it reconsider *Hirst (No 2)*. But, in its judgment the Grand Chamber said (para 96) that it reaffirmed

> "the principles set out by the Grand Chamber in the *Hirst (No 2)* judgment, in particular the fact that when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence,

> irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with [A3P1]."

However, the Grand Chamber (reversing the simple Chamber) found no contravention in relation to the Italian law in issue in *Scoppola*. The only dissent, by Judge Thór Björgvinsson, related to this conclusion. The Italian law was held compatible with the Convention because disenfranchisement applied only to sentences of three or more years, and lasted for only five years in the case of sentences of three to five years, though for life in the case of longer sentences. The Grand Chamber said that "As a result, a large number of convicted prisoners are not deprived of the right to vote" (paras 106 and 108). Furthermore, any prisoner could, three years after completing his sentence, apply for "rehabilitation", which would be granted upon his displaying "consistent and genuine good conduct" and would "terminate any ancillary penalties and other penal effect of the conviction" including disenfranchisement (*Scoppola*, paras 38 and 109).

23. The Grand Chamber specifically rejected the Chamber view that any decision to deprive a prisoner of the vote should be taken by a court, saying (para 99):

> "While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed."

24. Judge Thór Björgvinsson dissented because in his view the Grand Chamber judgment in *Scoppola* "offer[ed] a very narrow interpretation of the *Hirst* judgment" which stripped it of "all its bite" (para OI-16). In particular, the Grand Chamber had in his view overlooked significant elements of the reasoning in *Hirst (No 2)*, notably the absence of any direct link between the facts of the individual case and the ban on voting, the bluntness of the Italian legislation, "just like the UK legislation", and the absence of evidence that either the legislature or the courts had weighed the proportionality of the ban (para 0I-13).

Should the Supreme Court follow the Strasbourg case-law?

25. On the present appeal, the Attorney General (withdrawing a concession of incompatibility made in the courts below) has made a fresh challenge to the principles endorsed by the European Court of Human Rights in *Hirst (No 2)* and *Scoppola*. He points out, correctly, that the Supreme Court is, under section 2(1) of the Human Rights Act, obliged only to "take into account" any judgment or decision of the European Court of Human Rights when determining a question which has arisen in connection with a Convention right. In *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, para 11 Lord Phillips said that

> "The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court."

26. In *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, para 48 Lord Neuberger summarised the position:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see e g *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] AC 367, para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand

> some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

27. In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as *R v Horncastle*, to refuse to follow Strasbourg case-law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.

28. The Attorney General's submissions to us in this case have to be considered in that light. Parliament has required this Court to "take into account" Strasbourg case-law (Human Rights Act, section 2(1)(a)) and, "So far as it is possible to do so", to read and give effect to legislation in a way which is compatible with the Convention rights (section 3(1)). Parliament has given this Court, if satisfied that a provision of primary legislation is incompatible with a Convention right, power to make a declaration of that incompatibility (section 4). The Act itself contemplates that domestic legislation may not match this country's international obligations as established by case-law of the European Court of Human Rights.

29. It is against this background that the Supreme Court must consider whether the Attorney General has made good his case that the Court should refuse to follow and apply the approach taken by the European Court of Human Rights in *Hirst (No 2)* and *Scoppola*. The Attorney General took issue with any description of *Hirst (No 2)* and *Scoppola* as "a clear and consistent line of decisions". But, whatever else may be said about their reasoning or its outcome, they both clearly stand for the core proposition, directly applicable to the current general ban on convicted prisoners' voting, quoted in paras 20 and 22 above.

30. At the heart of the Attorney General's submissions lies the wide margin of appreciation which States have in this area, and the variety of legislative attitudes in other States, some according with the United Kingdom's. These were matters which the European Court of Human Rights acknowledged, but in the Attorney General's submission failed to respect. In support of his submission the Attorney General makes a number of points. First, the area is one where there is room (in Laws LJ's words in the Court of Appeal, [2010] EWCA Civ 1439, [2011] 1 WLR 1436, para 32) for "deep philosophical differences of view between reasonable

people". In circumstances where the Grand Chamber accepted as a legitimate aim of disenfranchisement "enhancing civic responsibility and respect for the rule of law" (*Scoppola*, para 90), the United Kingdom was, as a participatory democracy, entitled to withhold the vote from those serving sentences for offences sufficiently serious to justify such a sentence, including those who, after their tariff period, could not satisfy the Parole Board that it was "no longer necessary for the protection of the public" that they should be confined (Crime (Sentences) Act 1997, section 28(6)(b)).

31. Secondly, the Grand Chamber in *Hirst (No 2)* (para 79) attached some significance to a suggested lack of "evidence that Parliament [had] 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", adding only:

> "It may perhaps 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."

32. The majority in *Scoppola* did not mention this factor, as Judge Thór Björgvinsson, dissenting, pointed out at paras OI-09 and OI-15. Nevertheless, the Attorney General submits that it is relevant that Parliament has, since *Hirst (No 2)*, conducted three formal debates, in Westminster Hall on 11 January 2011, in the Commons on 10 February 2011, when MPs voted 234 to 22 to maintain the status quo, and again in the Commons on 22 November 2012, after the Lord Chancellor introduced a draft Bill, the outcome of which is not yet determined. Mindful of the injunction in the Bill of Rights 1688 "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament", the Attorney General did not suggest that we should seek to evaluate the quality of the debate in Parliament. But he relied upon the fact of debate and the continuation following it of the ban on prisoner voting as underlining his submission that the Convention rights should be understood and applied in a way respecting the choice made by the institution competent to make such choices in a democracy. He pointed out that the Court in its recent decision in *Animal Defenders International v United Kingdom* (Application No 48876/08, 22 April 2013) demonstrated the "considerable weight" that it was prepared to attach to "exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure [prohibiting religious or political advertising on radio and television] was necessary to prevent the

distortion of crucial public interest debates and, thereby, the undermining of the democratic process" (para 116).

33. Thirdly, the Attorney General argues, it was fallacious to treat the United Kingdom ban as affecting a "group of people generally, automatically and indiscriminately", simply because the ban was based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Any rule of law affects a group of people defined by its terms. If a group is rationally defined, there is no reason why there should necessarily be exceptions. As the Grand Chamber pointed out in relation to the Italian legislation in *Scoppola* (para 106), so also in the United Kingdom a sentencing court takes into account the nature and gravity of the offence as well as individual circumstances when deciding in the first place whether any and if so what sentence of imprisonment is required. As a result, only 8% of convicted offenders go to prison in England, 15% in Scotland. The group affected is confined to convicted prisoners and so excludes those in prison on remand awaiting trial as well as hospital detainees. Further, within the group of convicted prisoners, the ban does not extend to those in prison for contempt or default in paying fines.

34. Despite the Attorney General's forceful submissions, I do not consider that it would be right for this Court to refuse to apply the principles established by the Grand Chamber decisions in *Hirst (No 2)* and *Scoppola* consistently with the way in which they were understood and applied in those decisions. The Grand Chamber in *Scoppola* was prepared to give the Italian legislator a greater margin of manoeuvre than one would have expected from its previous decision in *Hirst (No 2)*. But this was on the basis that the Italian law did not involve a blanket ban in respect of all or almost all convicted prisoners. It excluded those convicted of "minor" offences (involving less than three years imprisonment), and it had a two step gradation in the length of the ban according to whether the sentence was for less or for more than five years imprisonment. As a result "a large number of convicted prisoners" had the vote. Furthermore, there was the possibility of rehabilitation for "consistent and genuine good conduct" displayed for three years after release. Nothing in *Scoppola* therefore suggests that the Grand Chamber would revise its view in *Hirst (No 2)* to the point where it would accept the United Kingdom's present general ban. There is on this point no prospect of any further meaningful dialogue between United Kingdom Courts and Strasbourg.

35. I would also reject the suggestion that the Supreme Court should refuse to apply the principles stated in the Strasbourg case-law in the present circumstances. Deep though the "philosophical differences of view between reasonable people" may be on this point, it would in my opinion exaggerate their legal and social importance to regard them as going to "some fundamental substantive or procedural aspect of our law": see the citation from *Pinnock* in para 26 above.

While the diversity of approach in this area within Europe derives from different traditions and social attitudes, it makes it difficult to see prisoner disenfranchisement as fundamental to a stable democracy and legal system such as the United Kingdom enjoys. It is possible to argue, as the Canadian Supreme Court did in *Sauvé v Canada (No 2)* [2002] 3 SCR 519 that the objective of promoting civic responsibility and respect for the law may be undermined, rather than enhanced, by denying serving prisoners the right to vote. The haphazard effects of an effectively blanket ban are certainly difficult to deny. As the Grand Chamber observed in *Hirst (No 2)* (para 77) "it … includes a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity." The Grand Chamber may have had in mind that, although minor offences involve shorter periods of disenfranchisement, the effect is more likely to be haphazard, depending as it must upon the timing of elections.

Application of the principles in Hirst (No 2) and Scoppola

36. This brings me to the effect of the principles in *Hirst (No 2)* and *Scoppola* in the present cases. Chester's claim, which relates to voting in European Parliamentary elections, is based directly on the Convention rights as well as on EU law. The first question is therefore whether he is a "victim" capable of bringing a claim against the respondents under the Human Rights Act. Section 7 of the Act provides:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> ….
>
> (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in

> relation to the unlawful act only if he is, or would be, a victim of that act.
>
> (4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.
>
> ….
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

37. In *Hirst (No 2)*, the majority rejected a submission by the United Kingdom Government that the Chamber "had assessed the compatibility of the legislation with the Convention in the abstract without consideration of whether removal of the vote from the applicant as a person convicted of a serious offence and sentenced to life imprisonment disclosed a violation." It said (para 72) that Hirst's complaint was

> "in no sense an actio popularis. He was directly and immediately affected by the legislative provision of which complaint is made 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 if the measure had been framed otherwise and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote. …. 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."

This was another point on which the minority disagreed, observing the Court's task was "not normally to review the relevant law and practice in abstracto" and that it was "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" (para O-III8).

38. Taking the majority approach, Chester is a victim for the purposes of section 7 of the Human Rights Act, but this means that he satisfies a pre-condition to, not that he is necessarily entitled to any particular relief in, a complaint about the general disenfranchisement of prisoners from voting in United Kingdom and European Parliamentary elections which results from EPEA section 8(2) and (3), read with RPA section 3. He claims a declaration that both RPA section 3 and EPEA section 8(2) are incompatible with A3P1. (I note that, in contrast, under European Union law, his primary submission in relation to EPEA section 8(2) is that it can be rendered compatible with European Union law by reading in an additional right to vote in European Parliamentary elections "if necessary to comply with European Union law".)

39. The incompatibility of RPA section 3 with A3P1 was recognised by the Registration Appeal Court in *Smith v Scott* 2007 SC 345, which made a declaration of incompatibility. That declaration was properly made in the case of a convicted person sentenced to five years' imprisonment for being concerned with supply of controlled drugs. It entitled the Government to use the remedial order provisions contained in section 10 of the Human Rights Act. The Government decided not to do this. The issue is now however before the United Kingdom Parliament and under active consideration in the light of the decisions in *Hirst (No 2), Greens* and *Scoppola*. Further, it is clear from *Greens* (para 18 above) and the Attorney General accepts that EPEA section 8 is, in relation to European Parliamentary elections, as incompatible with A3P1 as RPA section 3 is, in relation to United Kingdom Parliamentary elections. A declaration is a discretionary remedy, both generally and under the Human Rights Act 1998, section 4 (4). There is in these circumstances no point in making any further declaration of incompatibility. On this I am in agreement with both Burton J at first instance, [2009] EWHC 2923 (Admin), and the Court of Appeal, [2010] EWCA Civ 1439, [2011] 1 WLR 1436. The Strasbourg Court's own decision in *McLean and Cole* to defer consideration of applications concerning future elections in the light of the ongoing Parliamentary process is also consistent with this view.

40. Further, it can, I consider, now be said with considerable confidence that the ban on Chester's voting is one which the United Kingdom Parliament can, consistently with the Convention right, and would maintain, whatever amendments it may be obliged to make or may make to allow any prisoners detained for different reasons or periods to vote. In the original Chamber decision in *Hirst* (2004) 38 EHRR 825, reference was made to the continuation of the ban on voting after the expiry of the tariff period in the case of a life prisoner as an "additional anomaly" (para 49). Nevertheless, the Chamber went on to say that it could not "speculate" as to whether Hirst, whose tariff had expired, "would still have been deprived of the vote even if a more limited restriction on the right to [sic] prisoners to vote had been imposed, which was such as to comply with the requirements of [A3P1]" (para 51). It is notable that the majority in the Grand Chamber in *Hirst*

(No 2) did not endorse this reference in para 49 of the simple Chamber's judgment to an additional anomaly, saying only that 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 [A3P1]" (para 72). Only in a concurring opinion of Judge Caflisch did he raise the point, going so far as to say that "this may be the essential point for the present case" (para O-17(d)). His opinion does not appear to have been shared by other judges, and must now in any event be seen in the light of the decision in *Scoppola*, accepting that a lifelong ban on voting by prisoners sentenced for five or more years was legitimate. The additional fact that it was subject to removal after three years had elapsed from release, "provided that the offender has displayed consistent and genuine good behaviour" does not appear to have been critical to this conclusion; but, however that may be, it points strongly in favour of a view that it can be legitimate to withhold a prisoner's voting rights until "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".

41. The Grand Chamber's reasoning in its very recent decision in *Vinter v United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10; 9 July 2013), which post-dated submissions in this case, is also worth noting for its explanation of detention during a post-tariff period by reference to core aims of imprisonment:

> "108. First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is de jure and de facto reducible ….. In this respect, the Court would emphasise that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public …... Indeed, preventing a criminal from re-offending is one of the 'essential functions' of a prison sentence ….. This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State's positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous ….." *[case references omitted]*

42. In *Greens*, the Court noted (para 113) that the Grand Chamber had emphasised in *Hirst (No 2)* that

> "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. The Court recalls that its role in this area is a subsidiary one: the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight."

See also *Scoppola*, para 83 and *Söyler*, para 33. Within the domestic legal context, it is now therefore for Parliament as the democratically elected legislature to complete its consideration of the position in relation to both RPA section 3 and EPEA section 8. There is no further current role for this Court, and there is no further claim, for a declaration or, in the light of the incompatibility, for damages which the appellant Chester can bring.

European law

43. I turn to the position under European Community and now Union law. Before Burton J and the Court of Appeal, and reflecting no doubt the argument before those courts, any claim under European Union law by Chester was treated as effectively consequential on the incompatibility of the ban with A3P1, and attracted no separate analysis. Bearing in mind the date of Chester's claim for judicial review (December 2008), he is also unable to rely upon European law as it stands after 1 December 2009 under the TEU and TFEU, as a result of the Treaty of Lisbon. This difficulty is not overcome by maintaining that his claim related to forthcoming elections. It still required to be viewed in the light of the law when it was brought.

44. At that date, the Charter of Fundamental Rights did not have direct legal force, so that there was no equivalent of article 6.1 TEU. The predecessor of article 6.3 TEU was article 6.2 of the pre-December 2009 TEU reading:

> "The Union shall respect fundamental rights, as guaranteed by the [Human Rights] Convention and as they result from the

> constitutional traditions common to the Member States, as general principles of Community law."

The predecessor of article 14.3 TEU was article 190.1 and 4 of the Treaty on the European Community ("EC"), set out in para 11 above. Article 22.1 and 22.2 had a precise equivalent in article 19.1 and 19.2 EC, but the predecessor of article 20 was article 17 EC, reading simply:

> "17.1 Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby".

45. McGeoch's claim under European Union law was on the other hand issued in early 2011 and relates to voting in local as well as Scottish and European Parliamentary elections. It therefore opens up all possible avenues for exploration under current European Union law. However, there is nothing in European Union law which can entitle McGeoch to complain in respect of his inability to vote in Scottish Parliamentary elections. European Union law refers in various contexts, which have already been set out in this judgment, to voting in European Parliamentary elections and in "municipal" elections, and to no other elections. It is obvious that Scottish Parliamentary elections fall within neither category: see also what I have already said in para 9 above. That municipal elections are local government elections at a lower level of government, closer to people and with a more direct responsibility for service delivery, is furthermore consistent with the nature of the units found (though in the case of Scotland, not yet updated) in the annex to Council Directive 94/80/EC, which lays down detailed arrangements for the exercise of the right to vote and stand in municipal elections by Union citizens residing in a Member State of which they are not nationals.

46. The submissions under European Union law are put at various different levels. Mr Aidan O'Neill QC for McGeoch concentrated upon articles 20 and 22 TFEU, read with articles 39 and 40 CFR. Mr Southey for Chester adopted Mr O'Neill's submissions, but relied in addition upon the more general provisions of articles 6.3 (or its predecessor article 6.2 in the pre-December 2009 TEU), 10 and 14.3 TEU (or the latter's predecessor articles 190.1 and 4 EC). In his submission, the effect of these articles was, at the least, to incorporate into European Union law in relation to voting in European Parliamentary elections the principles recognised under Strasbourg case-law (*Hirst (No 2)* and *Scoppola*) in relation to national

legislatures. Quite possibly, he submitted, their effect may even be to lead the Court of Justice to go further than Strasbourg case-law by prohibiting on a more extensive basis any limitations on the democratically based universal suffrage to which the Treaties refer.

47. If Mr Southey's wider submission with regard to the wholesale importation into European Community or Union law of the Strasbourg jurisprudence regarding the right to vote were valid, it would be surprising to find no hint of this in any Court of Justice judgment. That is particularly so with regard to Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917 and Case 300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van den Haag* [2006] ECR I-8055, despite the difference in the actual issues. Mr Southey's submission would also mean that a case such as *Matthews v United Kingdom* (1999) 28 EHRR 361 could, now at least, be pursued in either of two parallel forums.

Spain v United Kingdom and Eman and Sevinger

48. The judgments in *Spain v United Kingdom* and *Eman and Sevinger* were both issued on the same day (12 September 2006) following an opinion of Advocate General Tizzano (dated 6 April 2006) which had covered both cases. The judgments contain discussion of the scope and effect of European Treaty law which bears on both Mr Southey's wider and Mr O'Neill's narrower submissions. In *Spain v United Kingdom* the first issue was whether it was legitimate under European law for the United Kingdom to extend the franchise in European Parliamentary elections to qualifying Commonwealth citizens, as well as European Union citizens, registered in the Gibraltar register. The Court held (para 78) that, in the then current state of Community law

> "the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory."

49. In the course of its reasoning, the Court said:

> "65 …. Articles 189 EC and 190 EC do not expressly and precisely state who are to be entitled to the right to vote and to stand as a candidate for the European Parliament.
>
> 66 … [Article 19 EC] is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of that right, by providing that every citizen of the Union residing in a Member State of which he is not a national is to have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.
>
> ….
>
> 76 …. Article 19(2) EC …. is confined, as pointed out in paragraph 66 above, to stating a rule of equal treatment between citizens of the Union residing in a Member State so far as concerns that right to vote and stand for election. While that provision, like Article 19(1) EC relating to the right of Union citizens to vote and to stand as a candidate at municipal elections, implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country and requires the Member States to accord those rights to citizens of the Union residing in their territory, it does not follow that a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election to certain persons who have a close link with it without however being nationals of that State or another Member State."

The Court also referred to the provisions of the 1976 Act (paras 67 to 69).

50. In paras 90 to 97 the Court of Justice addressed Spain's second plea that the United Kingdom had, in the arrangements made to enable the Gibraltar electorate to vote, gone further than required to comply with the European Court of Justice's judgment in *Matthews v United Kingdom*. It recited in this connection that it was the United Kingdom's obligation to comply with *Matthews* and that in the light of the "case-law of the European Court of Human Rights and the fact that that Court has declared the failure to hold elections to the European Parliament in Gibraltar to be contrary to [A3P1] …., the United Kingdom cannot be criticised" for adopting the necessary legislation.

51. In *Eman and Sevinger* the Court was concerned with the legitimacy under European Union law of a provision of Dutch law which conferred the right to vote in European Parliamentary elections upon Dutch nationals residing in the Netherlands or abroad except in Aruba and the Netherlands Antilles. After repeating (para 45) that "in the current state of Community law, the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State in compliance with Community law", the Court opened a possible role for European law in the instant case by continuing

> "It must, however, be ascertained whether that law precludes a situation such as that in the main proceedings, in which Netherlands nationals residing in Aruba do not have the right to vote and to stand as a candidate in elections to the European Parliament."

52. In relation to articles 189 and 190 EC, the Court repeated its words in para 65 of *Spain v United Kingdom*. It also repeated (para 53) that

> "Article 19(2) EC … is confined to applying the principle of non-discrimination on grounds of nationality to that right to vote and stand for election, by stipulating that every citizen of the Union residing in a Member State of which he is not a national is to have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State."

53. The Court further noted that the European Court of Human Rights had accepted that the right to vote might be limited by reference to residence. However, the Court found in "the principle of equal treatment or non-discrimination, which is one of the general principles of Community law" a basis for comparing the position of "a Netherlands national resident in the Netherlands Antilles or Aruba and one residing in a non-member country" (paras 57-58) and for concluding that the Dutch Government had not demonstrated an objective justification for the different treatment of these two persons (para 60).

54. Earlier in its judgment, the Court of Justice had observed that A3P1 did not apply to Aruba; unlike the case with Gibraltar, the European Treaties have no application there, so the European Parliament could not be regarded as the Aruba "legislature" (para 48). But the Court's decision was based on the fact that the complainants held Dutch nationality and were as such citizens of the Union under article 17(1) EC, and entitled to enjoy the rights conferred by the Treaty under article 17(2). They succeeded under the general European legal principle of non-discrimination.

55. In *Spain v United Kingdom* the Court was thus concerned with Gibraltar which is within the territorial scope of both the Community and the European Convention on Human Rights, but with voting rights which the United Kingdom had conferred on persons who were not United Kingdom nationals for the purposes of Community law. The Court had nonetheless to consider the nature of the United Kingdom's obligation to extend the franchise in European Parliamentary elections to Gibraltar. In *Eman and Sevinger*, the Court was concerned with Aruba which is outside the territorial scope of the Community, but within the territorial scope of the European Convention on Human Rights (by the combination of declarations dated 29 November 1954 and 24 December 1985 deposited by the Netherlands with the Council of Europe), and with voting rights which had been withheld from persons who were citizens of the European Union.

56. What is notably absent from the Court of Justice's judgments in both *Spain v United Kingdom* and *Eman and Sevinger* is any suggestion that, by reason of article 6.2 of the pre-December 2009 TEU and articles 17 and 190 EC, the European Treaties confer on citizens of the Union an individual right to vote, the scope and conditions of which must be measured by reference to the principles established in European Court of Human Rights jurisprudence, such as *Hirst (No 2)* and *Scoppola*. If available, that could have been advanced as a reason why it was obligatory under European Community law for the United Kingdom to take steps to enable the Gibraltar electorate to vote. Instead, the reason given was the United Kingdom's Council of Europe obligations to comply with Strasbourg decisions: see para 49 above. Likewise, in *Scoppola* there was no suggestion that as Union citizens the claimants were under Community law entitled to enjoy an individual right to vote, complying with the principles established by European Court of Human Rights jurisprudence.

57. Advocate General Tizzano in his opinion for these two cases had adopted much broader reasoning which the Court in its judgments was careful not to endorse. He would have "inferred from Community principles and legislation as a whole …. that there is an obligation to grant the voting rights in question to citizens of the Member States and, consequently, to citizens of the Union" (para 67), deriving this (para 69) from

> "the principles of democracy on which the Union is based, and in particular, to use the words of the Strasbourg Court, the principle of universal suffrage which 'has become the basic principle' in modern democratic States [FN: Eur. Court H.R. *Mathieu-Mohin and Clerfayt v Belgium*, judgment of 2 March 1987 …. , *Hirst v United Kingdom (No 2)*, …. 30 March 2004] and is also codified within the Community legal order in Article 190(1) EC and Article 1 of the 1976 Act, which specifically provide that the members of the European Parliament are to be elected by 'direct universal suffrage'."

He went on to say that this "general guidance" was "also confirmed by the fact that the right in question is a fundamental right safeguarded by [A3P1]", and to mention in a footnote that the text of article 6(2) "need merely be borne in mind" (paras 70 to 71). Turning to Spain's second criticism, Advocate General Tizzano also derived from his conclusion that individual voting was a fundamental right of citizens of the Union a converse conclusion that it was illegitimate for the United Kingdom to deviate to any greater extent from its statement in what was then Annex II of the 1976 Act that "The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom". As stated in para 49 above, the Court of Justice adopted quite different reasoning and reached an opposite conclusion, based simply on the United Kingdom's obligation to give effect to the European Court of Human Rights' ruling in *Matthews*.

58. The Court of Justice did not therefore endorse Advocate General Tizzano's broad approach, or import the Strasbourg jurisprudence into the general provisions of Community and Union law referring to voting in European Parliamentary elections. There was good reason for this. Eligibility to vote is under the Treaties and the 1976 Act a matter for national Parliaments, one of considerable national interest. There is no sign that the European Commission has ever sought to involve itself in or take issue with voting eligibility in Member States or specifically with the restrictions on prisoner voting which apply in a number of such States. The Strasbourg jurisprudence operates as the relevant control, albeit one that has itself proved in some respects controversial. It would not only unnecessarily duplicate that control at the European Community or Union level, it could also lead to further conflict and uncertainty. Hence the Court of Justice in *Eman and Sevinger* confined its reasoning to a well-established core principle of Treaty law, that of non-discrimination, in that case between different categories of Dutch national, to which I shall return (paras 60-64 below). Further, even in the form into which they have been shaped by the Treaty of Lisbon, it is notable that such provisions as the European Treaties contain concerning individual voting rights are notably limited in scope. They relate to the core Treaty concerns of equality between nationals or Union citizens and freedom of movement within the European Union (see para 59 below). For all these reasons, I reject Mr Southey's wider submission set out in (paras 46-47 above).

Articles 20.2 and 22 TFEU

59. In Mr O'Neill's submission, the changes effected by the Treaty of Lisbon significantly altered the Treaty position considered in *Spain v United Kingdom* and *Eman and Sevinger*. In those cases article 19 EC was explained as confined to stating rules of equal treatment requiring Union citizens residing in Member States of which they were not nationals to be able to vote and stand in municipal as well as European Parliamentary elections "under the same conditions as nationals". The same must apply to the current equivalent, article 22 TFEU. But Mr O'Neill relies

upon the introduction of the new article 20.2(b). This, he submits, is a self-standing provision, expressly conferring the individual right to vote on citizens of the Union in respect of European Parliamentary and municipal elections. In my opinion, it is clear that that is not the effect of article 20.2(b). As its opening sentence proclaims, article 20 deals with the enjoyment of rights provided in the Treaties. What follow are some of the basic rights so enjoyed. They all have a supra-national element. Article 20.2(b) is thus expressly limited to recording the existence of the right of Union citizens to vote and stand in municipal and European Parliamentary elections in their Member State of residence "under the same conditions as nationals of that State". The omission of express reference to the fact that this is dealing with citizens resident in a State other than that of their nationality is entirely understandable in the context of what was intended as a concise summary. That fact is anyway implicit. The detailed Treaty provisions regarding the rights to which article 20.2(b) refers are contained in article 22.1 and 22.2, which would on Mr O'Neill's case in fact be not only redundant but also positively misleading in their limitation to the situation of residence in a Member State other than that of nationality. The position is further confirmed by articles 39 and 40 CFR, which again would be positively misleading in their limitation to that situation, and by the Explanations to the CFR which explicitly equate articles 20.2 and 22: see para 16 above. There is no basis for or likelihood in Mr O'Neill's supporting submission that article 20.2(b) was expressly aimed at, in effect, endorsing Advocate General Tizzano's views as to where European Union law was or should go in conferring individual rights. Had that been remotely intended, quite different explicit language would have been used.

Non-discrimination

60. The other limb of Mr O'Neill's submissions involves reliance on the principle of non-discrimination applied in *Eman and Sevinger*. The infringement there consisted in unequal treatment by Dutch law in relation to voting in European Parliamentary elections by Netherlands nationals in comparable situations. The most fundamental area in which this principle has always manifested itself is in relation to discrimination on the grounds of nationality: see article 7 of the original EEC Treaty, now article 18 TFEU, which provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited."

But the principle has achieved much wider application. Article 13.1 EC (now substantially reproduced as article 19.1 TFEU) provides:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council …. may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

61. Article 13 has been responsible for some well-known, if in some respects controversial case-law. The Court of Justice has accepted that, although the Treaty contemplates that the general principle of non-discrimination underlying article 13 will be implemented by directives, Member States will be bound thereby to discontinue, disregard or set aside measures so far as they involve discrimination on a basis contrary to article 13 at least after the time for transposition of such a directive: Case C-555/07 *Kükükdeveci v Swedex GmbH & Co KG* [2010] 2 CMLR 33, para 61 and perhaps even when legislating in the area of the directive during the period for transposition: Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

62. However, for the general principle of non-discrimination to apply, the context must fall within the scope of Community or now Union law: see *Mangold*, para 75, Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmBH* [2008] ECR I-7245, para 25, *Kükükdeveci*, para 23, Case C-147/08 *Römer v Freie und Hansestadt Hamburg* [2013] CMLR 11, para 70, and Craig and de Burca, *EU Law: Text, Cases and Materials* [OUP: 4th ed, 2008, p 891]. The only difficulty about *Eman and Sevinger* is to identify the link with European law, once one has rejected the conclusion that European law recognises all EU citizens as having under European law an individual right to vote in European Parliamentary elections (paras 56 to 58 above). The general principle was simply stated to be applicable in a context where, and on the basis that, Netherlands nationals, who were under article 17.1 EC Union citizens, were being treated unequally in comparable situations in relation to European Parliamentary elections, having regard to the difference in treatment of Netherlands nationals resident, on the one hand, in the Netherlands Antilles and Aruba and, on the other hand, in other non-EU member countries: see in particular paras 45, 56 to 58 of the Court's judgment.

63. It is however a general principle of Strasbourg law under article 14 of the Convention that additional rights falling within the general scope of any Convention right for which the state has voluntarily decided to provide must in that event be provided without discrimination: *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, 283, *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, paras 12, 17-18. This principle in my opinion clearly underlies *Eman and Sevinger.* As the Court noted (para 53), article 19 EC (now article 22 TFEU) only covered nationals resident in another Member State. But the Dutch legislator had chosen to extend the right to vote to its nationals resident outside any Member State – but not in the Dutch Antilles or Aruba. There

was no justification for this different treatment of comparable situations in a context which fell within the scope of European law, that is voting by nationals residing outside their own member state.

64. Supporting this is also the consideration that the Court accepted that "the definition of the persons entitled to vote and to stand … falls within the competence of each Member State in compliance with Community law" (*Spain v United Kingdom*, para 78, *Eman and Sevinger*, para 45). If the qualification "in compliance with Community law" were meant to require scrutiny by reference to European Community law of all national limitations affecting European Parliamentary elections for their non-discriminatory quality even where no other link with European law was established other than that the elections were European Parliamentary elections, that could, depending upon the intensity of the scrutiny, effectively erode the general principle that the Court was accepting.

Position if the principle of non-discrimination had been engaged

65. This brings me to consideration of the nature and intensity of the scrutiny which would be required, if (contrary to my conclusion in paras 63-64) the principle of non-discrimination were to be viewed as all-embracing in the manner advocated by Mr O'Neill and Mr Southey. In both Strasbourg and Luxembourg case-law, discrimination issues are customarily described as involving a two-stage process, consisting of first the identification of an appropriate comparator and then, if one is found, examination of the justification for any difference in treatment: see e.g. Edward and Lane, *European Union Law* (EE, 2013) para 6.125, citing numerous authorities. The exercise as presented is neither a unitary nor an entirely open one, or a court would in every case be required to ascertain the differences between two different situations and ask whether, assessing such differences and their significance as best it could, it considered the differences in their treatment to be fair or justified. There must be basic comparability before the court embarks on considering justification. Thus, in *Eman and Sevinger* itself the Court observed (para 57) that

> "the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified…"

The principle was reiterated in Case C-485/08 P, *Gualtieri v European Commission* [2010] ECR I-3009, para 70 with reference to *Eman and Sevinger* as

well as other cases including Case C-227/04 P *Lindorfer v Council of the European Union* [2007] ECR I-6767.

66. As the Court noted in Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, para 73, it is for the national court to determine whether two persons are in a comparable position. That does not however mean an identical position. The referring court in *Maruko* identified a gradual movement towards recognising equivalence of life partnership and marriage, meaning that, although the two were not identical, persons of the same sex could be regarded as being in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in that case. The Court of Justice in Case 147/08 *Römer v Freie und Hansestadt Hamburg* approved that approach, saying:

> "41 Accordingly, the existence of direct discrimination, within the meaning of the Directive, presupposes, first, that the situations being weighed up are comparable.
>
> 42 In that regard, it should be pointed out that, as is apparent from the judgment in *Maruko* … at [67]—[73], first, it is required not that the situations be identical, but only that they be comparable and, secondly, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned."

67. *Gualtieri* was an appeal from the General Court and provides a contrasting example. The claimant complained that she received a lower daily allowance on the basis of the proximity of her spouse's residence to her place of secondment than she would have done if she had been single, but living in a de facto union. The Court upheld the General Court's conclusion that the two situations were not comparable, saying:

> "75 …. it must be observed that, although de facto unions and legally recognised unions, such as marriage, may display similarities in certain respects, those similarities do not necessarily mean that those two types of union must be treated in the same way.
>
> 76 In those circumstances, the decision to apply the criterion of matrimonial legal status appears neither arbitrary nor manifestly inappropriate in relation to the objective of reducing the allowances paid to SNEs [national experts seconded to the Commission] when they are in a situation in which it can be assumed that they bear

> fewer costs and disadvantages on account of their matrimonial status."

68. Applying these principles to the present case, I do not regard convicted prisoners serving their sentence as in a comparable position either to free persons or to remand prisoners awaiting trial. They have a very different status, to which it is evident that very different considerations may apply and which are capable at least of giving rise to very different arguments. It follows that, assuming that the general principle of non-discrimination applies under European Union law to eligibility to vote in European Parliamentary elections, there is in my view no basis for its application in the context of a complaint that convicted prisoners are discriminated against by reference to free persons or remand prisoners.

The position assuming contrary conclusions

69. I have concluded that the appellants are not entitled to invoke European law, because, firstly, it confers no individual right by reference to which the Strasbourg case-law of *Hirst (No 2)* and *Scoppola* could be relevant (paras 58 and 59) and, secondly, the general principle of non-discrimination recognised in *Eman and Sevinger* is not engaged (paras 63-64) or, if it is engaged, does not assist the appellants (para 68). In what follows, I will, for completeness, consider the position assuming opposite conclusions on all these points.

70. If European law recognises an individual right to vote in European Parliamentary and/or municipal elections, I would reject Mr Southey's submission that it would or might go further than the Strasbourg case-law in allowing convicted prisoners the vote. Court of Justice jurisprudence pays close attention to and, with very few exceptions, follows Strasbourg jurisprudence. Examples of divergence are few and far between, although one may, ironically, have occurred in a sequel to *Eman and Sevinger* concerning the right to vote in elections for the Kingdom of Holland, in so far as it is arguable that the Strasbourg court went less far in *Sevinger and Eman v Netherlands* (2007) 46 EHRR 179 than the Court of Justice did in *Eman and Sevinger* itself: see an instructive case-note by Professor Leonard F M Besselink on this Strasbourg authority in (2008) 45 CMLR 787. In the present case, I reject in particular the submission that the Court of Justice might return to the theme - suggested in *Frodl v Austria* (2010) 52 EHRR 267, para 34 by reference to *Hirst (No 2)*, para 82 – that it is essential that any disenfranchisement of a convicted prisoner be ordered on a case by case basis by a judge, rather than be pre-determined by an otherwise appropriate legislative scheme. This suggestion was very clearly, and for very obvious reasons, rejected by the Grand Chamber in *Scoppola v Italy*, paras 99-100, a rejection which the simple Chamber in *Anchugov*, para 107, took pains to reiterate; see also (though

coupled with a reference to judicial interventions being "likely to guarantee the proportionality of restrictions on prisoners' voting rights") *Söyler*, para 39.

71. The majority in the European Court of Human Rights in *Hirst (No 2)* found a violation because Hirst "was directly and immediately affected by the legislative provision of which complaint is made" and that "the Chamber was justified in examining the compatibility with the Convention of such a measure, without regard to the question whether, if the measure had been framed otherwise and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote" (para 72). But it regarded the finding of a violation as just satisfaction and awarded no damages.

72. As the Court said in *Kükükdevici*, para 51, it is for a national court, in applying national law,

> "to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*, para 77)."

In the present cases, on the assumptions (contrary to my conclusions), first, that European law recognises an individual right to vote paralleling in substance that recognised in the Strasbourg case-law of *Hirst (No 2)* and *Scoppola*, and, second, that the view taken by the majority of the Grand Chamber in *Hirst (No 2)* regarding standing to claim a general declaration were to be transposed into European law, the only relief that could be considered under domestic law would be a generally phrased declaration that the legislative provisions governing eligibility to vote in European Parliamentary and municipal elections in the United Kingdom were inconsistent with European Union law. Thereafter, it would be for the United Kingdom Parliament to address the position and make such legislative changes as were considered appropriate. But, for reasons paralleling those given in paras 40 – 42 above, it appears improbable that the Convention rights would, even when viewed through the prism of European Union law, involve or require the granting of declarations in the abstract at the instance of claimants like both Chester and McGeoch, detained in circumstances summarised in para 1 above, from whom the United Kingdom Parliament could legitimately, and it seems clear would, under any amended legislative scheme still withhold the vote.

73. I reject the submission that the Supreme Court could or should simply disapply the whole of the legislative prohibition on prisoner voting, in relation to European Parliamentary and municipal elections, thereby making all convicted

prisoners eligible to vote pending fresh legislation found to conform with European Union law. It is clear from both *Hirst (No 2)* and *Scoppola* that, under the principles established by those cases, a ban on eligibility will be justified in respect of a very significant number of convicted prisoners.

74. Nor would it have been possible to read the RPA section 3 or EPEA section 8 compatibly with European law; the legislation is entirely clear and it would flatly contradict the evident intention of the United Kingdom, when enacting it, to read into it or to read it as subject to some unspecified scheme or set of qualifications allowing some unspecified set of convicted prisoners to vote under some unspecified conditions and arrangements. It would also be impossible for the Supreme Court itself to devise an alternative scheme of voting eligibility that would or might pass muster in a domestic or supra-national European Court. Equally, the Court could not determine or implement the practical and administrative arrangements that would need to be made to enable any convicted prisoners eligible under any such scheme to have the vote. Such matters would be beyond its jurisdiction. In the domestic constitutional scheme, any scheme conferring partial eligibility to vote on some convicted prisoners is quintessentially a matter for the United Kingdom Parliament to consider, determine and arrange. In the passage quoted in para 72 above, the Court of Justice made clear that it is only "within the limits of its jurisdiction" that a national court can be expected to provide the legal protection that European Union law requires. That being so, the creation of any new scheme must be a matter for the United Kingdom Parliament.

75. That does not necessarily conclude this Court's role under European law. The principles established in Case C-6/90 *Francovich v Italian Republic* [1992] IRLR 84 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* [1996] QB 404 require domestic courts, under certain conditions, to order their State to make good any loss caused by breach of European Union law, even where the breach consists in legislation incompatible with that law. After these decisions by the Court of Justice, the principles stated by that Court were examined and applied domestically by the House of Lords in *R v Secretary of State, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524. Neither Chester nor McGeoch has set out, supported with evidence or pursued any claim for damages in the courts below. Both now seek to claim damages, still without any supporting evidence, and, if necessary, to have their cases remitted for further determination in this regard. I will however put on one side without deciding the question whether either should be given leave to enable them at this late stage to raise any damages claim, and consider the nature and application of the relevant principles, assuming that such claims were to be permitted.

76. An important factor in determining whether liability in damages may exist under European law is the width of the discretion available to the legislator: see *Ex*

p Factortame, paras 44 to 46. In this respect the Court equated the position of the Community and national legislators (para 47). A "strict" (meaning more limited) approach was taken towards the liability of the Community (or therefore of national legislators) in the exercise of legislative activities. This was explained (para 45) as due to two considerations:

> "45. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Secondly, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers…"

As the Court went on to point out, "the national legislature — like the Community institutions — does not systematically have a wide discretion when it acts in a field governed by Community law" (para 46). It depends on the nature of the European law or principle being implemented. However, in the context of eligibility to vote, it is clear that national legislatures have a wide discretion.

77. Where a wide legislative discretion of this nature exists, three conditions govern the incurring of any liability on account of the legislative choices made by the State pursuant to such discretion. These were explained in *Ex p Factortame* as follows:

> "51 In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.
>
> 52 First, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.
>
> 53 Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on

> liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.
>
> ….
>
> 55 As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> 56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> 57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."

These principles were reiterated in Case 392/93 *R v HM Treasury, Ex p British Telecommunications plc* [1996] QB 615, an example of a case where the Court of Justice held that the breach had not involved a manifest and grave disregard of European law, and Case 278/05 *Robins v Secretary of State for Work and Pensions* [2007] ICR 779, where the Court emphasised the importance of the breadth of the legislative discretion in that case and the fact that the provisions of the relevant directive did not make it possible to establish with any precision the level of pension protection which it required.

78. Turning to apply these principles to the present cases, I make the twin assumptions (again contrary to my conclusions) that (a) European Union confers rights to vote on individual citizens of the Union, subject to the United Kingdom's legislative discretion to introduce limitations, but that (b) the present general

prohibition on prisoner voting is contrary to principles paralleling those stated by the Strasbourg court in *Hirst (No 2)* and *Scoppola* and/or the general European Union principle of equality or non-discrimination. On those assumptions, the second and third conditions for any personal claim arise for consideration.

79. The second condition is that the breach was sufficiently serious. This in turn depends, under European law, upon whether Parliament, the relevant United Kingdom authority, can be said manifestly and gravely to have disregarded the limits on its discretion. This must be judged taking into consideration "the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable" (para 77 above). In relation to voting by convicted prisoners, the United Kingdom legislature enjoyed a wide margin of discretion. Further, this is in a context where there has been and remains a considerable lack of certainty about what the parameters of that discretion may be. This is evident from a reading of the Strasbourg case-law, particularly the two *Hirst* judgments, the Chamber judgment in *Frodl v Austria* (2010) 52 EHRR 267 and the Grand Chamber judgment over-ruling the Chamber judgment in *Scoppola v Italy*, in which the European Court of Human Rights has sought to identify the relevant considerations and to apply them to particular facts. Accordingly, it is clearly very arguable that this condition is not met.

80. I will not however say more about the application of the second condition in this case, in view of one further factor, which I prefer to leave open. The test stated in the European authorities postulates some degree of examination of the conduct of the relevant national authority. Since the relevant United Kingdom authority is here Parliament in enacting and continuing in force the relevant legislation, an assessment of some of these matters (particularly whether the infringement was intentional or involuntary, excusable or inexcusable) may threaten conflict with the constitutional principle enshrined in the Bill of Rights 1688 that domestic courts in the United Kingdom ought not to "impeach or question" proceedings in Parliament. To avoid this, it may perhaps be necessary to approach a claim for damages in a case like the present on an objective basis, without regard to what has actually happened or been said in Parliament. The decision in *R v Secretary of State, Ex p Factortame (No 5)* [2000] 1 AC 524 does not appear to throw any light on this problem, because there does not seem there to have been any call to consider Parliamentary debates. On any view, however, the fact of Parliamentary activity, referred to in *Greens* and continuing, can no doubt be taken into account.

81. The third condition is that there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

82. In relation to both the second and the third conditions, it must in my opinion be relevant to have regard to the particular position of the present appellants. The questions are whether, in refusing *them* the vote, the United Kingdom has manifestly and gravely disregarded the limits on its discretion and whether *they* have sustained damage directly caused by the United Kingdom's breach of an obligation owed to give each of *them* a right to vote. In Strasbourg case-law, according to the majority in *Hirst (No 2)*, a claimant can complain that the law in general is incompatible with the Convention rights, without showing that it was or would have been incompatible with such rights to deprive him in particular of the vote. But to award a convicted prisoner damages without showing that European Union law required *him*, rather than some other prisoner or prisoners, to have the vote would be positively inconsistent with the conditions stated in *Francovich* and *Ex p Factortame*.

83. On that basis, I consider that any claim for damages by McGeoch and Chester must on any view fail. McGeoch is still serving the punishment part of his sentence resulting from the combination of his life and consecutive fixed-term sentence. There can, in the light of *Scoppola*, be no question about the United Kingdom's entitlement to deprive a prisoner in his position of the vote. Chester is in his post-tariff period of his life sentence, but it is notable that the European Court of Human Rights deliberately refrained from endorsing the original Chamber view or Judge Caflisch's concurring minority view (para 40 above) that there is a critical distinction between the tariff and post-tariff period. Further, in *Scoppola*, the Strasbourg court accepted that disenfranchisement could continue for life in the case of sentences of five years or more. This was subject only to the right, three years after release, to apply for "rehabilitation", which would be granted upon his displaying "consistent and genuine good conduct": see para 22 above. The requirement to display good conduct in order to regain voting rights was thus regarded as not only relevant, but acceptable. The Strasbourg court accepted as a legitimate aim "enhancing civic responsibility and respect for the rule of law". Continuing detention for a period lasting so long as "necessary for the protection of the public" (paras 30 and 40 above) can be no less relevant and acceptable as a criterion for continuing deprivation of the right to vote during that period. The underlying consideration, that the offender is not fully rehabilitated or ready to participate responsibly in the country's democratic life, is the same in each case. This is underlined by the passage from the Grand Chamber's recent decision in *Vinter* quoted in para 41 above.

Conclusions

84. My conclusions on the issues argued on this appeal are summarised in para 4 above. It remains only to consider whether the resolution of this appeal necessitates a reference to the European Court of Justice. This depends upon whether it depends upon the determination of any question of European law which

is open to reasonable doubt under the principles stated in Case 283/81 *CILFIT Srl v Ministry of Health* [1982] ECR 3415 and recently discussed in this Court in *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] ICR 249. In my opinion, the conclusions of European law reached in paras 45, 58, 59 and 63-64 are acte clair, and they are by themselves sufficient to resolve the appeals. Were it necessary for the decision of these appeals, I would also regard the conclusions in para 70 as acte clair. The further conclusions (again not necessary for the resolution of these appeals) reached in other paras are matters for this Court to determine, applying established principles of European law where relevant. In the circumstances, I do not consider that any reference to the Court of Justice is called for.

85. It follows that, in my opinion, both appeals should be dismissed.

LADY HALE (with whom Lord Hope and Lord Kerr agree)

86. Prisoners' voting is an emotive subject. Some people feel very strongly that prisoners should not be allowed to vote. And public opinion polls indicate that most people share that view. A YouGov poll in November 2012 found that 63% of respondents said that "no prisoners should be allowed to vote", 15% said that those serving sentences of less than six months should be allowed to vote, 9% said that those serving less than four years should be allowed to vote, and 8% said that all prisoners should be allowed to vote. A YouGov poll in January 2011 which asked the same questions produced respective figures of 69%, 6%, 3% and 8%. This suggests that public opinion may be becoming more sympathetic to the idea, with 32% now favouring some relaxation in the present law, but there is still a substantial majority against it. It is not surprising, therefore, that in February 2011 elected Parliamentarians also voted overwhelmingly against any relaxation of the present law.

87. In such circumstances, it is incumbent upon the courts to tread delicately. As I shall explain, in my view it is now clear that the courts should not entertain a human rights claim on behalf of Mr Chester or, indeed, of Mr McGeoch had he made one. Both are serving sentences of life imprisonment for murder. Mr Chester was sentenced to life imprisonment for the murder of his niece, with a tariff of 20 years which expired in October 1997. The Parole Board has not yet found him suitable for release on licence. Mr McGeoch was also sentenced to life imprisonment for murder, with a tariff of 13 years which expired in October 2011; but he has had further convictions for serious offences committed while in prison and is currently serving seven and a half years for violently escaping from prison in 2008. I do not consider that the human rights of either were violated by the Electoral Registration Officers' refusal to register them on the electoral roll. Their

claims under European Union law are another story, because they raise novel arguments which require to be resolved. On those claims I have nothing to add to the judgment of Lord Mance, with which I agree.

88. Of course, in any modern democracy, the views of the public and Parliamentarians cannot be the end of the story. Democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities, including unpopular minorities. "Democracy values everyone equally even if the majority does not": *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 132. It follows that one of the essential roles of the courts in a democracy is to protect those rights. It was for that reason that Lord Bingham took issue with the argument of a previous Attorney-General, Lord Goldsmith, in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 42:

> "I do not . . . accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. . . . But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

89. The present Attorney General has wisely not suggested any such thing. He recognises that it is the court's task to protect the rights of citizens and others within the jurisdiction of the United Kingdom in the ways which Parliament has laid down for us in the Human Rights Act 1998. But insofar as he implied that elected Parliamentarians are uniquely qualified to determine what the franchise should be, he cannot be right. If the current franchise unjustifiably excludes certain people from voting, it is the court's duty to say so and to give them whatever remedy is appropriate. More fundamentally, Parliamentarians derive their authority and legitimacy from those who elected them, in other words from the current franchise, and it is to those electors that they are accountable. They have no such relationship with the disenfranchised. Indeed, in some situations, they may have a vested interest in keeping the franchise as it is.

90. To take an obvious example, we would not regard a Parliament elected by an electorate consisting only of white, heterosexual men as uniquely qualified to decide whether women or African-Caribbeans or homosexuals should be allowed to vote. If there is a Constitution, or a Bill of Rights, or even a Human Rights Act, which guarantees equal treatment in the enjoyment of its fundamental rights, including the right to vote, it would be the task of the courts, as guardians of those

rights, to declare the unjustified exclusion unconstitutional. Given that, by definition, Parliamentarians do not represent the disenfranchised, the usual respect which the courts accord to a recent and carefully considered balancing of individual rights and community interests (as, for example, in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719 and *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312, both upheld in Strasbourg for that very reason) may not be appropriate.

91. Of course, the exclusion of prisoners from voting is of a different order from the exclusion of women, African-Caribbeans or homosexuals. It is difficult to see how any elected politician would have a vested interest in excluding them (save just possibly from local elections in places where there are very large prisons). The arguments for and against their exclusion are quite finely balanced. On the one hand, unlike women, African-Caribbeans and homosexuals, prisoners share a characteristic which many think relevant to whether or not they should be allowed to vote: they have all committed an offence deemed serious enough to justify their removal from society for at least a while and in some cases indefinitely. While clearly this does not mean that all their other rights are forfeited, why should they not for the same time forfeit their right to take part in the machinery of democracy?

92. Hence I see the logic of the Attorney General's argument, that by deciding that an offence is so serious that it merits a custodial penalty, the court is also deciding that the offence merits exclusion from the franchise for the time being. The custody threshold means that the exclusion, far from being arbitrary and disproportionate, is tailored to the justice of the individual case.

93. One problem with that argument is that it does not explain the purpose of the exclusion. Any restriction of fundamental rights has to be a proportionate means of pursuing a legitimate aim. Is it simply an additional punishment, a further mark of society's disapproval of the criminal offence? Or is it rather to encourage a sense of civic responsibility and respect for democratic institutions? If so, it could well be argued that this is more likely to be achieved by retaining the vote, as a badge of continuing citizenship, to encourage civic responsibility and reintegration in civil society in due course. This is indeed, as Laws LJ observed in the Court of Appeal, a matter on which thoughtful people can hold diametrically opposing views.

94. A more concrete objection to the Attorney General's argument is that the custody threshold in this country has never been particularly high. As Lord Bingham of Cornhill CJ observed in *R v Howells* [1999] 1 WLR 307, 310, deciding when an offence is so serious that only a custodial sentence can be

justified is “one of the most elusive problems of criminal sentencing”. Between 1992 and 2002, the custodial sentencing rate rose from 5% to 15% in the magistrates’ courts and from 44% to 63% in the Crown Court (for an overview of sentencing trends in the last 20 years, see Ministry of Justice, *The Story of the Prison Population 1993-2012*, 2013). Some of the rise may be accounted for by the greater seriousness of the offences coming before the courts, but this cannot be the whole explanation. There are many people in prison who have not committed very serious crimes, but for whom community punishments are not available, or who have committed minor crimes so frequently that the courts have run out of alternatives.

95. Also, the threshold has varied over time in accordance with changes in penal policy which have nothing to do with electoral policy: what, for example, are we to make of the ups and downs in the legislative popularity of suspended sentences? Exactly the same crime may attract an immediate custodial sentence and disenfranchisement at one time or a suspended sentence without disenfranchisement at another. Moreover, the custody threshold has traditionally varied as between different parts of the United Kingdom, with a significantly greater use of imprisonment in Scotland than in England and Wales (although this is diminishing). The sentencing regimes are different in England and Wales, Scotland and Northern Ireland, but the exclusion from voting is the same.

96. All of this suggests an element of arbitrariness in selecting the custody threshold as a unique indicator of offending so serious as to justify exclusion from the democratic process. To this may be added the random impact of happening to be in prison on polling day and the various reasons why someone who has been sentenced to a period of imprisonment may not in fact be in prison on that day. He may, as Lord Clarke points out, be on bail pending an appeal; or he may be released early under electronic monitoring.

97. Then there is the situation of mental patients. All those who are detained in hospital as a result of an order made in a criminal court, apart from those on remand, are also disenfranchised (Representation of the People Act 1983, section 3A(1),(2)). This includes patients who have been found unfit to plead or not guilty by reason of mental disorder, whose culpability may be very different from that of convicted prisoners. There is no equivalent of the custody threshold (as long as the offence is punishable with imprisonment) and no correlation between the seriousness of the offence and the length of time that the patient will be detained in hospital.

98. I mention these additional matters to explain why, in common with Lord Clarke, I have some sympathy for the view of the Strasbourg court that our present law is arbitrary and indiscriminate. But I acknowledge how difficult it would be to

devise any alternative scheme which would not also have some element of arbitrariness about it. The Strasbourg court, having stepped back from the suggestion in *Frodl v Austria* (2010) 52 EHRR 267 that exclusion from the franchise requires a judicial decision in every case and approved the Italian law in *Scoppola v Italy (No 3)* (2012) 56 EHRR 663, must be taken to have accepted this.

99. However, I have no sympathy at all for either of these appellants. I cannot envisage any law which the United Kingdom Parliament might eventually pass on this subject which would grant either of them the right to vote. In *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849, the Strasbourg court declined to conclude that applying the ban to post-tariff life prisoners would necessarily be compatible with article 3 of the First Protocol. But it seems clear from the decision in *Scoppola v Italy (No 3)* that Strasbourg would now uphold a scheme which deprived murderers sentenced to life imprisonment of the right to vote, certainly while they remained in prison, and probably even after they were released on licence, as long as there was then a power of review.

100. Hence I cannot see how Mr Chester can sensibly have a claim to a remedy under the Human Rights Act. It may be, as Lord Mance has concluded, that he qualifies as a "victim" for the purpose of section 7 of the Human Rights Act. But this is only in the sense that, as the majority of the Grand Chamber in *Hirst (No 2)* held, he was directly affected by the law in question. This justified that court, in the majority view, examining the compatibility of the law with the Convention, irrespective of whether he might justifiably have been deprived of the vote under some other law. A strong minority, including the then President, Judge Wildhaber, and his successor, Judge Costa, pointed out that this was not the usual practice of the court (para OIII8):

> "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 solutions compatible with the Convention. 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."

In other words, it would have been in accordance with the consistent practice of the court for the majority to indicate in precisely what way *Mr Hirst's* rights had been violated by the law in question. It seems to me that the courts of this country should adopt that sensible practice when considering the application of the various remedies provided by the Human Rights Act.

101. In this case, there can be no question of Mr Chester having a cause of action under section 6(1) of the Human Rights Act. The Electoral Registration Officer for Wakefield refused his application for inclusion on the electoral roll. But in my view that could not have been incompatible with *his* Convention rights, because (at least following *Scoppola v Italy*) the Convention does not give him the right to vote. But even if it was incompatible, the public authority could not have acted differently, because of the provisions of the Representation of the People Act, and so by virtue of section 6(2)(a) the act was not unlawful. Nor is there any question of our reading and giving effect to the Act in a way which is compatible with the Convention rights, in accordance with our duty under section 3(1). No-one has suggested that it would be possible to do so in a case such as this. It is obvious that any incompatibility can only be cured by legislation and the courts cannot legislate. But even if we could, we would only seek to "read and give effect" to the statute in a way which was compatible with the rights of the individual litigant before us. As, in my view at least, the ban on voting is not incompatible with the rights of this particular litigant, a reading which was compatible with the rights of a completely different litigant would do him no good.

102. That leaves the possibility of a declaration of incompatibility under section 4(2) of the Human Rights Act. This applies "in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right". This does appear to leave open the possibility of a declaration *in abstracto*, irrespective of whether the provision in question is incompatible with the rights of the individual litigant. There may be occasions when that would be appropriate. But in my view the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims. It is principally for that reason that I would decline to make a declaration of incompatibility on the application of either Mr Chester or (had he made one) Mr McGeoch. Indeed, in my view the courts should not entertain such claims. It is otherwise, of course, in borderline cases.

103. In those circumstances it seems to me unnecessary to express a view on whether we should follow or depart from the substance of the decision in *Hirst v*

United Kingdom (No 2) (although, as will be apparent, had we had to do so, I would have agreed with Lord Mance). I would therefore dismiss these appeals.

LORD CLARKE

104. I agree that these appeals should be disposed of as proposed by Lord Mance and Lord Sumption.

105. I also agree with the reasoning of both Lord Mance and Lord Sumption, subject to this. I would be less critical than Lord Sumption of the decisions of the European Court of Human Rights to which they refer. The reasoning of the Strasbourg Court has very recently been summarised in *Anchugov and Gladkov v Russia* (Application Nos 11157/04 and 15162/05), 4 July 2013, at paras 93-100. In particular, in para 100 it distinguished between *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849 and *Scoppola v Italy (No 3)* (2012) 56 EHRR 663 in this way:

> "100. The principles set out in the *Hirst (No 2)* case were later reaffirmed in the *Scoppola (No 3)* [GC] judgment. The Court reiterated, in particular, that when disenfranchisement affected a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it was not compatible with Article 3 of Protocol No 1 (see *Scoppola (No 3)* [GC], cited above, para 96). The Court found no violation of that Convention provision in the particular circumstances of this latter case however, having distinguished it from the *Hirst (No 2)* case. It observed that in Italy disenfranchisement was applied only in respect of certain offences against the State or the judicial system, or offences punishable by a term of imprisonment of three years or more, that is, those which the courts considered to warrant a particularly harsh sentence. The Court thus considered that 'the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show[ed] the legislature's concern to adjust the application of the measure to the particular circumstances of [each] case, taking into account such factors as the gravity of the offence committed and the conduct of the offender' (ibid, para 106). As a result, the Italian system could not be said to have a general automatic and indiscriminate character, and therefore the Italian authorities had not overstepped the margin of appreciation afforded to them in that sphere (ibid, paras 108 and 110).

106. On the facts the Court held at para 101 that the position in Russia was very similar to that in *Hirst (No 2)*, namely that the applicants were stripped of their right to vote by virtue of a provision of the Russian Constitution which applied to all persons convicted and serving a custodial sentence, irrespective of the length of their sentence and of the nature or gravity of their offence and their individual circumstances. The Court compared *Hirst (No 2)* at para 82 with *Scoppola (No 3)* at paras 105-110. The Court said at para 102 that it was prepared to accept that the relevant measure pursued the aims of enhancing civic responsibility and the respect for the rule of law and ensuring the proper functioning and preservation of civil society and the democratic regime and that those aims could not, as such, be excluded as untenable or incompatible with A3P1.

107. The essence of the Court's decision is set out in para 103. It rejected the Government's arguments on the issue of proportionality, reiterating the point made in para 82 of *Hirst (No 2)*, that, although the margin of appreciation is wide, it is not all-embracing and added:

> "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 and universal suffrage has become the basic principle. In the light of modern-day penal policy and of current human rights standards, valid and convincing reasons should be put forward for the continued justification of maintaining such a general restriction on the right of prisoners to vote as that provided for in Article 32(3) of the Russian Constitution (ibid, para 79)."

108. Further, at para 105 the Court emphasised the fact that the Russian constitution imposed a blanket ban on all those imprisoned, from two months, which is the minimum period of imprisonment following conviction in Russia, to life and from "relatively minor offences to offences of the utmost seriousness". At para 106 it stressed that, as in the United Kingdom, there was no evidence that, when deciding whether to impose a custodial sentence, the court should take into account the fact that the sentence would involve disenfranchisement, so that there was no direct link between the facts of a particular case and the loss of the right to vote. It recognised in para 107 that removal of the right to vote without an ad hoc judicial decision does not of itself give rise to a violation but, in response to an argument that the adoption of the Russian constitution was preceded by extensive public debate, it observed that the Government had submitted no relevant materials to support it. In doing so, it expressly followed an almost identical conclusion in para 79 of *Hirst (No 2)*.

109. As I see it, the thrust of the conclusions in the Strasbourg cases is that a blanket ban is disproportionate and indiscriminate, at any rate without detailed analysis of the problem because, as it is put at para 82 of *Hirst (No 2)*, the ban applies automatically to all prisoners irrespective of the nature and gravity of the relevant offence or the individual circumstances of the particular offender. It thus applies to those sentenced to very short sentences and operates in an arbitrary way for two reasons. First, it applies in the same way to a person sentenced to 28 days or 28 years. Yet there is clearly an enormous gulf in terms of culpability between those sentenced to 28 days for, say, persistent shoplifting and those sentenced to 28 years for a very serious offence. Secondly, whether a person loses the right to vote depends upon the chance that the relevant person happens to be in prison on a particular day, by comparison perhaps with a co-defendant who received an identical sentence but is on bail pending appeal. Moreover, it is difficult to see how it can be proportionate to deprive a person of a vote which is relevant to the governance of the state for a period of five years in circumstances where that person may be in prison for no more than 14 days.

110. I appreciate that, wherever the line may be drawn, there may be an element of arbitrariness as to the choice and effect of a particular line. But there seems to me to be much to be said for the Strasbourg Court's approach to a blanket ban, at any rate absent detailed consideration of the pros and cons of such a ban. However that may be, I agree that this Court should follow the now settled jurisprudence in the Strasbourg Court for the reasons given by Lord Mance and Lord Sumption.

111. Since writing the above, I have read the judgment of Baroness Hale in draft and would simply like to add that I agree with it.

LORD SUMPTION (with whom Lord Hughes agrees)

112. I agree with the orders proposed by Lord Mance, for all of the reasons that he gives in his judgment as well as those given in the judgment of Lady Hale. I wish to add my own observations on one question only, namely whether we should apply the principles stated by the European Court of Human Rights in *Hirst (No 2)* and *Scoppola*. It is an issue which raises in an acute form the potential conflict between the interpretation of the European Convention on Human Rights by the European Court of Human Rights and the processes by which alone laws are made in a democracy. The conflict arises from the requirement of the European Court of Human Rights that the United Kingdom should amend the Representation of the People Act 1983 so as to give at least some convicted prisoners the right to vote in national and local elections, something for which there is at present only negligible support in the House of Commons and very little among the public at large. If democracy is viewed as a system of decision-making by those answerable to the

electorate (as opposed to a system of values thought to be characteristic of democracies), this is bound to be a matter of real concern. Of course, as Lady Hale has pointed out, it does not follow that a democracy can properly do whatever it likes, simply by virtue of the democratic mandate for its acts. The protection of minorities is a necessary concern of any democratic constitution. But the present issue has nothing whatever to do with the protection of minorities. Prisoners belong to a minority only in the banal and legally irrelevant sense that most people do not do the things which warrant imprisonment by due process of law.

113. In any democracy, the franchise will be determined by domestic laws which will define those entitled to vote in more or less inclusive terms. The right to vote may be based on citizenship or residence, or a combination of the two. There will invariably be a minimum voting age and may be other conditions of eligibility, such as mental capacity. In the United Kingdom, the right to vote at parliamentary and local government elections is enjoyed by Commonwealth citizens and citizens of the Republic of Ireland aged over 18, who are on the electoral roll, and not subject to any legal incapacity to vote. Inclusion on the electoral roll depends on current (or in some cases recent) residence. The only legal incapacity of any significance relates to convicted prisoners. Section 3(1) of the Representation of the People Act 1983 provides that convicted prisoners are "legally incapable of voting at any parliamentary or local government election." There are limited exceptions for those committed for contempt of court or detained for default of compliance with another sentence (such as a fine). Section 8(1) and (2) of the European Parliamentary Elections Act 2002 apply the same rules of eligibility to elections for the European Parliament. These provisions are entirely clear. There is no way in which they can be read down so as to allow voting rights to any category of convicted prisoners other than those falling within the specified exceptions.

114. The exclusion of convicted prisoners from the franchise is not a universal principle among mature democracies, but neither is it uncommon. Information provided by the Foreign Office in answer to a parliamentary question (updated to July 2012) indicates that at least 18 European countries including Denmark, Finland, Ireland, Spain, Sweden and Switzerland have no restrictions on voting by prisoners. Bulgaria, Estonia, Georgia, Hungary, Japan, Liechtenstein, Russia and the United States ban all convicted prisoners from voting, as do two of the seven Australian states. In some countries such as France disenfranchisement is reserved for those convicted of certain particularly serious offences, and in others such as Belgium for cases in which the prisoner is sentenced to a period of imprisonment exceeding a given threshold. In France, the Netherlands and Belgium disenfranchisement is an additional penalty imposed as a matter of judicial discretion. In other countries, such as Germany and Italy, it is automatic in specified cases. In Belgium, Italy and some jurisdictions of the United States, the

loss of voting rights may continue even after a prisoner's release. It is apparent that this is not a question on which there is any consensus.

115. From a prisoner's point of view the loss of the right to vote is likely to be a very minor deprivation by comparison with the loss of liberty. There are no doubt prisoners whose interest in public affairs or strong views on particular issues are such that their disenfranchisement represents a serious loss, just as there are prisoners (probably more numerous) whose enthusiasm for active sports makes imprisonment a special hardship. The severity of a sentence of imprisonment for the convicted person will always vary with a wide variety of factors whose impact on him or her will inevitably be arbitrary to some degree. It has been said, for example, that disenfranchisement may bear hardly on someone sentenced to, say, a short period of imprisonment which happens to coincide with a general election. For some prisoners, this will no doubt be true. But I decline to regard it as any more significant than the fact that it may coincide with a special anniversary, a long anticipated holiday or the only period of fine weather all summer.

116. Article 3 of the First Protocol to the Human Rights Convention provides that the 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." In 2005, the Grand Chamber of the European Court of Human Rights held in *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849 that a "blanket restriction" on voting by all prisoners violated article 3 of the First Protocol. In *Greens and MT v United Kingdom* (2010) 53 EHRR 710, the European Court of Human Rights delivered a "pilot judgment" on a large number of petitions by convicted prisoners which sought damages for the denial of their rights under article 3 of the First Protocol, consequent upon the decision in *Hirst*. The court refused to make an award of damages, but directed that the United Kingdom should "bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant" and effectively stayed further proceedings on pending petitions of the same kind until the expiry of that period. The deadline was subsequently extended by the European Court until six months after the judgment of the Grand Court in another case, *Scoppola v Italy (No 3)* (2012) 56 EHRR 663, in which the United Kingdom government proposed to intervene to make submissions about the correctness of *Hirst*. However, the judgment in that case, which was delivered on 22 May 2012, reaffirmed both the reasoning and the decision in *Hirst*. The deadline imposed by the Strasbourg Court expired in November 2012.

117. In December 2006, in the light of the decision in *Hirst*, the Government published a consultation paper setting out two alternative proposals for amending section 3 of the Representation of the People Act. One was to enfranchise

prisoners sentenced to less than a specified term, which would be "low..., such as one year in prison". The other was to allow sentencers a discretion on whether the franchise should be withdrawn in the particular case. A further consultation paper was published in April 2009 summarising responses to the first paper and seeking views on the approach to be adopted. The Government indicated its own preference for an automatic restriction of the franchise based on the seriousness of the offence, as reflected in the length of the sentence. On 20 December 2010, after the decision of the European Court of Human Rights in *Greens and MT*, the Government announced that it would propose to Parliament that offenders sentenced to a term of imprisonment of less than four years would have the right to vote in parliamentary and European Parliament elections, unless the sentencing judge directed otherwise. Subsequently, the question of prisoners' voting rights was debated twice. There was a Westminster Hall adjournment debate on 10 January 2011, at which many members of the House of Commons expressed strong opposition to enfranchising any prisoners. A month later, on 11 February 2011, there was an all-day debate on the floor of the House of Commons on a motion put forward jointly by senior backbench MPs from both sides of the House, that

> "legislative decisions of this nature should be a matter for democratically elected lawmakers; and supports the current situation in which no sentenced prisoner is able to vote except those imprisoned for contempt, default or on remand."

This motion was carried by 234 votes to 22, both front benches abstaining.

118. On 22 November 2012 the Government published the Voting Eligibility (Prisoners) Draft Bill (Cm 8499), setting out three options, (a) a ban on voting by prisoners sentenced to four years imprisonment or more, (b) a ban for prisoners sentenced to more than six months imprisonment, or (c) a general ban, i.e. a restatement of the present position. The explanatory memorandum accompanying the draft Bill pointed out that option (c) could not be regarded as compatible with the Convention. The draft Bill is currently being considered by a joint Select Committee of both Houses. For the moment, however, the only reasonable conclusion that can be drawn from this history is that there is no democratic mandate for the enfranchisement of convicted prisoners.

119. It is an international obligation of the United Kingdom under article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute. The remainder of article 46 contains provisions for its collective enforcement by the institutions of the Council of Europe. Many states have written constitutions which give automatic effect in domestic law to treaties to which they are party. Constitutional provisions of this kind are generally accompanied by provisions

giving the legislature a role in the ratification of treaties. But the making of treaties in the United Kingdom is an exercise of the royal prerogative. There was no legal requirement for parliamentary scrutiny until the enactment of Part 2 of the Constitutional Reform and Governance Act 2010, although pursuant to an undertaking given to Parliament in April 1924 treaties were in practice laid before Parliament and there was a recognised constitutional convention (the so-called 'Ponsonby Rule') that this should be done. The result of the constitutional status of treaties in the United Kingdom is that they are not a source of rights or obligations in domestic law unless effect is given to them by statute: *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 747-748 (Lord Bridge of Harwich), 762 (Lord Ackner); *R v Lyons* [2003] 1 AC 976; *In re McKerr* [2004] 1 WLR 807, para 25 (Lord Nicholls of Birkenhead), para 48 (Lord Steyn), para 63 (Lord Hoffmann), para 80 (Lord Rodger of Earlsferry) and para 90 (Lord Brown of Eaton-under-Heywood).

120. The Human Rights Act 1998 might have given direct legal effect to interpretations of the Human Rights Convention by the Strasbourg Court, or required the executive to give effect to them by statutory instrument. Both techniques were employed in relation to EU law by the European Communities Act 1972. But, as is well-known, its drafting was a compromise designed to make the incorporation of the Convention into English law compatible with the sovereignty of Parliament. Neither of these techniques was therefore adopted. Under section 10 of and Schedule 2 to the Act, the Crown has a power but not a duty to amend legislation by order so as to conform with the Convention where there are "compelling reasons" for doing so, but this is subject to prior parliamentary approval under the positive resolution procedure (there are special provisions in urgent cases for an order to be made with provisional effect subject to such a resolution being passed). It follows that the interpretation of the Convention by the Strasbourg Court takes effect in English law only by decision of the English courts. Section 2(1) of the Act provides that a United Kingdom court determining a question which has arisen in connection with a Convention right must "take into account" any judgment, decision or declaration of the European Court of Human Rights. For this purpose Convention rights are those set out in those of its provisions to which effect is given by the Act, i.e. articles 2 to 12 and 14 of the Convention, articles 1 to 3 of the First Protocol and article 1 of the Thirteenth Protocol: see section 1(1) and (2). Whatever may be meant by "taking into account" a decision of the Strasbourg Court, it is clearly less than an absolute obligation. The international law obligation of the United Kingdom under article 46.1 of the Convention goes further than section 2(1) of the Act, but it is not one of the provisions to which the Act gives effect.

121. In the ordinary use of language, to "take into account" a decision of the European Court of Human Rights means no more than to consider it, which is consistent with rejecting it as wrong. However, this is not an approach that a

United Kingdom court can adopt, save in altogether exceptional cases. The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so. In enacting the Human Rights Act 1998, Parliament must be taken to have been aware that effect would be given to the Act in accordance with this long-standing principle. A decision of the European Court of Human Rights is more than an opinion about the meaning of the Convention. It is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being reviewed by the Strasbourg Court.

122. In *R v Horncastle* [2010] 2 AC 373 at para 11, Lord Phillips of Worth Matravers, with the agreement of the rest of this court, rejected the submission that it should hold itself to be bound by a clear statement of principle of the European Court on the precise issue that was before it:

> "The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court."

123. In *Manchester City Council v Pinnock (Nos 1 and 2)* [2011] 2 AC 104, para 48, Lord Neuberger MR, again with the agreement of the whole court, expanded on this statement:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see e.g. *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a

> clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] AC 367, para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

124. It follows that the exceptionally delicate issues presently before the court cannot be resolved by summarily applying the decisions of the European Court of Human Rights in *Hirst* and *Scoppola*. It is necessary to consider the basis on which the Strasbourg Court approached the relevant features of our domestic law.

125. What is the rationale of the statutory rule excluding convicted prisoners from the franchise? In his *Second Treatise of Government* (1690), John Locke considered that because (as he saw it) all social obligations were ultimately founded upon implicit contract, a criminal, having repudiated that contract, had no rights. He had repudiated the collective security which was the purpose of the social contract and returned to the pre-existing state of nature in which force was the only law. It followed, Locke thought, that he "may be destroyed as a lion or tyger, one of those wild savage beasts, with whom men can have no society nor security." The same view was taken by others who identified the social contract as the foundation of the state, including Thomas Hobbes and Jean-Jacques Rousseau.

126. It is tempting to regard the present British rule about prisoners' voting rights as a distant reflexion of this view, and plenty of commentators have succumbed to the temptation. But like most rhetoric, this is misleading. The disenfranchisement of convicted prisoners is not and never has been a form of outlawry, or "civil death" (the phrase sometimes used to describe the current state of the law on prisoners' voting rights). On the contrary, until the 1960s, it was mainly the incidental consequence of other rules of law. In the first place, until 1870, convicted felons automatically suffered the confiscation of their real property, as a result of which they could not meet the property qualification which at that time was part of United Kingdom electoral law. The Forfeiture Act 1870 abolished the rule of confiscation. But section 2 partially preserved its effect on the franchise by providing that those sentenced for treason or felony to a period of imprisonment exceeding one year could not vote in parliamentary elections until they had served their sentence. This remained the position until the Criminal Law Act 1967 abolished the distinction between felonies and misdemeanours and

amended section 2 of the Act of 1870 so that it applied only to those convicted of treason. Secondly, section 41(5) of the Representation of the People Act 1918 provided that "an inmate … in any prison, lunatic asylum, workhouse, poorhouse, or any other similar institution" was not to be treated as resident there. This had the unintended effect of excluding from registration not only convicted prisoners, but prisoners on remand, an anomaly which was not corrected until the Representation of the People Act 2000 allowed remand prisoners to be treated as residing in the place where they were in custody. Thirdly, even those prisoners who before 1969 were eligible to vote were generally unable in practice to do so because of the absence of the necessary administrative arrangements. Except in the case of servicemen, postal voting was not introduced until the Representation of the People Act 1948, and was not available generally until the Representation of the People Act 2000.

127. The modern law on this subject can be said to date from the Speaker's Conference on Electoral Reform, which sat from 1965 to 1968 and issued its final report in February 1968 (Cmnd 3550). The conference was a non-partisan body drawn from all parties in the House of Commons and meeting under the chairmanship of the Speaker. It gave systematic consideration to all aspects of electoral law including the franchise and, apparently for the first time, the question of prisoners' voting rights. Only its conclusions, not its reasons, were published, but the final report records that it considered evidence and documentation from many sources. It unanimously recommended that all convicted prisoners should be ineligible to vote. This recommendation was accepted, and effect was given to it by section 3 of the Representation of the People Act 1969.

128. The rationale of the exclusion of convicted prisoners from the franchise is as complex as the rationale for imprisonment itself. Section 142(1) of the Criminal Justice Act 2003 provides:

> "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—
>
> (a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences."

All of these factors, except in the earlier period for (e), have been features of sentencing policy for very many years. For my part, I doubt whether the disenfranchisement of convicted prisoners can realistically be regarded as an additional punishment or a deterrent, and it may at least arguably be said to work against the reform and rehabilitation of the offender. But in my opinion, it has a more fundamental rationale. All criminal law, and penal policy in particular, has an important demonstrative function, which underlies all five of the statutory sentencing factors. The sentencing of offenders, and imprisonment more than any other sentence, is a reassertion of the rule of law and of the fundamental collective values of society which the convicted person has violated. This does not mean that the offender is disenfranchised because he is unpopular. Nor does it mean that he is regarded as having lost all civil rights or all claims against society, which is why the expression "civil death" is inappropriate. The present rule simply reflects the fact that imprisonment is more than a mere deprivation of liberty. It is a temporary reclusion of the prisoner from society, which carries with it the loss of the right to participate in society's public, collective processes. Similar principles appear to underlie the exclusion of convicted offenders from the franchise in the many other jurisdictions which practise it, whether on an automatic or a discretionary basis, and in particular those in which the suspension or abrogation of voting rights may be imposed independently of a prison sentence or continue after a term of imprisonment has been served.

129. Fundamental to this approach, and to the automatic character of the exclusion of convicted prisoners from the franchise is the principle that sentences of imprisonment are imposed only for the more serious offences. This has always been a central feature of sentencing policy. Currently, section 152 of the Criminal Justice Act 2003, repeating previous statutory provisions and the long-standing practice of the Court of Appeal (Criminal Division) provides:

"(2) The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence."

The only exceptions relate either to a very few grave offences where the sentence is prescribed (such as murder, some firearms offences, repeated violence or Class A drug trafficking) or to a separate sentencing regime for dangerous repeat offenders. The section also provides that it does not apply in cases where the offender has refused to accept or comply with the conditions on which some lesser sentence would have been imposed. These principles are broadly reflected in the

composition of the prison population. As Lord Mance has pointed out, only 8 per cent of persons convicted of an offence in England and 15 per cent in Scotland are sentenced to imprisonment. A statistical breakdown of the prison population as at 30 September 2010 suggests that 85% of prisoners serving sentences of less than five years were convicted of violent or sexual offences, robbery, burglary, theft, handling, fraud, forgery or drug offences. No doubt the threshold of seriousness for the passing of a sentence of imprisonment will vary in practice from one country to another. Different offences will perfectly properly be regarded as having more serious implications for some societies than for others. The United Kingdom is widely thought to have a relatively low threshold, but I am not aware that any comprehensive comparative study has been carried out which takes account of the underlying patterns of criminality.

130. Although article 3 of the First Protocol is in unqualified terms, the jurisprudence of the Strasbourg Court has acknowledged from the outset that the right to vote may be subject to limitations of a kind which is familiar in the case-law governing other Convention rights. The limitations must pursue a legitimate aim by proportionate means and must not be such as to impair the essence of the right: see *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1, para 52; *Matthews v United Kingdom* (1999) 28 EHRR 361, para 63. It has generally been held that the essence of the right is not impaired if it does not thwart the free expression of the opinion of the people as a whole: see *Holland v Ireland* (Application No 24827/94) (unreported) 14 April 1998. It follows that the exclusion of certain categories of person from the franchise may be compatible with the Convention notwithstanding that as far as those persons are concerned the exclusion is total while it lasts. The case-law has consistently emphasised that these are matters on which the state enjoys a wide margin of appreciation. In *Hirst* this was said to reflect the

> "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 its own democratic vision" (para 61).

131. The United Kingdom government argued before the Strasbourg Court in *Hirst* that the objective of disenfranchisement was to serve as an additional punishment. The court accepted that that was a possible rationalisation, and regarded it as a legitimate objective, compatible with article 3 of the First Protocol. The rule was nevertheless held to be incompatible because it was disproportionate,

> "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" (para 76).

The court considered the government's argument that the exclusion "affected only those convicted of crimes serious enough to warrant a custodial sentence", and the very similar argument put forward by an intervener that imprisonment was "the last resort of criminal justice." They appear to have rejected this argument on the facts, observing that sentences of imprisonment are imposed for a wide range of offenders and for periods from one day to life, and that because disenfranchisement was automatic the sentencer had no opportunity to assess its proportionality in any particular case (paras 77, 80).

132. The court considered that the absolute character of the rule disenfranchising convicted prisoners and its application to all convicted prisoners put it beyond the state's margin of appreciation. They were fortified in this conclusion by their view that there was no evidence that Parliament had weighed the proportionality of a general exclusion. The court referred to the Speaker's Conference of 1965-1968, and the Home Office working party of 1998-1999, and acknowledged that Parliament might be said implicitly to have endorsed their conclusions:

> "Nonetheless [they concluded] 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." (para 79).

133. The court concluded as follows, at para 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 Act of 2000 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."

134. *Scoppola v Italy (No 3)* (2012) 56 EHRR 663 was directly concerned with the automatic lifetime exclusion from the franchise which was the consequence under Italian law of the imposition of a sentence of life imprisonment. However, the United Kingdom rule was indirectly in question, because the Grand Chamber reviewed the decision in *Hirst* and the British government intervened to make submissions about it. The Chamber had held that the Italian rule violated article 3 of the First Protocol because of its automatic character. The Grand Chamber held that it was compatible with the Convention. It found that the rule pursued the legitimate aim of "preventing crime and enhancing civil responsibility and respect for the rule of law" (para 90). Turning to proportionality, it held that notwithstanding the statements in *Hirst* the test of proportionality did not require that disenfranchisement should be discretionary. It could be automatic, provided that the principles governing its imposition were sufficiently related to the gravity of the offence. The provisions of the relevant Italian law were held to be proportionate, unlike the English rule, because they disenfranchised only those convicted of particularly serious offences and those sentenced to the longer terms of imprisonment. Subject to the point about the absence of judicial discretion, the Grand Chamber reaffirmed the decision in *Hirst*.

135. Accordingly, the Strasbourg Court has arrived at a very curious position. It has held that it is open to a Convention state to fix a minimum threshold of gravity which warrants the disenfranchisement of a convicted person. It has held that the threshold beyond which he will be disenfranchised may be fixed by law by reference to the nature of the sentence. It has held that disenfranchisement may be automatic, once a sentence above that threshold has been imposed. But it has also held that even with the wide margin of appreciation allowed to Convention states in this area, it is not permissible for the threshold for disenfranchisement to correspond with the threshold for imprisonment. Wherever the threshold for imprisonment is placed, it seems to have been their view that there must always be some offences which are serious enough to warrant imprisonment but not serious enough to warrant disenfranchisement. Yet the basis of this view is nowhere articulated. It might perhaps have been justified by a careful examination of the principles of sentencing in the United Kingdom, with a view to demonstrating that they involve the imprisonment of some categories of people for offences so trivial that one could not rationally suppose them to warrant disenfranchisement. That would be an indictment not just of the principle of disenfranchisement but of the sentencing principles themselves. However, no such exercise appears to have been carried out.

136. I confess that I also find it surprising that the Strasbourg Court should have concluded in *Hirst* that the United Kingdom Parliament adopted the present rule

per incuriam, so to speak, in 1969, without properly considering the justification for it as a matter of penal policy. The absence of debate to which the court referred reflects the attention which had already been given to the issue by the Speaker's Conference, and the complete consensus on the appropriateness of the voting ban.

137. Without the decisions in *Hirst* and *Scoppola*, I would have held that the question how serious an offence has to be to warrant temporary disenfranchisement is a classic matter for political and legislative judgment, and that the United Kingdom rule is well within any reasonable assessment of a Convention state's margin of appreciation. However, the contrary view has now been upheld twice by the Grand Chamber of the European Court of Human Rights, and is firmly established in the court's case-law. It cannot be said that the Grand Chamber overlooked or misunderstood any relevant principle of English law. The problems about the view which the court ultimately came to were fairly pointed out in both cases in the course of argument. Whatever parliamentary consideration may or may not have been given to the issue in 1969, it has undoubtedly received a great deal of parliamentary attention more recently, in debates which were drawn to the Grand Chamber's attention in *Scoppola* but made no difference to its view. There is no realistic prospect that further dialogue with Strasbourg will produce a change of heart. In those circumstances, we would be justified in departing from the case-law of the Strasbourg Court only if the disenfranchisement of convicted prisoners could be categorised as a fundamental feature of the law of the United Kingdom. I would regard that as an extreme suggestion, and in agreement with Lord Mance I would reject it.

138. A wider and perhaps more realistic assessment of the margin of appreciation would have avoided the current controversy. But it would be neither wise nor legally defensible for an English court to say that article 3 of the First Protocol has a meaning different from that which represents the settled view of the principal court charged with its interpretation, and different from that which will consequently apply in every other state party to the Convention.