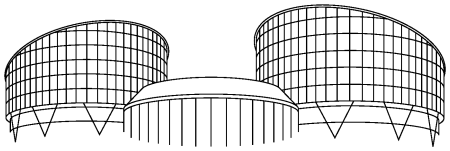

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FIRTH AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09)

JUDGMENT

STRASBOURG

12 August 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Firth and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 8 July 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in ten applications against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by ten British nationals (see list appended).

2. The applicants were represented by Taylor & Kelly, a firm of solicitors based in Coatbridge. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicants alleged in particular that, as convicted prisoners, they were ineligible to vote in the elections to the European Parliament on 4 June 2009.

4. On 27 May 2014 these complaints were communicated to the Government and the remainder of the applications were declared inadmissible.

5. Written observations were received from the respondent Government and just satisfaction claims were received from the applicants.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were all incarcerated at the relevant time following criminal convictions. The case-file does not disclose either the offences of which they were convicted or the lengths of the sentences of imprisonment

imposed on them. They were automatically prevented from voting, pursuant to primary legislation, in the elections to the European Parliament held on 4 June 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE

7. The relevant domestic law and practice is set out in the Court's judgments in *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX; and *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010 (extracts). Further developments since the *Greens and M.T.* judgment are set out in the Court's decision in *McLean and Cole v. the United Kingdom* (dec.), nos. 12626/13 and 2522/12, 11 June 2013.

8. On 18 December 2013 the United Kingdom Parliament's Joint Committee on the Draft Voting Eligibility (Prisoners) Bill published its report. It made the following recommendation:

> "We recommend that the Government bring forward a Bill, at the start of the 2014-15 session of Parliament, to give legislative effect to the following conclusions:
>
> That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections;
>
> ...
>
> That prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

9. The applicants complained that they had been prevented from voting in the elections to the European Parliament on 4 June 2009. They relied on Article 3 of Protocol No. 1 to the Convention, which reads as follows:

> "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."

A. Admissibility

10. The Court is obliged, by the Convention, to satisfy itself, where appropriate on its own motion, that it has jurisdiction in any case brought

before it (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 58, ECHR 2008). In the present case, the question arises whether, in order to show that they have "victim" status within the meaning of Article 34 of the Convention and that, for the purposes of Article 35 § 3 (a) of the Convention, their applications are compatible *ratione personae* with the Convention and its Protocols, the applicants must demonstrate that they applied to be registered as voters in accordance with applicable deadlines for voter registration (see, for example, the Government's inadmissibility plea in *Toner v. the United Kingdom* (dec.), no. 8195/08, § 23, 15 February 2011).

11. In this respect, it is significant that the contested preclusion from voting in the elections to the European Parliament stemmed from primary legislation. In *Smith v. Scott* 2007 SLT 137, the Registration Appeal Court considered the refusal of the Electoral Registration Officer to enroll a convicted prisoner on the electoral register on the basis of the applicable legislation. The court held that the legislation could not be read compatibly with Article 3 of Protocol No. 1 and accordingly made a declaration of incompatibility (see the summary of the case in *Greens and M.T.*, cited above, §§ 27-30).

12. In these circumstances, it is self-evident that any application by a convicted prisoner for registration as a voter is bound to fail as long as the legislation remains in the same terms as that considered by the court in *Smith v. Scott*. It was accordingly not necessary for the applicants to undertake the wholly pointless exercise of applying to be registered as voters in order to be able to show that they can claim to be "victims" of an alleged violation of Article 3 of Protocol No. 1 deriving from the statutory prohibition on voting.

13. The Court further notes that the applicants' complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

14. In *Greens and M.T.*, cited above, §§ 78-79, the Court held that the statutory ban on prisoners voting in elections to the European Parliament was, by reason of its blanket character, incompatible with Article 3 of Protocol No. 1 to the Convention. It further indicated that some legislative amendment would be required in order to render the electoral law compatible with the requirements of the Convention (see § 112 of the Court's judgment). Since then, the Government have published a draft bill, which has undergone parliamentary scrutiny by a joint committee of both Houses of Parliament. The committee's report, published in December 2013, made recommendations as to suitable legislative amendments to be

enacted and the appropriate timetable for enactment (see paragraph 8 above).

15. Given that the impugned legislation remains unamended, the Court cannot but conclude that, as in *Hirst (no. 2)* and *Greens and M.T.* and for the same reasons, there has been a violation of Article 3 of Protocol No. 1 in the applicants' case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

16. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

17. The applicants made a claim for non-pecuniary damage.

18. The Court has found violations of Article 3 of Protocol No. 1 in a number of cases concerning prohibitions on prisoners' right to vote in various countries (see *Hirst (no. 2)*, cited above; *Calmanovici v. Romania*, no. 42250/02, 1 July 2008; *Frodl v. Austria*, no. 20201/04, 8 April 2010; *Greens and M.T.*, cited above; *Cucu v. Romania*, no. 22362/06, 13 November 2012; *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013; and *Söyler v. Turkey*, no. 29411/07, 17 September 2013). In the vast majority of these cases, the Court expressly declined to make any award of damages. As in those cases, in the present case the Court concludes that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Costs and expenses

19. The applicants claimed their costs and expenses in relation to the proceedings before the Court.

20. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In *Greens and M.T.*, cited above, § 120, the Court said:

> "The award made in respect of costs in the present cases was limited to the proceedings before this Court and reflected the fact that extensive written submissions were lodged. In future follow-up cases, in light of the above considerations, the Court would be likely to consider that legal costs were not reasonably and necessarily incurred and would not, therefore, be likely to award costs under Article 41."

21. The Court established in its 2005 Grand Chamber judgment in *Hirst (no. 2)* that the existing electoral legislation in the United Kingdom precluding prisoners from voting was incompatible with Article 3 of Protocol No. 1. Subsequent applicants lodging an application with this Court concerning their ineligibility to vote in an election needed only to complete an application form in which they (i) cited Article 3 of Protocol No. 1; (ii) alleged that they had been in post-conviction detention in prison on the date of an identified election to which that provision applies (see *McLean and Cole*, cited above; and *Dunn and Others v. the United Kingdom* (dec.), nos. 566/10 and 130 other applications, 13 May 2014); and (iii) confirmed that they had been otherwise eligible to vote in the election in question (in particular, that they had satisfied the applicable age and nationality requirements). It is clear that the lodging of such an application was straightforward and did not require legal assistance.

22. In these circumstances, the legal costs claimed by the present applicants cannot be regarded as reasonably and necessarily incurred (see *Greens and M.T.*, cited above, § 120). The Court therefore declines to make any award in respect of legal costs.

FOR THESE REASONS, THE COURT:

1. *Declares*, by six votes to one, the complaints admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 August 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Nicolaou and Wojtyczek are annexed to this judgment.

I.Z.
F.E.P.

DISSENTING OPINION OF JUDGE NICOLAOU

In *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX, the Court was prepared to accept, albeit rather reluctantly (see § 75), that section 3 of the Representation of the People Act 1983, which did not allow convicted prisoners to vote for as long as they remained in custody, pursued the legitimate aim of discouraging crime while "enhancing civic responsibility and respect for the rule of law", as the respondent State had suggested. Then, ruling on the proportionality of the measure, the Court found that the measure was too broad, since it covered the whole spectrum of those convicted, and expressed the view that it was a blunt instrument, embodying past notions which remained untested by "any substantive debate ... in light of modern-day penal policy and of current human rights standards" (see § 79). However, it would seem from the tenor of the judgment that such a measure, with a single all-embracing restriction, could not have been saved even if it had been preceded by such debate. The Court said, at § 82, that

> "... although the situation was somewhat improved by the 2000 Act 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".

The Court also pointed out that disenfranchisement, in order to be justified, required "a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned" (see § 71). In this regard the Court cited with approval a recommendation of the Venice Commission that "... the withdrawal of political rights ... may only be imposed by express decision of a court of law" and noted, at § 77, that "...when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote." That paragraph ended with the statement that "[a]s in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness."

In light of those views, the Court subsequently held in *Frodl v. Austria* (no. 20201/10, §§ 34-35, 8 April 2010), that "the decision on disenfranchisement should be taken by a judge" and must contain reasoning as to "... why in the circumstances of the specific case disenfranchisement

was necessary". However, in *Scoppola v. Italy (no. 3)* ([GC], no. 126/05, 22 May 2012), where the applicant had been convicted of murder in aggravating circumstances and was ultimately sentenced to thirty years' imprisonment, it was said that the "reasoning in *Frodl* takes a broad view of the principles set out in *Hirst (no. 2)*, which the Grand Chamber does not fully share" and that disenfranchisement may take effect on the basis of legislative provisions, without specifically being ordered by judicial decision. This was summed up in the following statement, at § 99:

> "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".

The Court then went on to find, in *Scoppola (no. 3)*, that the general measure which Italy had adopted was Convention compliant. This was, essentially, because

> "In the Court's opinion the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender. It is applied only in connection with certain offences against the State or the judicial system, or with offences which the courts consider to warrant a particularly harsh sentence, regard being had to the criteria listed in Articles 132 and 133 of the Criminal Code (see paragraph 37 above), including the offender's personal situation, and also to the mitigating and aggravating circumstances. The measure is not applied, therefore, to all individuals sentenced to a term of imprisonment but only to those sentenced to a prison term of three years or more. Italian law also adjusts the duration of the measure to the sentence imposed and thus, by the same token, to the gravity of the offence: the disenfranchisement is for five years for sentences of three to five years and permanent for sentences of five years or more".

Further clarifications made by the Court are not directly relevant to what is now in issue.

What I consider to be critical is that in *Scoppola (no. 3)* the Court expressed its approval of a specific level of protection above which, therefore, States are not obliged to go, while it did not exclude that a lower level of protection may also suffice.

It will be recalled that in *Hirst (no. 2)* the United Kingdom had argued that, even if a much less restrictive measure had been in place, the applicant, with a sentence of life imprisonment, could not reasonably have expected to benefit. He thus lacked victim status and his application was actually an *actio popularis*. The Chamber answered this, in its judgment, by saying, at § 51, that

> "The Court cannot speculate as to whether the applicant would still have been deprived of the vote even if a more limited restriction on the right of prisoners to vote had been imposed, which was such as to comply with the requirements of Article 3 of Protocol No.1."

The Grand Chamber endorsed that statement but with some shift in emphasis. It said this:

> "[The applicant] was directly and immediately affected by the legislative provision of which he complained, 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, had the measure been drafted differently and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote."

As to what restrictions, if any, would be compatible with Article 3 of Protocol No. 1 the Grand Chamber declined to offer guidance. It was not prepared, owing to the nature of the matter, to take the initiative of saying how and where to draw the line. It explained, at § 84, that

> "In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1."

Now, however, on the basis of the judgment in *Scoppola (no. 3)* it can be said with certainty, first, that disenfranchisement can take place without a specific judicial decision to that effect if the legislation of the State so provides; secondly, that the law may provide for disenfranchisement where a convicted person is sentenced to imprisonment for five years or more; and, thirdly, a lower threshold for disenfranchisement is not excluded. The conclusion that no specific judicial decision is required for disenfranchisement has obviously been the result of further reflection, while the recognition that disenfranchisement is permissible, where imprisonment exceeds a certain threshold, has been made possible by examining a concrete legislative measure that provided limits. The finding of a violation in *Hirst (no. 2)* must, I think, be attributed to the fact that the Court was not then prepared to accept these propositions without more.

In my opinion, it would not in principle be right to read *Hirst (no.2)* as meaning that if a general legislative measure regulating pre-defined situations does not meet with Strasbourg's approval, an applicant must necessarily succeed in his claim. A general measure transcends the individual facts of any particular case and may indeed work hardship in some. Yet, where its necessity and proportionality are demonstrated by relevant and sufficient reasons, the measure will be upheld irrespective of how the balance lies in the individual case (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-24, 22 April 2013) and the concurring opinion of Judge Bratza, at point 4. Where, on the other hand, a general measure does not meet these requirements the Court has to consider the matter outside the context of the

measure and, the legitimate aim of the restriction having been established, to examine the proportionality of the interference on the facts of the individual case seen in the light of the case-law.

The applicants have given no details of the respective dates of their conviction and length of sentence, that is, whether a life sentence, a long term of imprisonment or a relatively short one had been imposed. Neither have they informed the Court of whether they are still in detention, almost five years after their applications were introduced. It was incumbent on them to do so (see *Dunn v. the United Kingdom*, (dec.), no. 566/10 and 130 other applications, §§ 16 and 17, and *McLean and Cole v. the United Kingdom* (dec.), nos. 12626/13 and 2522/12, §§ 5-12, 11 June 2013).

In these circumstances I am unable to accept the majority view that the applicants' complaints are admissible or, having been held so to be, that they have been substantiated. I conclude, therefore, that there has been no violation of Article 3 of Protocol No. 1.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. The instant case raises several serious and highly difficult questions affecting the interpretation of the Convention and the Protocols thereto. The legal issues at stake concern the core of constitutional democracy in the context of European integration. Furthermore, legal scholarship rightly points out the "consistency deficit" of the Court's case-law on the right to free elections (see, for instance, Y. Lecuyer, *L'européanisation des standards démocratiques*, Rennes 2011, p. 73). In my view, we have here a typical situation referred to in Article 30 of the Convention, which pertains to the relinquishment of cases to the Grand Chamber. I regret that the majority of the Chamber did not share the view that the conditions for such relinquishment were fulfilled. For the reasons explained below I have voted for a non-violation of Article 3 of Protocol No. 1 to the Convention.

2. I have expressed my views concerning certain problems of interpretation of Article 3 of Protocol No. 1 in my separate opinion in the case of *Zornić v. Bosnia and Herzegovina* (no. 3681/06, 15 July 2014). I would like to underline once again the necessity of taking into account, in cases pertaining to constitutional questions, the interpretative directives derived from the Preamble to the Convention. Firstly, the Preamble refers to a "common understanding and observance of human rights". The Convention should therefore be construed in a way which reflects the common understanding of human rights among the High Contracting Parties. The Court should try to avoid imposing an interpretation which goes against that common understanding. Secondly, the Preamble refers to "a common heritage of political traditions, ideals, freedom and the rule of law". An interpretation of the Convention and its Protocols therefore has to duly take this common heritage into account. The common European constitutional heritage co-determines the meaning and the scope of the Convention rights (see my separate opinion in *Zornić,* cited above).

I would like to note two further considerations stemming from the Preamble to the Convention. Where the Preamble speaks of "further realisation of human rights and fundamental freedoms", it implies that the actors of this task are the national governments. It refers to only one instrument for this purpose, namely the conclusion of treaties. It is also important to note that the "further realisation of human rights and fundamental freedoms" is a tool for the achievement of greater unity between the member States of the Council of Europe. From this perspective, the task in question belongs to the High Contracting Parties, which can conclude new treaties for this purpose, whereas the European Court of Human Rights has to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" (Article 19 of the Convention), while bearing in mind that the instrument to be applied was only one of "the first steps for the collective

enforcement of certain of the rights stated in the Universal Declaration" (Preamble to the Convention).

Moreover, the Preamble emphasises the function of "an effective political democracy" as a tool for maintaining fundamental freedoms. Democracy and rights are thus not seen to collide but rather to be in a symbiotic relationship with each other. The wording used may be understood, especially when read in conjunction with Article 3 of Protocol No. 1, as justifying a presumption in favour of broad powers of national legislatures.

3. The point of departure of an interpretation of Article 3 of Protocol No. 1 should be its wording. The most thorough and persuasive interpretation of this provision was proposed in the judgment of 16 March 2006 in the case of *Ždanoka v. Latvia* [GC] (no. 58278/00, ECHR 2006-IV). In that case the Court rightly draw attention to the peculiarities of the provision in question, stressing among other things that "because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8 to 11 of the Convention. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights. The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention" (see *Ždanoka*, cited above, § 115). The Court also stated that "[t]he concept of 'implied limitations' under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 of Protocol No. 1 is not limited by a specific list of 'legitimate aims' such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case" (see *Ždanoka*, cited above, § 115).

Unlike in other provisions of the Convention guaranteeing specific rights, in the provision in question the accent is placed on the objective guarantees of free elections rather than on the subjective rights of the right-holders (compare, for instance, C. Grabenwarter, *European Convention of Human Rights, Commentary*, München – Oxford – Baden-Baden – Basel 2014, p. 400). This focus on the objective law is of paramount importance for establishing the scope and content of the provision under consideration. In determining whether national authorities comply with this provision one has to verify primarily whether the free expression of the opinion of the people in the choice of the legislature has been ensured.

On the other hand, the notion of free elections to the legislature presupposes universal suffrage, understood as the absence of unreasonable restrictions on the right to vote and on the right to be elected. Individual subjective rights can therefore be inferred from the wording of Article 3 of Protocol No. 1. At the same time, democratic European constitutionalism has accepted certain implied limitations on the scope of those rights, provided that they do not thwart the free expression of the opinion of the people in the choice of the legislature (see my separate opinion in *Zornić*, cited above). The reasonableness of limitations imposed on voting rights should be determined in the context of the common European constitutional heritage. Furthermore, an analysis of the *travaux préparatoires* confirms that the intention of the signatory governments was to leave the States a very broad scope of freedom in the domain of elections (see, for instance, J. Kissangoula, *Élections libres (Droit à des −)* in: *Dictionnaire des droits de l'homme*, J. Adriantsimbazovina *et al*. eds., Paris 2008, p. 363).

4. The applicants complain that the respondent State violated Article 3 of Protocol No. 1 by preventing them from voting in the elections to the European Parliament on 4 June 2009. The majority shared the view of the applicants. While the Court should limit itself to an examination of the grievance submitted by the applicants, who complain only about their disenfranchisement in the elections to one legislative body of the European Union, finding a violation in the instant case requires a preliminary assessment of whether the whole system of choosing the legislature of the European Union is compatible with the requirements of this provision of the Convention. It is therefore necessary to identify all the legislative bodies of the European Union and to establish which of them have to be elected in order to "ensure the free expression of opinion of the people in the choice of the legislature" before finding that a restriction on the right to vote in elections to one of them violates Article 3 of Protocol No. 1.

In the case of *Matthews v. the United Kingdom* ([GC], no. 24833/94, ECHR 1999-I) the Court stated that Article 3 of Protocol No. 1 applied to elections to the European Parliament. This statement implies a more general assumption that the provision in question applied to the legislature of the European Communities and that it continues to apply today to the European Union. I agree with this implicit assumption. A transfer of legislative powers to international organisations should not circumvent the guarantees of the provision in question by enabling the creation of unelected supranational legislative bodies. However, it raises the legally complex and politically sensitive question of how this provision applies to the European Union. I note in this context that the *Matthews* judgment was criticised by a large number of legal scholars for failing to properly conceptualize the problem of the legislative power in the European Communities at the material time.

The legislative power in the European Union, in the present day, after the Lisbon Treaty entered into force, is divided between several bodies: the Council, the European Parliament and the Commission. The most important powers belong to the Council, which consists of the representatives of national governments. Important powers also belong to the European Parliament, elected by universal and direct but unequal suffrage. EU legislation is to be enacted by both the Council and the European Parliament. The Commission also exercises powers in the field of legislation and in particular has a monopoly on initiating legislation in most matters. Legal scholars have widely discussed the problem of the democracy deficit within the European Union and some of them have criticised the organisation on that account. Although the Lisbon Treaty was designed, among other things, to improve the democracy deficit, it was not able to overcome the problem completely.

In the case of *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, ECHR 2009) the Court declared Article 3 of Protocol No. 1 applicable to the second chamber of the Bosnian Parliament, namely the House of Peoples, pointing out that its powers were similar to those of the first chamber. It is not clear whether the same requirement should be applied to the two legislative bodies of the European Union, namely the Parliament and the Council. Should both be elected according to the standards enshrined in the Article in question? Will the enfranchisement of those deprived of the right to vote in elections to the European Parliament solve the problem from the perspective of the Convention? Or will the problem persist as long as the other legislative body of the European Union is not directly elected by the people? I will leave these broader questions unanswered in the present dissenting opinion and consider only the narrow issue raised by the applicants, namely the question of their inability to vote in the elections to the European Parliament, on the assumption that Article 3 of Protocol No. 1 requires that in the European Union at least the Parliament has to be elected according to the standards of free election enshrined in that provision.

5. The Court examined the British legislation pertaining to the voting rights of the prisoners in the judgment of 6 October 2005 in the case of *Hirst v. the United Kingdom (no. 2)* (no. 74025/01, ECHR 2005-IX). Under the British law a convicted person, during the time he is detained in a penal institution, is legally incapable of voting at any parliamentary or local election. The Court found the British legislation incompatible with Article 3 of Protocol No. 1. The Court noted that "the provision [of UK legislation] imposes a blanket restriction on all convicted prisoners." .It considered that "[s]uch 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."

The question of the disenfranchisement of prisoners was revisited in the judgment of 22 May 2012 in the case of *Scoppola v. Italy (no. 3)*. In that case the Court examined the Italian system, in which disenfranchisement applies only to persons sentenced to a prison term of three years or more. In Italy, disenfranchisement lasts five years in cases of sentences imposing a prison term of three to five years and is permanent in cases of sentences imposing a prison term of five years or more. However, in the latter case a convicted person who has been permanently deprived of the right to vote may recover that right. The Court found the system under consideration compatible with the Convention. Although the reasoning refers extensively to the *Hirst* judgment, it is difficult to see in the *Scoppola v. Italy (no. 3)* judgment anything other than a partial overruling of the former judgment.

6. The approach adopted by the Court in the two above-mentioned cases pertaining to the voting rights of prisoners raises many doubts and objections. Firstly, any general legal rule imposing a restriction *ex lege* on certain rights applies to a class of persons defined by some criteria. It is always a "general, automatic and indiscriminate restriction" for this class of persons. The notion of a "blanket restriction" is therefore relative. Whether a restriction can be qualified as "blanket" is a matter of perspective. It presupposes the definition of a class of persons that is the point of reference for the assessment. A "blanket" restriction is a restriction which applies to all persons belonging to this class. In this context, the choice of the reference group should be explained rationally by those contesting the permissibility of an allegedly "blanket" restriction. Why should the reference group subject to voting-rights restrictions be persons sentenced to a prison term rather than all persons convicted of a criminal offence or all persons sentenced to a prison term of at least three years? I note that in the UK legislation there is no "blanket" restriction imposed on all convicted persons. The UK legislation carefully differentiates between those detained in a penal institution and other convicted persons. At the same time, if we take as the reference group those sentenced to a prison term of at least three years, then the Italian legislation should be regarded as imposing a "blanket" restriction imposed on this category of persons. The notion of a "blanket" restriction seems to be useless as a tool for identifying "suspicious" restrictions on rights because of its relativity. If the Court means that the personal scope of a restriction was too broad, then it should say so clearly and explain why.

Secondly, the Court lays emphasis on the need for individualisation of the punishment. In *Hirst no. 2* the Court stressed that the restriction of electoral rights applied automatically to prisoners irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. In *Scoppola no.* 3 the Court noted that "legal provisions in Italy ... show the legislature's concern to adjust the application of the measure to the particular circumstances of the case at

hand". It is difficult to agree with these two assessments, which seem to be contradicted by the content of the respective national legislation. In the United Kingdom, the deprivation of the right to vote coincides with the prison term. Its duration therefore varies according to the specific circumstances of each case. There is a therefore a very clear adjustment of the restriction to the specific circumstances of each case. In Italy, the duration of the restriction was determined in a very general way: it was either for five years or for life. Therefore, there was no adjustment at all to the circumstances of the case once disenfranchisement had to be applied. It is impossible to understand why this second system of restrictions is to be viewed as better protecting electoral rights. On this point, I agree with the critical remarks expressed in the dissenting opinion of the judge David Thór Björgvinnson in *Scoppola no. 3*.

Thirdly, I note that in many States a legal conviction automatically entails a certain number of legal consequences defined in different statutes. In particular, the exercise of some rights may depend upon the lack of a criminal record. Such requirements are equivalent to "blanket" restrictions placed on all convicted persons. It is not possible to require that all consequences of a criminal conviction should be individually assessed and imposed by a judgment.

In this respect I agree with the view expressed in the *Ždanoka* judgment, cited above, that "[t]he requirement for 'individualisation', that is the necessity of the supervision by the domestic judicial authorities of the proportionality of the impugned statutory restriction in view of the specific features of each and every case, is not a precondition of the measure's compatibility with the Convention" (see *Ždanoka*, cited above, § 114). In that same judgment, the Court rightly recognized that "[f]or a restrictive measure to comply with Article 3 of Protocol No. 1, a lesser degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8 to 11 of the Convention" (see *Ždanoka*, cited above, § 115). It concluded that "the Convention does not exclude a situation where the scope and conditions of a restrictive measure may be determined in detail by the legislature, leaving the courts of ordinary jurisdiction only with the task of verifying whether a particular individual belongs to the category or group covered by the statutory measure in issue. This is particularly so in matters relating to Article 3 of Protocol No. 1." (see *Ždanoka*, cited above, § 125).

Fourthly, restrictions on rights imposed *ex lege* are neither unacceptable *per se* nor necessarily disproportionate. Their proportionality should be carefully assessed. In *Hirst no. 2* the Court considered the limitation unacceptable from the outset because of its "blanket" character. It contested the breadth of the restriction but no real explanation was given as to why the scope of the restriction was considered too broad. The Court refrained from carrying out a true proportionality test and, in particular, it abstained from

balancing all the conflicting values. Moreover, an assessment of the proportionality of a criminal-law measure has to take into account the whole set of applicable punishments and all other legal consequences of a conviction. The same measure may be considered disproportionate if applied together with other, severe, measures and proportionate when applied together with milder measures.

Fifthly, as mentioned above, the common constitutional tradition in Europe has accepted certain implied limitations on the scope of electoral rights. These rights are guaranteed only to nationals. Restrictions on the voting rights of incapacitated persons or persons deprived of their right to vote in connection with a criminal conviction are also part of this tradition. The electoral law of the United Kingdom is not only an important part of the "common heritage of political traditions, ideals, freedom and the rule of law" referred to in the Preamble to the Convention but has also played a significant role in the process of forming it.

Lastly, I agree that prisoners are a vulnerable group which requires special protection against mistreatment. However, the necessity of protecting vulnerable groups cannot prevent the State from imposing and applying just and humane punishments for criminal offences. A punishment is by definition an interference with certain legal assets precious to the persons punished. Deprivation of the right to vote is part of that punishment. The restriction imposed under the British legislation was neither arbitrary nor unreasonable. It cannot be declared as unjust or degrading. Furthermore, it neither thwarts the free expression of the people in the choice of the legislature, nor undermines the democratic validity of the legislature (see the general standards established in *Hirst no. 2*, cited above, § 62).

7. The rights enshrined in Article 3 of Protocol No. 1 have a very special dimension closely connected with a broader problem, often referred to by the scholarship as the "counter-majoritarian difficulty" (see in particular A. M. Bickel, *The Least Dangerous Branch,* 2nd edition, New Haven and London 1986, p. 16 et seq.). The issue is one of the most vividly discussed in constitutional law and political theory. For the purpose of the present opinion, it suffices to note briefly that the provision under consideration guarantees the right to vote in elections to the legislative bodies and to determine - through elections - legislative policies. The elected bodies should have broad legislative powers. Depriving the legislature of its legislative powers infringes the citizens' right protected by the provision in question. In this context, Article 3 of Protocol No. 1 is the explicit legal basis for the preservation of the margin of appreciation of the States in the implementation of the Convention. This doctrine protects first and foremost the freedom of choice of the people in the democratic decision-making processes and ensures a proper balance between the citizens' rights to political participation and other rights protected by the Convention and the

Protocols thereto. It is one of the fundamental guarantees of an effective democracy at national level in the High Contracting Parties.

Human rights are by definition counter-majoritarian claims. They are restrictions imposed on the freedom of choice of the people and especially on the scope of legislative powers protected under Article 3 of Protocol No. 1. There is no effective human rights protection without real protection against the democratic legislator. History teaches us that the parliamentary majority may be tempted to infringe the rights of different vulnerable groups. The right to elect a legislature with effective powers necessarily conflicts with other rights. At the same time, one has to bear in mind that unduly extended rights may erode the substance of the right protected under Article 3 of Protocol No. 1. In disputes concerning the scope of Convention rights there should be a – rebuttable – presumption that questions on which two or more reasonable persons strongly disagree should be decided by democratic national legislatures rather than by courts, let alone international courts, unless there are serious reasons for a particularly thorough judicial review of the disputed measures.

It is true that criminal legislation entails by its very nature a serious risk of human rights violations. On the other hand, enacting criminal law is an essential element of legislative power. It is the task of the national legislatures to devise a criminal policy and to translate it into criminal legislation. It is always possible to argue that the same aim could have been achieved by more lenient criminal legislation. As long as the system of sentencing is neither arbitrary nor manifestly disproportionate and respects the fundamental guarantees enshrined in Articles 3 and 7 of the Convention, it is not the role of the judge to substitute his own choices for those of the legislature by proposing an alternative approach in respect of the *ius puniendi*. A reappraisal of the electoral-rights question by the Court would be an opportunity to strike a better balance between the different conflicting rights and conflicting values protected under the Convention.

8. In the instant case the Court decided, without looking at the specific circumstances of each application, to find a "blanket" violation of Article 3 of Protocol No. 1, based on the assumption that the existence of an overbroad limitation on a right is *per se* a violation of this right even if it were justified in the specific situation of an applicant. I disagree with this approach. "Blanket" restrictions on rights do not justify a "blanket" judicial review. An overbroad limitation is in principle legitimate in situations in which a properly tailored limitation would have been justified. Moreover, the acceptability of the deprivation of voting rights in the case of a serious criminal does not depend on how the legislation treats minor offenders. In any event, finding a violation of Article 3 of Protocol No. 1 in the instant case required as a necessary precondition a thorough examination of the individual situation of each applicant.

9. For all the reasons explained above, I cannot agree with the approach developed in the *Hirst* and *Scoppola no. 3* cases. The arguments of the dissenting judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in their separate opinion annexed to the Grand Chamber judgment in the case of *Hirst* (cited above) are much more persuasive than the reasoning of the majority. Assuming that in the European Union at least the European Parliament has to be elected according to the standards imposed by Article 3 of Protocol No. 1, the specific restrictions imposed on the right to vote, *complained of by the applicants*, are not incompatible with this provision.

Furthermore, in my view, an analysis of the Court's existing case-law concerning voting rights does not yield any clear answer as to what restrictions of voting rights are permissible and what restrictions are prohibited. There is a high level of unpredictability of the law on this question, which makes it very difficult for the High Contracting Parties to adjust their legislation in order to avoid a finding of violations of their international engagements in the future. The ensuing situation does not facilitate the observance of the Convention and of the Protocols thereto. Therefore, in my opinion, the whole question should have been revisited once again.

LIST OF APPLICANTS

No.	Application no. and date of introduction	Applicant name, (prisoner no.) date of birth place of residence nationality	Represented by	Election concerned	Detention details if known
1.	47784/09 17/08/2009	**Paul FIRTH** (80736) 12/09/1951 Peterhead British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Peterhead
2.	47806/09 17/08/2009	**Douglas NEILL** (4123) 06/08/1966 Kilmarnock British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Kilmarnock
3.	47812/09 17/08/2009	**Michael MC KENNA** (5802) 05/05/1970 Greenock British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Greenock
4.	47818/09 11/08/2009	**Jamie BAIN** 10/03/1984 Shotts British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Shotts
5.	47829/09 17/08/2009	**Stewart MC KECHNIE** (96580) 01/04/1979 Peterhead British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Peterhead
6.	49001/09 28/08/2009	**David MC CONACHIE** (11333) 30/06/1959 Dumfries British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Dumfries
7.	49007/09 28/08/2009	**Paul DILLON** (8295) 31/10/1971 Shotts British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Shotts

No.	Application no. and date of introduction	Applicant name, (prisoner no.) date of birth place of residence nationality	Represented by	Election concerned	Detention details if known
8.	49018/09 28/08/2009	**Robert DOW** (90526) 13/08/1973 Peterhead British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Peterhead
9.	49033/09 28/08/2009	**Raymond LEE** (55947) 13/10/1947 Peterhead British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Peterhead
10.	49036/09 28/08/2009	**Raymond LOVIE** (47784) 23/07/1974 Peterhead British	TAYLOR & KELLY	EU election 4 June 2009	Detained at relevant time at HMP Peterhead