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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CIARAN TONER and HUGH WALSH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

GILLEN J

[1] The applicants in this matter are sentenced prisoners. Mr Toner is due to be released from custody on 11 April 2007 and Mr Walsh on 29 May 2007.

The application

[2] The applicants seek the following relief in an amended application pursuant to Order 53 Rule 3 (2)(a)RSC(NI):

(a) A declaration that the disqualification on convicted prisoners voting contained in Sections 3 and 4 of the Representation of the People Act 1983 ("the 1983 Act") does not apply to the forthcoming or any future election to the Northern Ireland Assembly.

(b) A declaration that the applicants are entitled to vote in the forthcoming and any future election in the Northern Ireland Assembly.

(c) An order of mandamus directing the Secretary of State and Chief Electoral Officer to take all such steps as are necessary to ensure that the applicants are permitted to vote in the forthcoming and any future election over the Northern Ireland Assembly.

(d) In the alternative to (c) above, an order of mandamus directing the Secretary of State to vacate, or cause to be vacated, the date of 7 March 2007 as the date of poll for the Northern Ireland Assembly and to substitute such other date to so ensure that the applicants are entitled to vote at an election for the Northern Ireland Assembly.

(e) Damages for breach of the applicants' rights under the ECHR.

(f) A declaration that Article 4 of the Northern Ireland Assembly (Elections) Order 2001 is not compatible with Article 3 of Protocol 1 ECHR and should not be applied to the forthcoming or any future election to the Northern Ireland Assembly.

A notice of incompatibility of subordinate legislation under Order 121 Rule 3A of the Rules of the Supreme Court (Northern Ireland) 1980 has been served on the relevant Government department on the basis that the claim gives rise to consideration of the compatibility of Article 4 of the Northern Ireland Assembly (Elections) Order 2001 being whether the current disenfranchisement of sentenced prisoners in Northern Ireland with respect to Assembly elections is compatible with Article 3 of the Protocol 1 ECHR as interpreted by the Grand Chamber of the European Court of Human Rights in Hirst v United Kingdom (No. 2) (2006) 42 EHRR 41.("Hirst")

Factual background

[3](i) The case made on behalf of the applicants is that they wish to be included on the electoral register and wish to exercise their right to vote in the forthcoming election to the Northern Ireland Assembly on 7 March 2007.

(ii) No special arrangements have been put in place either by the prison authorities or the Electoral Office to advise prisoners of the registration requirements or to make arrangements to facilitate registration.

(iii) By applications dated 31 January 2007 the applicants sought to be included on the electoral register.

(iv) By correspondence dated 12 February 2007 the Electoral Office for Northern Ireland replied to the solicitors on behalf of the applicants indicating that Section 3 of the 1983 Act provided that during the period that a convicted prisoner was detained in prison he is legally incapable of voting and concluded therefore that the applicants were subject to a legal incapacity to vote and could not be registered. The Chief Electoral Officer for Northern Ireland ("CEO") added that he did not consider that the effect of Sections 3 and 4 of 1983 Act left him with any room to reach a different decision under the existing law. In addition he indicated that the register to be used to determine entitlement to vote at the election on 7 March 2007 is the revised register published on 2 February 2007. The "cut off date" for that register was 11 January. Only those whose applications were received on or before that date and approved were included in the revised register. Accordingly, even if

the applicants had been approved, they would not have been included in the revised register and would not have been able to vote at the elections on 7 March.

The legislative context

[4](i) The Representation of the People Act 1983 ("the 1983 Act"), where relevant states at paragraph 3:

> "3.-(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any Parliamentary or local government election.
>
> (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; and
>
> (b) 'penal institution' means an institution to which …. the Prison Act (Northern Ireland) 1953 applies; and
>
> (c) a person detained for default in complying with his sentence shall not be treated as detained in pursuance of the sentence ……
>
> (3) It is immaterial for the purposes of this section whether a conviction or sentence was before or after the passing of this Act."

Section 4(1) of the 1983 Act provides that a person is entitled to be registered if, inter alia, he –

> "(b) Is not subject to any legal incapacity to vote (age apart)".

(ii) The Northern Ireland Act 1998 ("the 1998 Act") at Section 34, governs the franchise for Assembly elections in Northern Ireland. Section 34(4) reads as follows:

> "(4) The Secretary of State may by order make provision about elections or any matter relating to them."

(iii) The Elected Authorities (Northern Ireland) Act 1989 ("the 1989 Act") Section 1(1)(b) states that a person is entitled to vote as an elector at a local election in any district electoral area in Northern Ireland if he is not subject to any legal incapacity to vote. Section 2 of, and Schedule 1 to the 1989 Act applies, inter alia, Sections 3(1) and (2) of the 1983 Act.

(iv) The Northern Ireland Assembly (Elections) Order 2001("the 2001 Order"), states at Article 4:

> "Franchise
>
> 4. A person is entitled to vote at an Assembly election in a constituency if on the day of the poll he would be entitled to vote as an elector at a local election in a district electoral area wholly or partly comprised in that constituency."

The affidavit of Mark Darren Sweeny, Deputy Director, Rights and International Relations in the Political Directorate at the Northern Ireland Office, made on 23 February 2007, at paras. 18-26 carefully set out not only the legislation referable to Northern Ireland, but also the provisions across the rest of the United Kingdom. It is clear that the position in Northern Ireland whereby convicted prisoners are not entitled to vote, reflects the position in similar elections across the United Kingdom.

(iv) The Northern Ireland (St Andrew's Agreement) Act 2006 ("the 2006 Act"), inter alia, sets up a Transitional Assembly for the period 24 November 2006-30 January 2007, dissolves on 30 January 2007 the suspended Northern Ireland Assembly elected on 26 November 2003, sets the date for the next Assembly Elections as 7 March 2007, makes arrangements, subject to conditions, for automatic restoration of the Assembly on 26 March 2007 and states that if an Executive is not formed on 26 March 2007, the Assembly will be dissolved, the next election being postponed indefinitely and all the institutional amendments to the 1998 Act being repealed.

(v) The Human Rights Act 1998("the HRA") gives effect to, *inter alia,* Article 3 of the First Protocol of the Convention. That Article is in the following terms:

> "The High Controlling 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 other relevant provisions of the Human Rights Act are as follows:

> "2. – (1) A court ….. determining a question which has arisen in connection with a Convention right must take in account any ….. judgment ….. of the European Court of Human Rights.
>
> 3. – (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This action –
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> …
>
> 4. – (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provis0on of subordinate legislation, made in the exercise of a power conferred by primary legislation is compatible with a Convention right.
>
> (4) If the court is satisfied –
>
> (a) that the provision is incompatible with a Convention right ,and
>
> (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility
>
> it may make a declaration of incompatibility
>
> …

(5) In this section "court" means –

…

(d) In Northern Ireland, the High Court or the Court of Appeal

…

(6) A declaration under this section ("a declaration of incompatibility") –

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

…

6. – (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

…

(6) "An act" includes a failure to act but does not include a failure to –

(a) introduce in or lay before Parliament a proposal for legislation;

(b) make any primary legislation or remedial order.

7. – (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 –

…

(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.

…

(6) In subsection (1)(b) "legal proceedings" includes -

…

(b) an appeal against the decision of a court or tribunal.

…

10.-(1) This section applies if –

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right…; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to

> the legislation as he considers necessary to remove the incompatibility. "

Finally, it is accepted by the parties, that by virtue of the definitions contained in Section 21(1) of the 1998 Act, Sections 3 and 4 of the Representation of the People Act 1983 are provisions of primary legislation, and Article 4 of the Northern Ireland Assembly (Elections) Order 2001 is a provision of subordinate legislation.

(vi) The terms of the Elected Authorities (Northern Ireland) Act 1989 ("the 1989 Act") Section 2 provides:

> "(1) Notwithstanding Section 205(2) of the Representation of the People Act 1983 (Act does not affect law relating to local Government in Northern Ireland), the provisions of that Act specified in Part I of Schedule 1 to this Act shall have effect in Northern Ireland for the purposes of local elections (as well as Parliamentary elections) but, in the case of local elections, with the modifications specified in Part II of that Schedule.
>
> (2) In the case of local elections, it is immaterial for the purposes of Section 3 of that Act (Disfranchisement of Convicted Persons) as applied by this Section whether the conviction or sentence was before or after the passing of this Act."

In Schedule 1, Part I, the "provisions applied" include Section 3(1) and (2) of the 1983 Act.

Hirst v United Kingdom (2006) 42 EHRR 41.

[5] This was a seminal case in this instance and it is helpful therefore if I set out some of the salient parts of that case for ease of reference hereinafter:

(i) The case originated in 2001 in an application lodged with the European Court of Human Rights under Article 34 of the Convention. The applicant, who was serving a term of discretionary life imprisonment subsequent to a conviction of manslaughter was thus a convicted prisoner in detention who had been subject to a blanket ban on voting in elections. He invoked Article 3 of the First Protocol alone and in conjunction with Article 14, as well as Article 10 of the Convention. On 30 March 2004, a Chamber of the Fourth

Section of the Court held unanimously that there had been a violation of Article 3 of the First Protocol and that no separate issues arose under Articles 10 and 14. Thereafter the United Kingdom Government made a request for the case to be referred to the Grand Chamber under Article 43. A hearing took place on 27 April 2005 and on 6 October 2005 the court delivered its judgment. The Grand Chamber held, by a majority, that the blanket ban imposed by Section 3 of the 1983 Act could not be justified on the basis that it was a disproportionate and indiscriminate restriction on Article 3 of the First Protocol.

(ii) The salient issues in this case were considered in the Registration Appeal Court in Scotland in Smith v Scott (2007) CSIH 9 XA 33-04 ("Smith v Scott"). I consider that that court properly and comprehensively summarised the important aspects of Hirst in paragraphs 15-19 and I respectively cite the summary therein contained as follows:

> "[15] The right to vote was not a privilege. In the 21st century the presumption in a democratic state must be in favour of inclusion. Universal suffrage had become the basic principle. Nonetheless, the rights bestowed by Article *3* of the First Protocol were not absolute. There was room for implied limitations and Contracting States must be given a wide margin of appreciation in this sphere. It was, however, for the Court to determine in the last resort whether the requirements of Article 3 of the First Protocol had been complied with: it had to satisfy itself that any conditions did not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they were imposed in pursuit of a legitimate aim; and that the means employed were not disproportionate (see *Mathieu-Mohin and Clerfayt* v *Belgium).* In particular, the exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of the First Protocol.
>
> [16] This case highlighted the status of the right to vote of convicted prisoners who are detained. The case-law of the Convention organs had in the past accepted various restrictions on certain convicted prisoners. Disenfranchisement, however, was a severe measure which must not be undertaken lightly and the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual

concerned. The measure must therefore pursue a legitimate aim in a proportionate manner.

[17] As regards the United Kingdom, the Court noted that, although the situation was somewhat improved by the Representation of the People Act 2000 (which by amendment permitted unconvicted remand prisoners to vote), section 3 of the 1983 Act remained a blunt instrument. The provision imposed an automatic and indiscriminate blanket restriction on all convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a 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 the First Protocol.

[18] The Court went on to say that it was primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in discharging its obligation under Article 46 of the Convention to abide by the final judgment of the Court in any case to which it was a party. In a case such as the present, where Contracting States had adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, it must be left to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of the First Protocol.

[19] For these reasons the Court held by a majority that there had been a violation of Article 3 of the First Protocol. but that no separate issue arose under Article 14 or under Article 10. Like the Chamber. it also held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant and did not award any monetary compensation. It made an order for costs and expenses in favour of the applicant."

The affidavit evidence

[6](i) On behalf of the applicants Mr Green, solicitor, swore an affidavit of 15 February 2007. Therein he set out the background of the applicants together with reference to the exchange of correspondence with the Electoral Office to

which I have earlier referred. He averred that on 15 February 2007 he had spoken with the Chief Electoral Officer ("CEO") for Northern Ireland and sought clarification of the order of the Secretary of State made under Section 34(4) of the Northern Ireland Act 1988 that caused Section 3 of the 1983 Act to apply to the forthcoming election. Mr Green's account was that he was advised that the relevant provision was Article 3 of the Northern Ireland Assembly (Elections) Order 2001. I pause at this stage to observe that in an affidavit from the CEO of 23 February 2007 he avers that his recollection was that during the telephone call on 15 February 2007, he was asked to identify the provision that applied to Section 3 of the 1983 Act to the forthcoming Assembly election and that he had indicated that Mr Green might start by looking at Article 3 of the Northern Ireland Assembly (Elections) Order 2001 which applied many of the provisions of the 1983 Act to Assembly elections.

Mr Green went on to aver that Section 34(4) and (5) of the 1998 Act confers a broad discretion on the Secretary of State to set the eligibility to vote at elections, that no step has been taken by the Secretary of State to give effect to the applicants' rights under Article 3 of Protocol 1 notwithstanding the decision in Hirst but that there is still time for the Secretary of State to exercise those powers to avoid a breach of his obligations under Section 6 of the Human Rights Act 1998. Alternatively the polling date of 7 March 2007 should be vacated. Finally Mr Green makes the point that in single transferable vote system elections, a relatively small number of votes can make a material difference in the identity of members returned to the Assembly particularly when subsequent counts are held. Understanding that the number of sentenced prisoners was 914, he indicated that this number was capable of being electorally significant.

(ii) Two persons made affidavits on behalf of the respondent:

(a) Mr Mark Darren Sweeny the Deputy Director, Rights and International Relations in the Political Directorate at the Northern Ireland Office. That division has responsibilities which include electoral law in Northern Ireland. He was authorised to swear his affidavit on behalf of the Secretary of State for Northern Ireland ("SOS"). Mr Sweeny set out substantial public interest and political factors which he averred were relevant to this application. He described the background to the Northern Ireland Assembly which has been suspended for several years, the political impasse which had continued thereafter and the sequence of events which had led up to the present measures designed to restore devolved Government in Northern Ireland. Paragraph 16 declares:

> "If the election could not, for some reason, take place in sufficient time to fulfil the statutory deadline of 26 March 2007, the historic progress towards restoration of devolution could come to nothing and

> the result, at best, would be a lengthy period of uncertainty. In particular Schedule 3 to the 2006 Act, which makes provision for the situation where an Executive is not formed in accordance with Schedule 2, would be brought into force which would have the effect of postponing indefinitely the election. Other legislative provision, giving effect to the changes to the operation of the institutions of Belfast (Good Friday) Agreement which were agreed at St Andrews and are essential for the restoration of devolution, would also fall away if Schedule 3 were not brought into force."

Mr Sweeney thereafter purported to set out the steps that the Government had taken in the wake of the Hirst decision. At paragraph 29 he states:

> "The judgment of the court fell to be implemented by the UK Government …. by undertaking a detailed consideration of how prisoners' voting rights ought to be regulated in the future, which would culminate in Parliament examining this issue in the way which the court held had been lacking in recent years.
>
> 30. The implementation of judgments of the ECtHR is supervised by the Committee of Ministers (Article 46(2) of the ECHR). Under procedures adopted by the Committee of Ministers, it fell to the Government to inform it within six months of the court's judgment of the measures which it intended to take to implement the judgment, including 'general measures to prevent new violations similar to that or those found by the court or putting an end to continuing violations."

On 2 February 2006 it was announced by the Lord Chancellor, Lord Falconer that the Government was to embark on a full public consultation in which all the options could be examined. This was approached on a two stage basis. The first stage of the consultation was to explore and policy and principles of voting rights for convicted prisoners. The second stage looked exclusively at the possible impact of implementing any changes on the conduct of local and national elections and on officials through responsibility for maintaining the electoral register across the UK. The Government strategy for considering reform in this area was communicated to the Committee of Ministers in April 2006 in the form of an Action Plan which was exhibited to his affidavit. That plan gave a target publication date for a first stage consultation paper of

April-May 2006. It did not envisage the introduction of any amending legislation for which proposal was made before October 2006 at the earliest. He avers that the Committee of Ministers accepted the Government's proposals without criticism.

At paragraph 34 Mr Sweeney declared:

> "Regrettably, the timetable originally envisaged for publication for the first stage consultation paper was subject to considerable slippage. The issues are difficult and complex ones and which the Government needed to arrive at a common view as to the contents of a consultation paper."

On 20 December 2006 an updated Action Plan was submitted to the Committee of Minister which therein notes that any amending legislation would not be introduced to Parliament until May 2008.

Mr Sweeney further avers that the consultation paper notes that the Government would be wholly opposed to the full enfranchisement of convicted prisoners but sets out possible positions upon which consultees are invited to express a view. These include the enfranchisement of prisoners serving less than a specified term or permitting sentencers to decide whether convicted prisoners should retain the franchise.

At paragraph 39 of his affidavit Mr Sweeney states:

> "In summary, whilst there was a period of delay prior to the publication of the first stage consultation paper, the consultation exercise is now well advanced. This is a matter in which there is no clear way forward and in which the views of the public and of interested parties are highly material, and the Government will carefully consider all of the responses to the consultation before deciding how to take matters forward. It would be most unfortunate if the outcome of that consultation were now to be comprised by what the Secretary of State would consider to be precipitate and a duplicate litigation."

Mr Sweeney avers, that without wishing to pre-judge the outcome of the consultation process, "even if it pursues the option of permitting some prisoners to vote depending on the length of their sentence, the Government is unlikely to propose that prisoners serving sentences as long as those of Mr Toner and Mr Walsh should become entitled to vote whilst detained."

In a subsequent affidavit dated 28 February 2007, Mr Sweeney sets out what he alleges are the substantial difficulties which would be caused by any relief granted to the applicants which compelled the Government to enfranchise convicted prisoners in time for them for participate in the elections to the Northern Ireland Assembly on 7 March 2007. He asserts that the Government would be placed in a position of having to enact, at very great speed, a new legal regime for the registration of convicted prisoners in Northern Ireland and the Chief Electoral Officer and the Northern Ireland Prison Service would have to put in place the practical arrangements to secure registration and ensure that enfranchised prisoners are able to vote and that their votes are properly counted. He declares that the need to legislate at such speed would have the consequence of excluding altogether certain policy choices on which the Government is at present consulting and thus lose the benefit of the process of public consultation being presently undertaken. The Government would be compelled to legislate piecemeal, for Northern Ireland exclusively and indeed for one particular election when proposals are under consideration for changes to the UK law as a whole. He further avers to the practical difficulties communicated to him by the CEO and the Director of the Northern Ireland Prison Service.

(iii) The respondents also relied on an affidavit of the CEO Douglas Kinloch Bain wherein he sets out in general form the nature of his role.

(iv) Dealing with the mechanisms of registration for polling, Mr Bain states that to be entitled to vote an individual must on the day of the poll be on the relevant Electoral Register. Section 13B(1) of the 1983 Act provides in effect that subject to exceptions that do not apply in the current case, alterations to the Register which take effect after the final nomination day for candidates for elections shall not have effect for the purpose of that election. The final nomination day for nominations for the Assembly election was 13 February 2007. The register in use on 13 February 2007 was that published on 1 February 2007 which, accordingly, is the one to be used for the Assembly elections on 7 March. At paragraph 8 he goes on to state:

> "The outworking of this is that if one wished to be on the electoral register for 7 March elections one must be on the Register published on 1 February. To be on register one must have had had it approved by 18 February, ie. 14 days before 1 February. To have the registration approved one has to allow five (non-weekend) days before 18 January, ie by 11 January.
>
> 9. A significant number of other persons submitted applications for registration that arrive with me after that cut off date. None of these persons were, or will be, added to the register in time for

> 7 March election. These persons will be added to the register when it is next published.
>
> 10. In addition to the fact that the applications for registrations submitted by each of the Appellants were received outside the time limit for inclusion in the local Government Register published on 1 February 2007, I confirm that I would not have included the applicants on the Register due to the terms of the 1983 Act."

The applicants' case

[7] In a careful and skilfully presented skeleton argument, well augmented by oral submissions before me, Mr Larkin QC, who appeared with Mr Sayers on behalf of the applicants, made the following points:

(i) The Hirst case has already found that the blanket ban on sentenced prisoners voting is contrary to Article 3 of Protocol 1 ECHR.

(ii) The Government has not remedied that situation. Accordingly in Smith v Scott a declaration of incompatibility in relation to the 1983 legislation was made by the court.

(iii) If the situation remains unchanged, the election to the Northern Ireland Assembly due to take place on 7 March 2007 will take place in a manner that is not Convention compliant.

(iv) Article 3 of Protocol 1 ECHR guarantees individual rights including the right to vote and the right to stand for election.

(v) Taking the court on an odyssey through Hirst, he made the following points:

(a) The court referred to Article 25 of the International Covenant on Civil and Political Rights which provides that:

> "Every citizen shall have the right and opportunity, without any of the distinctions mentioned in Article 2 (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) and without unreasonable restrictions:

> (a) to take part in conduct of public affairs, directly or through freely chosen representatives;
>
> (b) to vote."

Reference was also made to the Code of Good Practice in electoral matters adopted by the European Commission for Democracy through Law (the Venice Commission) which whilst accepting that provision may be made for deprivation of the right to vote or stand for election, set out a number of conditions including the principle of proportionality for such deprivation.

(b) Sauve v Canada (Chief Electoral Officer) (No. 2) (2002) 3 LCR 519, a decision of the Canadian Supreme Court, was one of the authorities relied on. That court held that a provision disenfranchising every person serving a sentence of two years or more was unconstitutional. The court asserted that denying prisoners the right to vote was more likely to send messages that undermined respect for the law and democracy than a message supportive of those values.

(c) Whilst recognising that the rights conferred by Article 3 of Protocol 1 ECHR are not absolute and that there may be implied limitations with a wide margin of appreciation to States dealing with such matters, counsel adverted to paragraph 62 of the court's decision where it was said:

> "Any conditions imposed must not thwart the free expression of the people and the choice of the legislature – in other words, 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 sufferage …. any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates exclusion of any group or categories of the general population must accordingly be reconcilable with the underlying principles of Article 3 of Protocol No. 1."

(d) The severe measure of disenfranchisement must not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

(e) The court held that the blanket restriction on all convicted prisoners, applying automatically to such prisoners irrespective of the length of their

sentence and irrespective of the nature or gravity of their offence in individual circumstances, fell outside any acceptable margin of appreciation however wide that margin might be and was incompatible with Article 3 of Protocol 1.

(vi) Turning to the response of the Government of the United Kingdom to the Hirst judgment Mr Larkin borrowed the criticism of that response in Smith v Scott where at paragraph 52 the court said:

> "No doubt the issues which faced the Government following upon the judgment of the European Court of Human Rights in Hirst were complex and required careful consideration. We fully recognise that. But it would be surprising if the Government had not given some consideration to these issues, as least as a contingency, long before then. The issue of prisoners' voting rights is not new."

Mr Larkin questioned whether a genuine impetus exists for change to bring the present arrangements into compliance.

(vii) Counsel submitted that it had not been necessary for the proposed Assembly election, not being a regular scheduled election, to be fixed for 7 March 2007. Since the Government, with knowledge of the implications of Hirst, had decided to hold an election at a time when that election would not be Convention compliant, that Government must accept responsibility for choosing to act incompatibly with the Convention to disenfranchise a section of the public.

(viii) Mr Larkin argued that article 4 of the 2001 Order, subordinate legislation empowered by section 34 of the 1998 Act, should be declared incompatible with Art.3 of Protocol 1. He asserted that this Order had "dragged with it "the incompatible part of section 3 of the 1983 Act. Recognising that the terms of section 4(4)of the HRA rendered it impossible to make a declaration of incompatibility under the HRA, he nonetheless argued that the court should make such a declaration outside the terms of the HRA on the basis that the 2001 legislation did not comply with Article 3 of Protocol 1

(viii) Relying on Section 34(4) of the 1998 Act, which provides that the Secretary of State "may by order make provision about elections or any matter relating to them", he asserted that there was no reason why this matter could not now be swiftly addressed. In particular Section 34(5)(a) provides that an order under sub-section (iv) "may make provision as to the persons entitled to vote at an election and the registration of such person". He instances Article 4 of the 2001 Order as an example of this power being

exercised. Hence he essentially urged a combination of the declaration set out in (vii) and a order of mandamus as indicated in this paragraph .

(ix) Mr Larkin dismissed Mr Sweeney's detailed exposition of advances made as providing no justification for continued failure to address a confirmed violation of a Convention right of a substantial section of the community. The desire to ensure uniformed treatment of prisoners in the UK cannot be elevated above the human rights obligations owed to those prisoners disenfranchised at the time of the selection he asserted.

(x) Even if the court would refuse to make an order of mandamus, damages should be awarded.

(xi) Counsel asserted that there was no policy reason why Northern Ireland need await a United Kingdom wide approach to the voting rights of sentenced prisoners. The structure of governance in Northern Ireland differs from the UK and Section 34 of the 1998 Act at least impliedly countenances a variation of franchise.

(xii) Mr Larkin submitted that the failure of the Government to act effectively in response to Hirst cannot be relied upon as excusatory. No indication has been given that any changes are to be made with any sense of priority.

<u>The respondents' case</u>

[8] In the course of an equalling lucid and compelling skeleton argument with cogent oral submissions, Mr McCloskey QC, who appeared on behalf of the respondent with Mr McMillen, made the following points:

(i) He commenced by reminding the court that the onus is on the applicants to persuade the court that it is appropriate in the exercise of his discretion to grant one of the remedies claimed in paragraph 2 of the Order 53 Statement.

(ii) The respondents have accepted the judgment of the court in Hirst to the effect that the blanket prohibition against voting by convicted prisoners enshrined in Section 3 of the 1983 Act is not compatible with Article 3 of the First Protocol. A formal process of bringing the laws of the United Kingdom into conformity with the Convention is well advanced and pursuant to Article 46 of the Convention, the Government is subject to the superintendence of the Committee of Ministers. The Government must be

entitled to time to respond to those judgments which may require action to be taken (see R v Hereford Corporation ex parte Harrower (1970) 1 WLR 1424).

(iii) The date of the election is set out in Section 3 of the 2006 Act. The court is not competent to alter or suspend the operation of primary legislation.

(iv) Even if the court were so empowered, it would be inappropriate to interfere with or undermine the sequence of measures drawn up to restore devolved Government in Northern Ireland and in particular the St Andrew's Agreement.

(v) Article 4 of the 2001 Order contains nothing inconsistent with Article 3 of the First Protocol. It merely provides that categories of the population i.e. those having the right to vote in local elections enjoy the same right in the Assembly elections. The real mischief is section 3 of the 1983 legislation. Whilst article 4 of the 2001 Order is an empowering mechanism which applies section 3 of the 1983 Act, it is the latter which is at the top of the legislative pyramid and is the appropriate focus. The right of prisoners to vote cannot be read into the terms of Article 4 of the 2001 Order. Insofar as the applicants' case is that Article 4 has omitted to provide for the right of certain categories of convicted prisoners to vote, Mr McCloskey argues that at best this constitutes an omission to introduce a proposal for subordinate legislation to be made by the affirmative resolution procedure. On the authority of Regina (Rose) v Secretary of State for Health (2002) 2 FLR 962 paragraphs 49-51, the prosecution submits that draft Regulations to be made by the affirmative resolution procedure constitute a "proposal for legislation" within the meaning of Section 6(6) of the Human Rights Act 1998 which is excluded from the provisions of Section 6(1). In any event counsel urged that under the scheme of the HRA a declaration of incompatibility should only be made in compliance with section 4 of the HRA. That clearly could not be done in this case because under section 4(4) of the HRA a declaration may only be made in relation to subordinate legislation where the primary legislation (in this case section 34 of the 1998 Act) prevented removal of the incompatibility. Self evidently the SOS is not so obliged when exercising his powers under section 34 of the 1998 legislation. Finally in this context Mr McCloskey argued that:

(vi) Hirst is not authority for the proposition that these applicants enjoy a right under Article 3 of the First Protocol to vote in the elections. Restrictions pursuing a legitimate aim in a proportionate manner are permissible. The process of reform may well impose certain restrictions on prisoners.

(vii) This is a discretionary remedy. The remedy sought by the applicants would disenfranchise the voting population of Northern Ireland in the

forthcoming elections and frustrate their substantive legitimate expectation that the elections will be conducted on the prescribed date.

(viii) The elections have been a matter of public knowledge since November 2006. The applicants did not bring the proceedings until 15 February 2007. They have thus unduly delayed their application.

(ix) Even if the applicants enjoyed the right to vote under Article 3, they could not exercise it in the forthcoming elections as they failed to apply for registration until the final date for inclusion of new entries in the electoral register had expired.

(x) Any remedy in any event would need to be realistic, balanced and proportionate. Relying on the later affidavit of Mr Sweeney, counsel submitted that it would be inappropriate to require the Government to introduce the necessary statutory reforms within such a short period. It would intrude on the uncompleted consultation exercise and it would be inappropriate to grant a form of relief which the court in Hirst declined to do.

(xi) Insofar as the applicants seek an order of mandamus directing the Secretary of State and the CEO to take all such steps as are necessary to ensure that the applicants are permitted to vote, counsel argues that this remedy is misconceived. Not only is the relief sought too unparticularised and thus unenforceable by the court, but where incompatibility lies at the heart of the relevant challenge, the Human Rights Act 1998 does not empower the court to grant such a remedy. Not only would the remedy conflict with Section 6(6) of the 1998 Act, but it would afford to the applicants a right that they do not have under Article 3 of the First Protocol. Insofar as the order of mandamus would direct the Secretary of State to vacate the forthcoming election date this would require the Secretary of State to act in contravention of primary legislation.

(xii) Relying on the authority of Hobbs and others v United Kingdom (Applications Nos. 63684/00 and others – 14 November 2006), Mr McCloskey submitted the ongoing process of reform consideration should militate against the grant of any specific remedy.

(xiii) Mr McCloskey concluded by submitting that the public wrong arising out Section 3 of the 1983 has been unequivocally exposed by the judgment of Hirst. Measures are being taken to rectify this. It is therefore inappropriate for this court to become embroiled in the process. There is nothing to be added to the judgment of the European Court. It is sufficient for the court to speak for itself without any accompanied specific relief.

Conclusions

[9] My conclusions are as follows:

(i) It is common case that the effect of the Hirst judgment in the European Court is that a blanket prohibition against voting by convicted prisoners set out in Section 3 of the 1983 Act is incompatible with Article 3 of the First Protocol. Section 2(1) of the Human Rights Act 1998 makes it incumbent upon this court to take into account the decision of Hirst and accordingly I shall do so.

(ii) The Government of the United Kingdom is currently addressing that issue and has instituted a formal process of consultation as a prelude to bringing the laws of the United Kingdom into conformity with the Convention. Under Article 46 of the Convention the Committee of Ministers is currently supervising that process. It is admitted by the respondent that this process has been beset by slippage in its implementation. Criticism of that process was visited upon the Government in Smith v Scott in the Registration Appeal Court in Scotland in the following terms at paragraph 52:

> "No doubt the issues which faced the Government following upon the judgment of the European Court of Human Rights in Hirst were complex and required careful consideration. We fully recognise that. But it would be surprising if the Government had not given some consideration to these issues, at least as a contingency, long before then. The question of prisoners' voting rights is not new. The Representation of the People Act 2000 made provision enabling prisoners on remand to vote. Under Strasbourg jurisprudence the voting and other rights of convicted persons have been considered on several occasions. As discussed in the judgment in Hirst, contracting States to the Convention have adopted a number of different ways of addressing the question and prisoners' voting rights have also been considered in other jurisdictions. …… The case was allocated to the Fourth Section of the Court and on 30 March 2004 a Chamber of that Section issued its judgement in which, after a full review of the relevant authorities, it held unanimously that there had been a violation of Article 3 of the First Protocol."

Mr McCloskey argued before this court that the full material which was put before me had not been present at the Scottish hearing and that the criticism was unjustified. I pause to observe that the ready and frank

admission by Mr Sweeney in paragraph 34 of his first affidavit, that there had been "considerable slippage" in this matter has not been susceptible to adequate explanation. There is no doubt that in the wake of the Hirst decision, and in particular the reference in that judgment to the failure to produce evidence of adequate consultation prior to the introduction of the 1983 Act, it was incumbent on the Government to introduce a comprehensive and searching consultation process. However delay in commencing and thereafter completing that worthwhile and necessary exercise has not served well the principle of Convention compliance notwithstanding the self-evident thoroughness of the process. Whilst I find no basis to justify Mr Larkin's charge that this is evidence of deliberate inertia or cynical calculation in the delay, equally I find little evidence of a determination to prioritise appropriately the task that was defined by the Hirst decision.

(iii) I am satisfied by Hirst that the rights bestowed by Article 3 of the Protocol 1 are not absolute and the United Kingdom must be given a margin of appreciation in this area. The court stated at paragraph 60 et seq:

> "Nonetheless the rights are bestowed by Art. 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be given a margin of appreciation in this sphere.
>
> 61. There has been much discussion of the width of this margin in the present case. The court would reaffirm that the margin in this area is wide. 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 its own democratic vision.
>
> 62. It is, however, for the court to determine in the last resort whether the requirements of Art. 3 of the Protocol No. 1, have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not is proportionate. In particular, any conditions imposed must not thwart the free expression of the people in the choice of a legislature – in other words, they must reflect, or not run counter to, the concerns to maintain the integrity and effectiveness of an electoral

> procedure aimed at identifying the will of the people through universal sufferage."

It was against this background that the court considered that a general and automatic disenfranchisement of convicted prisoners was unacceptable. However I am not persuaded by Mr Larkin's submission that the United Kingdom Government could and will only find the approval of the European Court in circumstances where disenfranchisement was imposed by a sentencing judge. I consider that had this been the intention of the court, there was ample opportunity for it to have been specifically stated. On the contrary, it is clear to me that insofar as the court ventured onto this plane, their comments were non-prescriptive and purely advisory in character. The court said as follows:

> "71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions under electoral rights are imposed on an individual who has, for example, <u>seriously</u> abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations …. The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by expressed judicial decision. As in other context, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness."

I have concluded that the instances set out in paragraph 71 were but examples of steps that might be taken without intending to be prescriptive .

I am reinforced in this view by the comments of the court of paragraph 83:

> "Turning to the Government's comments concerning the lack of guidance from the Chamber as to what, if any, restrictions on the right of convicted prisoners to

> vote would be compatible with the Convention, the court notes that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to chose, subject to supervision by the Committee of Minister, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention. In cases where a systematic violation has been found the court has, with a view to assisting the respondent's State to fulfil its obligations under Article 46, indicated the type of measure that might be taken to put an end to the situation found to exist. In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and court may decide to indicate only one such measure.
>
> 84. In a case such as the present 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."

(iv) I consider that the court has deliberately left the method of compliance in the hands of the Contracting States subject to the overriding veto of the court. Insofar as Mr Larkin drew my attention to the judgments of judges Caflisch and Tulkens they gave merely examples of methods e.g disenfranchisement by judicial determination that could be adopted. Indeed the former at paragraph O-17 seemed to express disquiet that the Court had not set more parameters for compliance. I find that sentiment to be in harmony with my reading of the majority decision. Accordingly I see nothing intrinsically objectionable about the various options being explored by the Government proposals contained in the consultation paper of 14/12/06 which makes up its response to the Hirst decision. The consequence of this is that not only is Mr Sweeney entitled to say at paragraph 41 of his first affidavit that the Government is unlikely to propose that prisoners serving sentences as long as those of the applicants should become entitled to vote whilst detained, but I am left singularly unconvinced that the applicants are currently or will ever be able to lay claim to a right to vote. I reject the argument of Mr Larkin that because a blanket prohibition on prisoners is incompatible with the Convention that somehow converts into

the proposition that all prisoners are currently entitled to vote until the vacuum is filled. In my view that conforms neither with principle nor logic and certainly does not find any authority in Hirst which expressly recognises that restraints on Art 3 Protocol 1 are justifiable provided they pursue a legitimate aim and are proportionate. Additionally the unchallenged evidence of the CEO is that whatever the merits of the situation the fact of the matter is that both of these applicants failed to apply to register for a vote until the final date for inclusion of new entries in the electoral resister had expired, These matters in themselves are sufficient to persuade me that the relief sought at paragraph 2 (b) and (c)—namely a declaration that the applicants are entitled to vote in the forthcoming or future elections and an order of mandamus directing the SOS and the CEO to take steps as are necessary to ensure the applicants are permitted to vote as aforesaid –must be dismissed .

(v) I pause to observe that there are additional freestanding reasons why 2(c) must fail. They are:

(a) The court in judicial review does not substitute its own view but rather it asks what the primary decision-maker's duty was, ensuring that that duty has not been breached. What is the public law duty that it is alleged the SOS and the CEO have failed to perform that would merit an order of Mandamus ? Certainly in so far as section 6(6) of the HRA 1998 precludes a failure to introduce before Parliament a proposal for legislation or to make any primary legislation from constituting an unlawful act incompatible with a Convention right, there is no such duty under the HRA obliging the SOS or the CEO to take the steps now sought. I can find no other ground on which a duty to act in this way can arise and which can be enforced in the manner proposed.

(b) The phrase "all such steps" is in my view too vague to permit of enforcement by the court. In so far as Mr Larkin sought to put some meat on the matter by suggesting the steps would involve the SOS exercising his powers under section 34(4) of the I998 Act to create a temporary order that would involve according to Mr McCloskey the steps set out in section 96 of the 1998 Act namely laying a draft statutory instrument before both Houses of Parliament and obtaining approval over the course of the next few days. Apart from the uncertainty of it getting approval the question of whether it could even be physically performed in that time span all served to convince me that mandamus was not a suitable remedy in any event.

(vi) I shall deal briefly with my conclusion to dismiss the relief sought at 2(a)—a declaration that the disqualification contained in sections 3 and 4 of the Representation of the People Act 1983 does not apply to the forthcoming or any future election to the NI Assembly. Put simply this would require the court to disapply sections of a piece of primary legislation. I am unaware of any power vested in the court to do this. Indeed, as Mr McCloskey reminded

me, even if I was to declare that statute incompatible with the Convention under section 4 of the HRA 1998, section 4(6) of that Act precludes its validity being affected.

(vii) I can deal equally briefly with the relief sought at paragraph 2 (d)---an order of Mandamus directing the SOS to vacate the date of the poll scheduled for 7 March 2007 and to substitute a date when the applicants are entitled to vote. With characteristic candour Mr Larkin did not press this point with any vigour. The issue is clear. This date has been fixed by primary legislation namely section 3 of the 2006 Act. The court is not empowered to direct the SOS to contravene the wish of Parliament as enacted in a statute. Accordingly I dismiss this relief as sought.

(viii) So far as the relief sought at paragraph 2(i) is concerned - a declaration that Art 4 of the 2001 Order is not compatible with Article 3 of Protocol 1 and should not be applied to the forthcoming or any future election to the NI Assembly - I have decided to refuse that relief for the following reasons.

(a) Quite clearly such a declaration of incompatibility could not be made under section 4 of the HRA because of the terms of section 4(4). Indeed Mr Larkin expressly recognised this. In the exercise of my discretion in a judicial review in the context of human rights I consider it inappropriate to grant relief in the terms of the HRA—"incompatible with a Convention right" – outside the scheme of the HRA. These words take their colour from the context of the HRA and a court should be careful not to disturb the synthesis that the HRA represents.

(b) Mr Larkin asserted that the relief sought is based on the terms of section 6 of the HRA i.e. it is unlawful for a public authority to act in a way incompatible with a Convention right and he wishes a declaration to that effect in so far as article 4 does not comply with a convention right by including-not omitting – the impugned terms of blanket disqualification. I do not find this argument very compelling. The clear reality here is that the SOS has elected to omit a provision for prisoners in certain categories to have the right to vote. I am satisfied that amounts to a failure to introduce in, or lay before, Parliament a proposal for legislation under section 6(6)of the HRA which effectively excludes the operation of section 6(1). I find reassurance for this view in <u>R (Rose) v Secretary of State for Health</u> (2002)2 FLR 962. There the relevant SOS failed to make regulations under s31 (4)(a)of the Human Fertilisation and Embryology Act 1990. Such regulations required the approval of both Houses of Parliament. The court held this omission was within section 6(6). I regard that as an analogous situation with the present case.

(c) I found Mr McCloskey's submission that article 4 is no more than a provision that categories of the population, namely those with the right to

vote in local elections, should have the right to vote in the Assembly an attractive one. On its face it contains nothing inconsistent with the Convention. The real mischief is its nexus with the 1983 Act. It is section 3 of the 1983 legislation which is flawed and exclusive. It would be invidious to invalidate an Order that would serve to disenfranchise the voting population of Northern Ireland in circumstances where the genesis of the problem manifestly lies elsewhere and has been identified as such.

(ix) In the circumstances there is no need for me to consider the question of damages.

(x) If I am wrong in any of these conclusions or if I had been persuaded that there were grounds for granting any of the reliefs sought, I know make it clear that I would have refused a remedy in the exercise of my discretion for the following reasons.

(a) The needs of good administration and the public interest.

It is a matter of profound importance to the people of Northern Ireland that no impediment be placed in the path to progress. This election potentially is an integral part of that progress. Whilst it is important that the courts do not stray from the detachment required of an independent judiciary, nonetheless I discovered that the profound problems outlined by Mr Sweeny and the CEO should this election be postponed made engaging and disturbing reading. In these circumstances I find it difficult to take issue with the comments of Mr Sweeney at paragraph 16 of his first affidavit when he states:

> "If the election could not for some reason take place in sufficient time to fulfil the statutory deadline of March 2007, the historic progress towards restoration of devolution would come to nothing and the result, at best, would be lengthy period of uncertainty. It is the government's view that this would be manifestly detrimental to the interests of the population of Northern Ireland as a whole."

I find this to be a vivid and compelling analysis of the situation as it exists today. To take a risk laden step which would imperil or prejudice the forthcoming election at such short notice would visit hardship and detriment on the concept of good administration in Northern Ireland at this time. The population at large have a legitimate expectation that the elections will occur on schedule and the court should not readily become the instrument that frustrates that expectation.

(b) The conduct of the applicants.

Notwithstanding their knowledge since November 2006 that an election was to be in the near future, these proceedings were not launched until 15 February 2007 at a time when the granting of the relief sought would have caused potentially the maximum confusion, disruption and waste of public money already incurred. This is particularly pertinent in the context of both applicants having failed even to apply to register to vote in time. These factors alone should extinguish any smouldering sense of injustice harboured by these applicants at this time.

(c) The Government has accepted for some time now that a blanket prohibition is incompatible with the Convention and is confronting the matter through the vehicle of public consultation. The mischief is clearly being addressed although the outcome may from the point of view of the applicants is shrouded in uncertainty.

I therefore dismiss the applicants' case.