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Felony Disenfranchisement in the U.K. & the U.S.

by Yujin Chun*

On October 16, 2013, the Supreme Court of the United Kingdom dismissed appeals from two prisoners, Peter Chester and George McGeogh, over the right to vote under European Union rules.¹ The appellants, both serving life sentences for murder, claimed that their rights were being infringed because they were not allowed to vote.² United Kingdom law currently contains a general prohibition on voting by prisoners.³ However, in a series of cases such as *Hirst (No.2) v. UK* and *Scoppola v. Italy*, the European Court of Human Rights (ECtHR) has held that such a blanket prohibition is an indiscriminate restriction on a vitally important right and, as such, incompatible with Article 3 of Protocol No 1 (A3P1) of the European Convention of Human Rights, which includes the duty to hold free and fair elections.⁴

The issues before the U.K.'s Court were whether it should apply the principles established in *Hirst (No.2)*; whether, if such principles applied, the ban on voting was incompatible with Chester's rights under A3P1, and the Supreme Court should make a further declaration of incompatibility; whether European Union law recognizes an individual right to vote on which the appellants could rely upon to vote in their own countries; and what consequences would follow if EU law were to recognize such a right—in particular what, if any, relief would be available to the appellants.⁵

The Supreme Court unanimously dismissed both appeals. It applied the principles in *Hirst (No 2)* and *Scoppola* regarding the blanket ban, but declined to make any further

* Yujin Chun is a J.D. candidate at Cornell Law School, where she is the *Cornell International Law Journal's* Associate on European Affairs and the Career Chair of the Briggs Society of International Law. She holds a B.A. in English from Duke University.

¹ R v. Secretary of State for Justice, *McGeoch v. The Lord President of the Council and another*, [2013] U.K.S.C. 63 (H.L.) (appeal taken from [2010] WCA Civ 1439 and [2011] CSIH 67) available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0160_Judgment.pdf.

² *Id.* at [2].

³ See *Hirst v. United Kingdom (No 2)* (2005) 42 EHRR 849; *Greens and MT v. United Kingdom* (2010) 53 EHRR 710; *Scoppola v. Italy (No 3)* (2012) 56 EHRR 663.

⁴ See *id.*

⁵ See generally, *R v. Secretary of State for Justice*, [2013] U.K.S.C. 63 (H.L.).

declaration of incompatibility in respect of Peter Chester.⁶ The Court accepted that under the Human Rights Act, the Supreme Court of the United Kingdom is required to take into account decisions of the ECtHR, but not necessarily to follow them. Because a ban on prisoner voting is not a fundamental principle of law in the United Kingdom, the court reasoned, the circumstances did not justify a departure from the ECtHR's case law.⁷ The Supreme Court, however, found that this did not necessarily entitle Chester to any particular remedy, as a declaration of incompatibility is a discretionary remedy.⁸ The Court noted that both appellants were serving sentences of life imprisonment for murder and wrote it "do[es] not consider that the human rights of either were violated by the Electoral Registration Officers' refusal to register them on the electoral roll."⁹

The U.K.'s highest court also found that European Union law does not provide an individual right to vote that parallels that recognized by the ECtHR, writing that the provisions on voting contained in the applicable European treaties focus on safeguarding freedom of movement within the European Union by ensuring equal treatment between EU citizens residing in other member states.¹⁰ Therefore, so long as EU citizens are treated equally, national legislatures of member states can determine other criteria for voting eligibility.¹¹

COMPARING FELONY DISENFRANCHISEMENT IN THE U.S.

This is somewhat similar to the practice in the United States, where the Constitution leaves the determination of voting qualifications to the individual states, and the states vary greatly in their treatment of people with felony convictions.¹² The right to vote is not explicitly stated in the U.S. Constitution except in the post-Civil War amendments, and only in reference to the fact that it may not be denied or abridged based solely on qualifications such as race, color, previous condition of servitude,¹³ or gender.¹⁴ The states thus may have their own legislation on prisoners' voting rights. Where the state law restricts voting rights of criminals, the only means by which they can be restored is through a pardon from the governor, a process that has generally been "little known and cumbersome, and benefits only a handful of disenfranchised persons."¹⁵

⁶ *Id.* at [39]-[42].

⁷ *Id.* at [25]-[35].

⁸ *Id.* at [39].

⁹ *Id.* at [87].

¹⁰ *Id.* at [58]-[59].

¹¹ *Id.*

¹² Kassius O. Benson & Kaarin S. Nelson, *Felony Disenfranchisement Why 5 Million Americans Can't Vote This November*, BENCH & B. MINN 16, 17 (2012).

¹³ U.S. CONST. amend. XV, § 1.

¹⁴ U.S. CONST. amend. XIX.

¹⁵ Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L.J. 549, 551 (2011).

There have been attempts to revisit the status of criminals' voting rights in court, but they have foundered, largely due to the Supreme Court's holding in 1978 that such voting bans are presumptively constitutional.¹⁶ In *Richardson v. Ramirez*, the Court held that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles.¹⁷ The Court found that the section of the Fourteenth Amendment containing the Equal Protection Clause and dealing with voting rights could not have been meant to bar outright the disenfranchisement of convicted felons because such disenfranchisement was expressly exempted.¹⁸

WHERE WE GO FROM HERE

The debate is far from over, however, and in Europe, it is just getting started. Most notably, Dominic Grieve, the Attorney General for England and Wales, has warned that refusing to comply with European human rights rulings on prisoner voting rights risks "a degree of anarchy."¹⁹ During a Westminster hearing of a joint committee of members of Parliament and peers who were considering a draft prisoner voting bill, Grieve said that the issue of giving convicted prisoners the right to vote, while profoundly symbolic, was no slight matter for Britain.²⁰ Thorbjørn Jagland, secretary-general of the Council of Europe, also warned that refusal to implement the European court ruling was unprecedented and declared, "If we start to pick and choose the judgments from the court, then the court will be weakened and have no meaning."²¹ It appears the members of Parliament are more concerned with Britain's adherence to the decisions from the European Union rather than the human rights of the prisoners, with Jagland warning that the implications for the Council of Europe would be that other countries would start to do the same, weakening the whole convention system.²² However, regardless of their motives, the effect of these members' statements is a push towards greater enfranchisement.

¹⁶ See *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

¹⁷ *Id.*

¹⁸ *Id.* ("... in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation . . .").

¹⁹ Alan Travis, *Defying Strasbourg Ruling on Prisoner Voting Rights Risks Anarchy, MPs Told The Guardian*, GUARDIAN (Nov. 6, 2013), <http://www.theguardian.com/law/2013/nov/06/defying-strasbourg-ruling-prisoner-voting-anarchy>.

²⁰ *Id.*

²¹ *Id.*

²² *Dominic Grieve: Flouting European Rules Over Prisoner Voting Could Risk 'Anarchy'*, TELEGRAPH (Nov. 6, 2013), <http://www.telegraph.co.uk/news/uknews/10430770/Dominic-Grieve-flouting-European-rules-over-prisoner-voting-could-risk-anarchy.html>.

While the U.K.'s Supreme Court case focused on whether prisoners as EU citizens have a right to vote even if Westminster says differently, in 2012 the government conceded that it would have to change the law to allow some prisoners to vote.²³ Also in the United States many states have relaxed their felony disenfranchisement laws in the past twenty years to make it easier for felons to regain their right to vote.²⁴ With prisoner voting rights specifically left to the states, however, the United States does not seem to face the sort of pressure that British members of Parliament are so concerned with in regard to the European Union. The spotlight for this issue in the United Kingdom, interestingly, does not seem to be on prisoner rights but on the U.K.'s obligations to the European Union.

²³ *UK Inmates Lose Right to Vote Ruling*, BBC NEWS UK (Oct. 16, 2013), <http://www.bbc.co.uk/news/uk-24545294>.

²⁴ Benson & Nelson, *supra* note 12, at 19.