Criminal Justice Alliance

Briefing on voting rights for prisoners

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Criminal Justice Alliance briefing on voting rights for prisoners for House of Commons debate scheduled for Thursday 10 February 2011 at 11.30am

About the Criminal Justice Alliance
The Criminal Justice Alliance (CJA) is a coalition of 54 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions – involved in policy and practice across the criminal justice system.[1] The CJA works to establish a fairer and more effective criminal justice system.

Summary

- The blanket ban on prisoners voting was declared unlawful by the European Court of Human Rights (ECtHR) in 2004.
- Subsequent rulings by the ECtHR have reiterated this judgment, and the Council of Europe has, on several occasions, expressed serious concern with the UK Government's lack of action in this area.
- In November 2010, the ECtHR set a definitive timeframe for the UK Government to introduce legislative proposals to amend the blanket ban, and in December 2010 the Government announced proposals to enable some prisoners to vote.
- The Criminal Justice Alliance welcomed the proposals put forward by the Government that prisoners serving up to four years should be enfranchised but maintained that the proposals did not go far enough.
- The Criminal Justice Alliance believes that all prisoners should be given the right to vote.

Context

1. The main points of the proposals put forward by the Government in December 2010 to enable some prisoners to vote are: prisoners sentenced to less than four years will be allowed to vote, although sentencing judges will be given the discretion to remove the right to vote from these prisoners if they consider it appropriate; the right to vote will be restricted to Westminster and European Parliament elections; prisoners who are allowed to vote will do so either by post or proxy; and prisoners will not be registered at the prison, but at their former address or an area where they have a local connection.[2] Since these proposals were set out, however, there have been reports that the Government is considering limiting voting rights further by only enfranchising prisoners sentenced to less than one year or even to less than six months.

2. The blanket ban on sentenced prisoners voting that is currently in force (first set out in the 1870 Forfeiture Act, and most recently legislated for in Section 3 of the Representation of the People Act 1983) was declared unlawful by the ECtHR in March 2004, when it ruled in *Hirst v UK* that to bar all convicted prisoners from voting was in breach of Article 3 Protocol 1 of the European Convention on Human Rights (ECHR) – the right to free elections. In its ruling, the ECtHR argued that the right to vote is "the indispensable foundation of a democratic system".[3] Following this ruling, the UK

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[1] Although the CJA works closely with its members, this briefing should not be seen to represent the views or policy positions of each individual member organisation. For a full list of the CJA's members, please see http://www.criminaljusticealliance.org/organisations.htm
[2] Statement by the Cabinet Office, 17 December 2010 – available at http://www.cabinetoffice.gov.uk/news/government-approach-prisoner-voting-rights
[3] European Court of Human Rights (30 March 2004), Judgment in the case of Hirst v the United Kingdom (No. 2) (Application no. 74025/01) - http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=74025/01&sessionid=64499861&skin=hudoc-en

Government appealed to the Grand Chamber of the ECtHR in 2005, an appeal that was rejected by a majority of 12 votes to 5.

3. In December 2006, more than a year after the Grand Chamber's decision, the Government launched a consultation process on the best way to implement the judgment. In spite of the rulings by the ECtHR, the consultation nevertheless proposed retaining total disefranchisement as a possible option.[4] However, the findings of the consultation, published in April 2009, revealed that only a quarter of the 88 respondents backed a total ban and nearly half (47%) favoured all prisoners being allowed to vote.[5] A second stage consultation was published at the same time, which set out four possible options for reform but did not, in spite of the findings of the first consultation, include the option of all prisoners being enfranchised. Although the consultation closed on 29 September 2009, no response has ever been published.

4. In its Annual Report published in October 2008, the Parliamentary Joint Committee on Human Rights expressed its frustration at the Government's sluggish progress in proposing new legislation in response to the ECtHR's rulings, warning that "there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised."[6] In March 2010, the Council of Europe "strongly urged" the UK government to "rapidly adopt measures, even of an interim nature, to ensure the execution of the court's judgment before the forthcoming general election", and warned that failure to do so would be likely to result in multiple applications for compensation.[7]

5. In April 2010, in *Frodl v Austria*, the disenfranchisement of prisoners serving sentences exceeding one year and convicted of offences committed with intent, set out in Austrian law under section 22 of the National Assembly Election Act, was ruled unlawful. Although the ECtHR acknowledged that the Austrian provisions were "more detailed" than that set out in UK legislation, and "restrict[ed] disenfranchisement to a more narrowly defined group of persons", they were nevertheless ruled to be in breach of Article 3 Protocol 1: "Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions. The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners".[8] Disenfranchisement, therefore, may only be imposed

[4] Department for Constitutional Affairs (2006) *Voting Rights of Convicted Prisoners Detained within the United Kingdom* - http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/voting-rights/cp2906.pdf

[5] Ministry of Justice (2009) *Voting Rights of Convicted Prisoners Detained within the United Kingdom: Second Stage Consultation* - http://www.justice.gov.uk/consultations/docs/prisoner-voting-rights.pdf

[6] Joint Committee on Human Rights (2008) *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, London: The Stationery Office - http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/173/173.pdf

[7] Council of Europe Committee of Ministers, 1078th meeting, 2-4 March 2010, Decisions adopted at the meeting - https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Del/Dec%282010%291078&Language=lanEnglish&Ver=immediat&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D38

[8] European Court of Human Rights (8 April 2010), Judgment in the case of Frodl v Austria (Application no. 20201/04) - http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=20201/04&sessionid=64500745&skin=hudoc-en

on individuals imprisoned for electoral fraud or a similar offence, and on the specific instruction of the sentencing judge.

6. In November 2010, in *Greens and MT v UK*, the ECtHR judged that "the lengthy delay to date has demonstrated the need for a timetable for the introduction of proposals to amend the electoral law to be imposed", and ruled that the UK Government "must introduce legislative proposals … within six months of the date on which the present judgment becomes final".[9] Since judgments by the Court become final on expiry of a three-month period if no challenge is made, the Government has until 23 August 2011 to comply with this ruling.[10]

7. In February 2011, during an evidence session to the Political and Constitutional Reform Committee, it was advised by human rights lawyers that elections to the Scottish and Welsh parliaments on 5 May 2011 could be held to be incompatible with the ECHR, since Article 3 Protocol 1 protects the right to free elections "in the choice of the legislature". It was warned, therefore, that claims for compensation could be brought if action to comply with the Court's judgments is not taken before these elections go ahead.

8. The regressive nature of the approach taken by the UK is evident when compared with that of many other European countries. As Europe's Commissioner for Human Rights Thomas Hammarberg has recently pointed out, most other member states of the Council of Europe – of which the UK is a founding member – allow prisoners to vote, "and this has caused no real problems and is not even an issue in these countries."[11] Indeed, around 40% of the countries in the Council of Europe - including Ireland, the Netherlands and Spain - have no restrictions, and in France and Germany the courts have the power to restrict voting rights in individual cases, as additional punishment. The UK is now one of only a few European countries imposing a blanket ban on prisoner voting, with the others including Armenia, Bulgaria, Estonia, Hungary and Romania.[12]

Reasons for reform

By setting out proposals for voting rights for prisoners serving up to four years, the Criminal Justice Alliance believes that the Government has taken an important step forward. However, we have been concerned by reports that proposals to limit the right to vote to prisoners serving up to one year, or even to those serving up to six months, are now being considered. It is our view that all prisoners should be given the right to vote. Banning prisoners from voting is unlawful, undemocratic, and militates against efforts to rehabilitate prisoners.

1. *The ban is unlawful*
   As set out above, the ECtHR has passed a number of judgments which clearly state that barring all convicted prisoners from voting is unlawful, and breaches Article 3 Protocol 1 of the European Convention on Human Rights, the right to free elections in the choice of

[9] European Court of Human Rights (23 November 2010), Judgment in the case of Greens and MT v the United Kingdom (Applications nos. 60041/08 and 60054/08) - http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=60041/08&sessionid=64500745&skin=hudoc-en
[10] Hansard, 11 January 2011 - http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110111/halltext/110111h0001.htm#11011150000001
[11] http://www.guardian.co.uk/law/2011/feb/04/prisoner-voting-convicts-human-beings
[12] Prison Reform Trust and Unlock (2010), 'Barred from Voting: The Right to Vote for Sentenced Prisoners' - http://www.prisonreformtrust.org.uk/Portals/0/Documents/barred%20from%20voting%20Feb%202010.pdf

the legislature. Giving evidence to the Political and Constitutional Reform Committee in February 2011, Lord Mackay, the former Lord Chancellor, emphasised that as a signatory to the ECHR the UK is legally bound to give effect to the judgments of the ECtHR. If the UK refuses to comply with these judgments, it is refusing to observe the rule of law.

There could also be costly consequences if the ban remains in force. As the ECtHR warned in its ruling in *Greens and MT*, the UK Government could be sued by thousands of prisoners: "[T]he prevailing situation has given rise to the lodging of numerous subsequent well-founded applications. There are currently approximately 2,500 applications in which a similar complaint is made, around 1,500 of which have been registered and are awaiting a decision. The number continues to grow, and with each relevant election which passes in the absence of amended legislation there is the potential for numerous new cases to be lodged."[13] During Prime Minister's questions in November 2010, Rt Hon David Cameron MP put the potential cost of compensation claims at £160 million.[14] As set out above, additional claims for compensation could also be made following the elections to the Scottish and Welsh parliaments in May if action to comply with the Court's judgments has not been taken before then. In an interview with the BBC last week, Justice Secretary Rt Hon Kenneth Clarke QC MP asked how MPs who oppose the Government's proposals to enfranchise prisoners "are going to explain to their constituents that, at a time like this, we're spending money on compensating prisoners."[15]

The Government has, moreover, recently been warned that the approach that it proposed – that prisoners should be disenfranchised on the basis of sentence length – is unlikely to meet the requirements of the ECtHR. As detailed above, the judgment in *Frodl* ruled that a blanket ban on prisoners sentenced to more than one year and convicted of a criminal offence committed with intent was unlawful, and set out that "it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions." The principle was also stated in *Hirst*: "the severe measure of disenfranchisement must not be resorted to 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 express judicial decision." In February 2011, the Political and Constitutional Reform Committee was advised by Dr Eric Metcalfe of JUSTICE and Aidan O'Neill QC that imposing a blanket ban on an entire category of prisoner, such as those sentenced to less than one year, or even those sentenced to less than four years, may be judged to be incompatible with the ECHR since it does not use individualised assessment as the basis for the decision to disenfranchise.

[13] European Court of Human Rights (23 November 2010), Judgment in the case of Greens and MT v the United Kingdom (Applications nos. 60041/08 and 60054/08) - http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=60041/08&sessionid=64500745&skin=hudoc-en

[14] Hansard, 3 November 2010 http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101103/debtext/101103-0001.htm#10110358000010

[15] http://www.bbc.co.uk/news/uk-politics-12347992

2. *The ban is undemocratic*
   The current UK law is based on the outdated concept of 'civic death' laid out in the 1870 Forfeiture Act, which entails the withdrawal of citizenship rights as punishment. However, deprivation of liberty is the punishment that prison inflicts, and while those who are sentenced to prison lose the right to liberty, they remain citizens. Indeed, that prisoners do not suffer 'civic death' in other ways recognises this; they remain bound by the laws of the country, continue to have rights to services such as healthcare, and pay tax on their savings, capital gains and any earnings that they receive during their sentence.

   Voting is a right not a privilege, and in a democracy all citizens, whether they have been given a custodial sentence or not, should retain the right to vote. As the Canadian Supreme Court noted in *Sauvé*, a judgment to which the ECtHR referred in *Hirst*, "the right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of … democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claim to representative democracy and erodes the basis of its right to convict and punish law-breakers."[16] In 1999 the South African Constitutional Court gave all prisoners the right to vote, declaring that "the vote of each and every citizen is a badge of dignity and personhood. Quite literally it says that everybody counts."[17]

   The existing situation is also inconsistent. British prisoners in foreign prisons are allowed to vote, as 'penal institutions' in the Prisons Act 1983 does not extend to jails outside of the UK.

3. *The ban hinders rehabilitation*
   The ban on prisoners voting is damaging to efforts to rehabilitate prisoners and reduce reoffending. Prisoners are, all too often, some of the most marginalised individuals in society. They have far higher levels of poor physical and mental health, alcohol and drug dependency, poor educational attainment, unemployment and homelessness than in the general population.[18] Taking away their right to vote can only exacerbate their social exclusion, depriving them of inclusion within a community, and removing any sense of civic involvement or social responsibility. Conversely, allowing prisoners to vote would encourage them to act responsibly and engage with society. It is difficult to argue that this would not be beneficial, and prison governors are among those who support prisoners voting as an ordinary part of resettlement. There is, in addition, no evidence to suggest the ban has a deterrent effect on offending. It serves no positive practical purpose, therefore, while damaging efforts to rehabilitate prisoners.

4. *There are no practical obstacles to lifting the ban*
   In terms of practical arrangements, there is no reason why prisoners should not have the right to vote. Currently, those held in prison on remand keep their voting rights, and are able to vote by post or proxy, so there is no practical difficulty with this. Remand prisoners are not registered at the prison, but at their former address, or an address

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[16] Supreme Court of Canada (October 31 2002), Judgment in the case of Sauvé v Canada - http://scc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.html
[17] Prison Reform Trust and Unlock (2010), 'Barred from Voting: The Right to Vote for Sentenced Prisoners' - http://www.prisonreformtrust.org.uk/Portals/0/Documents/barred%20from%20voting%20Feb%202010.pdf
[18] Social Exclusion Unit (2002) *Reducing Re-offending by Ex-prisoners* - http://www.gos.gov.uk/497296/docs/219643/431872/468960/SEU_Report.pdf

where they have lived in the past. If sentenced prisoners were to be given the right to vote, this approach – favoured by the Government in its proposals – would avoid the problem of a sudden swing in the constituency in which the prison is located. However, the Criminal Justice Alliance also believes that, for those prisoners who may not have ties to a particular community outside that of their prison (for example, those who have moved around extensively prior to imprisonment), there should be the option to vote in their prison's constituency. This would be in line with the current status of students, who have the option to vote in the constituency of their educational institution.

Conclusions

Denying prisoners the vote is not only unlawful but also undemocratic, and governments that continue to disenfranchise whole sections of society risk their legal, political and moral authority. In addition, it prevents prisoners from maintaining links with their local community and in doing so has a damaging effect on efforts to rehabilitate them.

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