Case No: CO/31/01 and CO/448/01

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IN THE SUPREME COURT OF JUDICATURE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 4th April 2001

B e f o r e :

LORD JUSTICE KENNEDY
and
MR JUSTICE GARLAND

- -

	The Queen on the applications of Pearson & Martinez	
	- v -	
	The Secretary of State for the Home Department	

and 2 Electoral Registration Officers
Hirst v Attorney General

- -

(Transcript of the Handed Down Judgment of
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- -

Edward Fitzgerald QC & Philippa Kaufmann (instructed by **Hickman & Rose, Liverpool Road, London, N1 1LA)** for Pearson & Martinez.
Flo Krause (instructed by **Elkan Abrahamson, Rodney Street, Liverpool**) for Hirst.
Rabinder Singh & Karen Steyn (instructed by the **Treasury Solicitor**) for the Home Secretary, and the Attorney General and (instructed by Solicitor to Weymouth and Portland Borough Council and Solicitor to Elmbridge Borough Council) for the 2 Electoral Registration Officers

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Judgment

As Approved by the Court

Lord Justice Kennedy :

1. These are applications by three claimants which raise the issue of whether section 3(1) of the Representation of the People Act 1983 is compatible with Article 3 of the First Protocol to and Article 14 of the European Convention on Human Rights. Initially Ms Krause for Hirst also relied on Article 10, but in reply she sensibly abandoned her reliance on that Article, and I say no more about it. Section 3(1) reads -

> "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. That provision has a long history going back to the Forfeiture Act 1870, and before that to the common law relating to the forfeiture of goods by a convicted felon. The wording is clear, and it is accepted that the three electoral registration officers who rejected applications by all three claimants for registration were bound by statute to act as they did. Nothing turns on the individual circumstances of the claimants save that two of them, Martinez and Hirst, are serving discretionary sentences of life imprisonment, and have completed the part of their sentences which were specified under section 34 of the Criminal Justice Act 1991 (now section 28 of the Crime (Sentences) Act 1997). They are therefore detained on preventive grounds.

3. Article 3 of the First Protocol with which section 3(1) is said to be incompatible reads -

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

4. That wording does not, on its face, confer rights on individuals but it has been interpreted as conferring such rights. In paragraph 51 of its judgment in Mathieu-Mohin and Clerfayt v Belgium [1987] 10 EHRR 1 the European Court of Human Rights accepted that the rights enshrined in Article 3 include the right to vote and the right to stand for election, but in paragraph 52 the court continued -

> "The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of 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 disproportionate. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature.'"

5. The question we have to decide in this case is whether section 3(1) of the 1983 Act satisfies the court's requirements in paragraph 52.

Procedural

6. Before I turn to look at the recent history of section 3(1) and equivalent provisions in other jurisdictions I must say something about the nature of these proceedings. Each of the claimants seeks to obtain a declaration of incompatibility, but Mr Edward Fitzgerald QC for Pearson and Martinez has adopted the familiar route in proceedings for judicial review of challenging the decision of the electoral registrar to refuse registration. Ms Krause for Hirst simply asserts that pursuant to section 4(1) of the Human Rights Act 1998 her client is entitled to a declaration of incompatibility. As her client was in fact refused registration by an electoral registration officer it is unnecessary in this case to decide whether section 4(1) can be directly invoked in that way. Mr Rabinder Singh for the defendants wishes to reserve his position as to that. He adopts the same position in relation to the question whether if the substantive relief sought is a declaration of incompatibility in relation to primary legislation proceedings can properly be brought by any means other than under CPR Part 54. All counsel are agreed that those are not matters which we need resolve in this case. Suffice to say that, as at present advised, it does seem to me that normally speaking if a declaration of incompatibility in relation to primary legislation is to be sought it should be sought in conventional proceedings for judicial review listed before the Divisional Court.

Domestic approach to prisoners voting

7. As I have already said section 3(1) of the 1983 Act has a long history, but the topic has not been neglected by the legislature or the executive. In 1968 a multi-party Speaker's conference on Electoral Law unanimously recommended that -

> "A convicted prisoner who is in custody should not be entitled to vote"

That prohibition was enacted by section 4 of the Representation of the People Act 1969 and was then re-enacted by section 3(1) of the 1983 Act. After the last election a working group on electoral procedures was established to consider changes to electoral law and practice. It was chaired by the then Parliamentary Under Secretary of State at the Home Office, George Howarth MP, and included representatives from political parties and electoral administrators. In its final report in October 1999 it recommended that remand prisoners and mental patients (other than those in custody who have been convicted) should be allowed to vote, and that recommendation was enacted in the Representation of the

People Act 2000 with effect from February 2001. As to convicted prisoners the working party recorded "successive governments' view that prisoners convicted of a crime serious enough to warrant imprisonment have lost the moral authority to vote" and went on to say -

> "We accept the government's view that the franchise should be withdrawn from those serving a custodial sentence and we do not want to argue for any change in the legislation."

8. When the 2000 Act was being debated in the House of Commons Mr Howarth, for the government, maintained the view that "it should be part of a convicted prisoner's punishment that he loses rights, and one of them is the right to vote." He pointed out that the Bill was accompanied by a declaration that its provisions are consistent with the European Convention on Human Rights, and asserted that disenfranchisement of prisoners is consistent with the jurisprudence of the Convention.

9. As a result of these proceedings on 22nd February 2001 the Secretary of State for the Home Department gave his reasons for maintaining the current policy, saying -

> "By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative."

The practice elsewhere

10. From 1879 the California Constitution provided that no person convicted of a any infamous crime shall ever exercise the privileges of an elector. That was unsuccessfully challenged in Richardson v Ramirez [1974] 418 US 24 and in the United States Supreme Court Mr Justice Rehnquist, delivering the opinion of the court, said at 55 -

> "Pressed upon us by the respondents, and by amici curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and

> the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come round to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument."

11. Mr Rabinder Singh invites us to heed that passage as a useful reminder of the distinction between legislative and the judicial functions. Mr Fitzgerald for his part is critical of the United States attitude to human rights, but accepts, as he must, that in Europe today 8 states including the United Kingdom do not give convicted prisoners a vote. By way of contrast 20 European States do not disenfranchise prisoners, and in 8 other states the ban is more targeted than in the United Kingdom. As Mr Fitzgerald points out, the figures do show that over the years the number of States which disenfranchise prisoners has decreased, but clearly there is as yet no consensus, even in Europe.

European Commission decisions

12. The issue which we are being asked to consider, namely the allegation that disenfranchisement of all convicted prisoners is contrary to Article 3 of the First Protocol, has yet to be considered by the European Court, but it has been considered on three occasions by the European Commission, and on each occasion the Commission has held that the complaint was manifestly ill founded and therefore inadmissible. As Mr Rabinder Singh points out, we are required by section 2(1) of the Human Rights Act 1998 to take the decisions of the Commission into account although, as Mr Fitzgerald points out, we are not bound by them.

13. In X v the Netherlands [1974] 1 DR 87 the applicant had been deprived for life of the right to vote as a consequence of a conviction of uncitizenlike behaviour. He was therefore in the same position as a convicted felon in California, and at 89 the Commission, having referred to Mathieu-Mohin said -

> "The Commission has analysed the intention of the laws depriving, in several countries, convicted disloyal citizens of certain political rights, including the right to vote. The purpose of such laws is to prevent persons who have grossly misused in wartime their right to participate in public life from misusing their political rights in the future. Crimes against public safety or against the foundations of a democratic society should thus be avoided by such measures.
>
> The Commission considers that this ratio legis meets the criteria laid down by the Court in the above mentioned judgment. "

Having thus disposed of Article 3 the Commission continued -

"Therefore the difference in treatment imposed on the applicant in voting does not disclose any appearance of a violation of Article 14 of the Convention."

14. In H v the Netherlands [1983] 33 DR 242 the applicant was sentenced to 18 months imprisonment for refusing to attend a recruitment medical inspection and report for military service. He was under the Electoral Law deprived of his right to participate in elections for a period exceeding the length of his sentence by three years. The Commission observed that the electoral restriction was only imposed on a limited category of persons - those sentenced to a term of imprisonment exceeding one year regardless of the nature of the offence and without exception. It also pointed out that a large number of states had adopted legislation "whereby the right to vote of a prisoner serving a term of imprisonment of a specific duration is suspended in certain cases, even beyond the duration of the sentence". The Commission then continued -

"The wording of Article 3 of the Protocol implies that the legislator is competent to determine the conditions under which the right to vote shall be exercised.... the Commission is of the opinion that the practice referred to above reveals the existence of a generally recognised principle, whereby certain restrictions concerning the right to vote must be imposed on persons sentenced to certain terms of imprisonment."

The Commission then said that unlike the case of the right to marry the legislator, in the exercise of his margin of appreciation, may restrict the right to vote in respect of the convicted persons, and continued -

"Such restrictions can be explained by the notion of dishonour that certain convictions carry with them for a specific period, which may be taken into consideration by legislation in respect of the exercise of political rights. Although at first glance it may seem inflexible that a prisoner sentenced to more than one year should always result in the suspension of the exercise of the right to vote for three years, the Commission does not feel that such a measure goes beyond the restrictions justifiable in the context of Article 3 of the Protocol."

15. As Mr Rabinder Singh points out, a considerable degree of latitude was thus accorded to the legislator, which had imposed restrictions more severe than those now to be found in section 3(1) of the 1983 Act. Mr Fitzgerald, for his part, points to the Commission's reference to the then prevailing practice of other states, but although the attitude of some states subsequently changed the attitude of the Commission did not, as can be seen from its decision in Holland v Ireland [1998] 93A D.R 15 where the Commission referred at 26 to -

"Its constant case-law to the effect that, although Article 3 of Protocol No 1 implies a recognition of the principle of universal suffrage (including the right to vote in elections for the legislature), this right is neither absolute nor without limitations but subject to such restrictions which are not arbitrary and which do not affect the expression of the people in the choice of the legislature."

16. The Commission referred to earlier decisions, including H, and said it did not consider that "the suspension of the right of the applicant to vote while in prison affected the expression of the opinion of the people in the choice of the legislature; the fact that all of the convicted prisoner population cannot vote does not affect the free expression of the opinion of the people in the choice of the legislature". Mr Fitzgerald submits that we should decline to follow the Commission's decisions for a number of reasons. First, they afford a margin of appreciation to member states, and a domestic court has no business in that field. It can evaluate local needs and conditions. Secondly, the practice of prisoner disenfranchisement referred to in H in 1983 has changed. Thirdly, Mr Fitzgerald submits that the Commission has misinterpreted the test laid down by the court in Mathieu-Mohin which was the traditional test of proportionality, and has used a wider test, saying that States may impose restrictions so long as they are not arbitrary and do not interfere with the free expression of the people's opinion. It has also failed to have regard to the implied principle of equality of treatment of all citizens. Mr Fitzgerald is also critical of the reasoning of the Commission and points out that the decisions were all only admissibility decisions.

17. But, as Mr Rabinder Singh points out, the Commission has been consistent in its approach to this problem for many years and has reaffirmed its position as recently as 1998 despite the changes in practice of individual member states upon which Mr Fitzgerald places so much reliance, and its approach does reflect that of the European Court. The invocation of the implied principle of equality is inappropriate because convicted prisoners are by definition being treated differently from other citizens. The real question is what should be the extent of the differential.

Minimum infringements of prisoners rights

18. Essentially Mr Fitzgerald's argument is that convicted prisoners should not lose anything other than their liberty for the period prescribed by the sentencing judge, and he submits that decisions of English Courts have so indicated. He points out that in Raymond v Honey [1983] AC 1 at 10H Lord Wilberforce said that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication." Lord Bridge said much the same at 14G. Of course, as Mr Fitzgerald recognises, we are dealing with a case where rights are expressly taken away by statute, but unlike the position in 1983 we can consider whether that is compatible with the European Convention on Human Rights. Mr Fitzgerald also invited our attention to R v Home Secretary ex parte Leech [1994] QB 198 where Steyn LJ at 209 D

referred to what had been said in Raymond v Honey and went on at 212F to pose the question "whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability." That was the issue in that case, the power in question being found in Rule 33(3) of the Prison Rules 1964. Lord Steyn adopted the same approach in R v Home Secretary ex parte Simms [2000] 2 AC 115 looking at 129 D for a "case of pressing need" to justify the ban on face to face interviews between journalists and inmates to be found in a Prison Service Standing Order. But the reality is that when the defendant in a criminal trial is sentenced to imprisonment a sentencing judge can make a variety of other orders which have nothing to do with loss of liberty, but which may make serious inroads on other rights. For example he can order the payment of a fine, or compensation or costs. He can order confiscation and even destruction of certain goods, and he can order that, for example, the defendant shall be debarred from holding office as a director for a period extending well beyond the period of imprisonment he has been ordered to serve. On the face of it there would seem to be no reason why Parliament should not, if so minded, in its dual role as legislator in relation to sentencing and as guardian of its institutions, order that certain consequences shall follow upon conviction or incarceration without transgressing in any way the philosophy expounded in Raymond v Honey and subsequent cases.

Post Tariff Life Sentences

19. Mr Fitzgerald recognises, of course, that Parliament is entitled to decide what shall be the powers of a court in relation to a convicted defendant. Indeed it is part of his case that if there is to be any interference with voting rights it should be minimal, less than at present, and should be within the range of options available to a sentencing judge. He also points out that under present legislation some at least of those disenfranchised, namely post tariff discretionary life sentence prisoners, have completed the punitive element of their sentence, and are being detained only on preventive grounds. The same may be true of some of those detained under the Mental Health Act 1983, and some of those disenfranchised by section 3A of the Representation of the People Act 1983 will not even have been convicted before a hospital order was made (see section 51(5) of the Mental Health Act 1983). So Mr Fitzgerald contends that if the justification for disenfranchisement is that it is part of the punishment then it should only bite when a tariff sentence is being served by a person who has been convicted. Even though many orders made on sentencing are not co-terminous with tariff custody it is unjust that disenfranchisement should not be so, and therefore the requirements of disenfranchisement outlined in Matheiu-Mohin cannot be satisfied. The same argument can be advanced in relation to those serving mandatory life sentences, automatic life sentences, longer than normal sentences, and those detained during Her Majesty's Pleasure but, as Mr Fitzgerald recognises, the distinction between tariff and preventive detention which has been recognised by the European Court in relation to discretionary life sentences is not so clear cut in relation to those other categories of sentence. For example, mandatory life sentences have been accepted by the European Court as being

sentences where detention has a punitive element throughout (see Wynne v UK [1994] 19 EHRR 33).

Deference to Parliament

20. As Parliament has the responsibility for deciding what shall be the consequences of conviction by laying down the powers and duties of a sentencing tribunal or other body it necessarily follows that lines have to be drawn, and that on subsequent examination a case can be made in favour of the line being drawn somewhere else, but in deference to the legislature courts should not easily be persuaded to condemn what has been done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime. In Attorney General of Hong Kong v Lee Kwong-kut [1993] AC 951 Lord Woolf, giving the judgment of the Privy Council in relation to the Hong Kong Bill of Rights, and having referred to Canadian jurisprudence, said at 975 B -

> "While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effects of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crimes. It must be remembered that questions of policy remain primarily the responsibility of the legislature."

Similarly in R v D.P.P. ex parte Kebilene [2000] 2 AC 326 at 380 H Lord Hope said -

> "By conceding a margin of appreciation to each national system the (European) court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing

interests and issues of proportionality.

> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose actual decision is said to be incompatible with the Convention. ..... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

21. Clearly we are dealing with an area where the Convention requires a balance to be struck, and the right is not stated in terms which are unqualified. It has been inferred. The issues do involve questions of social policy but, as Mr Fitzgerald points out, the right to vote, even if under used, is of high constitutional importance and in so far as disenfranchisement is regarded as a punishment the courts may be said to be as well placed to assess the need for protection as they would be in relation to any other sentence in the armoury which the legislature controls.

22. In R v Lambert, Ali and Jordan [2001] 1 All E R 1014, a case concerning the burden of proof, Lord Woolf CJ referred to what was said by Lord Hope in Kebilene and at 1022 e he continued -

> "It is also important to have in mind that legislation is passed by a democratically elected parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention. The courts are required to balance the competing interests involved."

Even more recently, in relation to this topic, in Brown v Stott [2001] SLT 59 Lord Bingham, sitting in the Privy Council, said at 69 L -

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the

> European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies."

Lord Steyn made similar observations, and at 74 E cited with approval from Lester and Pannick "Human Rights Law and Practice", 1999 page 74 -

> "Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions."

23. In that case, as in this case, reliance had been placed on Canadian jurisprudence and more than one member of the Privy Council emphasised the need for caution in the use of comparative material. For example, Lord Hope at 81 H adopted what had been said by Lord Woolf in Lee Kwong-kut that -

> "In cases which are close to the borderline regard can be had to the approach developed by the Canadian courts. But care needs to be taken in the context of the European Convention to ensure that the analysis by the Canadian Court proceeds upon the same principles as those which have been developed by the European Commission and the European Court."

Canadian Authorities

24. With that warning in mind I turn to consider the Canadian authorities on which Mr Fitzgerald and Mr Rabinder Singh rely. The first thing to be recognised is that the Canadian Charter of Rights and Freedom by section 3 specifically grants a right to vote. It states -

> "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

25. It is qualified by section 1 which states that the Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." So the structure is different from that which arises under article 3 of the First Protocol with which we are concerned, even though the decision of the European Court in Mathieu-Mohin and earlier cases has resulted in a degree of convergence.

26. As to the proper approach to section 1, Dickson CJ said in the Supreme Court in R v Oakes [1986] 1 SCR 103 at 138 that a very high degree of probability would be commensurate with the occasion. Two central criteria must be satisfied - first, the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom", and second, the means chosen must be reasonable and demonstrably justified. The second criterion was said to embrace three components - first the measures adopted must be carefully designed to achieve the objective in question, they must not be arbitrary, unfair or based on irrational considerations. Second, the means chosen should impair as little as possible the right or freedom in question, and third there must be proportionality between the effects of the measures responsible for limiting the Charter right or freedom and the objective identified as of sufficient importance to do so. Mr Fitzgerald urges us to adopt a similar approach in relation to section 3 of the Representation of the People Act 1983, but with a patently different legislative framework I question the extent to which it is legitimate to do so.

27. In Belczowski v Canada [1992] 2 CS 440 the Federal Court of Appeal considered whether section 1 of the Charter could be invoked to protect section 51 of the Canada Elections Act 1985 which, so far as material, provided -

> "The following persons are not qualified to vote at an election and shall not vote at an election:
>
> (e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence"

28. The trial judge had found that section 51(e) did not meet the test and the Court of Appeal upheld his decision. The same conclusion was reached by the Court of Appeal for Ontario in Sauv v Canada (No 1) [1992] 7 OR (3d) 481 and the Canadian Supreme Court in Sauv (No 1) [1993] 2 SCR 438 dismissed the appeal from both Courts of Appeal, saying succinctly that -

> "In our view section 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test as expressed in the section 1 jurisprudence of the Court."

Section 51(e) was then amended, so that only prisoners serving a sentence of two years or more in a correctional institution were prohibited from voting in a federal election, and Sauv mounted a further challenge which was held by the Federal Court of Appeal to be unsuccessful (Sauv v Canada (No 2) [2000] 2CF 117). Just as Mr Fitzgerald relied on parts of the judgments in the earlier cases, Mr Rabinder Singh invited our attention to the judgment of Linden JA in the final case which does contain a number of helpful observations. Having reviewed the history of disenfranchisement in Canada Linden JA pointed out at paragraph 88 that in dealing with section 1 of the Charter context matters. The Oakes test is not meant to be a rigid test. "In many cases, scientific and conclusive

proof of the effects of legislation is impossible" (paragraph 89). In relation to the instant legislation, the amended section 51(e), it was the Crown's case that there were two underlying objectives, namely -

> "(a) The enhancement of civic responsibility and respect for the rule of law;
>
> (b) the enhancement of the general purposes of the criminal sanction."

29. That is not very different from the position adopted by the defendants in the present case, and in so far as Mr Fitzgerald is critical of woolly thinking as to the real objectives of disenfranchisement, Linden JA at paragraph 99 says -

> "I would leave to philosophers the determination of the 'true nature' of the disenfranchisement. It may be argued that this legislation does different things - it imposes a civil consequence, it fixes a civil disability, it imposes a criminal penalty, it furthers a civic goal, it promotes an electoral goal, or it is part of the sentencing process. I believe that these arguments, made alone, are of limited assistance. There are elements of <u>all</u> these ideas and ideals at work here."

At paragraph 100 he found the Crown's objectives sufficiently pressing and substantial to warrant an infringement of a Charter right. He then considered whether the objectives were rationally connected to the law which sought to further them, and found that they were. The next section of the judgment poses the question whether section 51(e) impairs the Charter right in an appropriately minimal way. That, in essence, is the same as the question posed by Mr Fitzgerald and Ms Krause in relation to the post tariff discretionary life sentence prisoners, and in paragraph 109 Linden JA points to the danger that a rigid application of a minimal impairment test would risk improperly usurping the role of parliament "and substitute judicial opinions for legislative ones as to the place at which to draw a precise line." In paragraph 110 he cited with approval an observation of McLachlin J that -

> "The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it over broad merely because they can conceive of an alternative which might better tailor objectives to infringement."

30. In paragraph 113 Linden JA cited from a judgment of his own where he had said -

> "some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because

the Court can conceive of an alternative which seems to it to be less restrictive."

Turning to the context of the instant case he said in paragraph 114 -

"While the notion of ensuring a 'decent' or 'moral' electorate may have little place in today's society, it is Parliament's role to maintain and enhance the integrity of the electoral process. Such considerations are by definition political and therefore warrant deference. This statute also represents an exercise of the criminal power which is necessarily linked to the criminal sanction. It is my view that parliament is entitled to a great deal of deference when it makes choices regarding penal policy."

31. In paragraph 116 he referred to the Federal Government's "attempt to reflect the growing intolerance of crime in our communities". A similar intolerance is apparent in the United Kingdom, and in attempting to protect individuals courts must be careful not to exceed their proper remit, or to send out signals more likely to confuse than to assist.

32. Before us Mr Fitzgerald pointed out that it is a matter of chance how many elections may fall within an individual prisoner's period of incarceration. That also was considered by Linden JA at paragraph 122 where, having cited a number of other cases, he concluded that the court should not interfere with the balancing exercise engaged in by the legislature. At paragraph 124 Linden JA said -

"I cannot characterise this legislation exclusively as an attempt to add a Parliamentary sentence to that handed out by the judiciary. Parliament enacted this law in pursuit of objectives which are not so one-dimensional. There can be no debate that this provision, in addition to its electoral component, creates a consequence to criminal conviction. That this provision creates a consequence to criminal conviction does not, however, transform it into a sentencing provision. The criminal sanction, generally speaking, is not limited only to sentencing. ..... Further it is well settled that legislation may validly provide for a civil disability arising out of a criminal conviction."

33. At paragraph 129 he continued with the same theme -

"... this prohibition is a hybrid which possesses elements of the criminal sanction as well as elements of civil disability based on electoral law. While it is linked to the exercise of the criminal law power, the provision also pursues valid electoral goals .... Parliament, basing itself on electoral policy, is entitled to add civil consequences to the criminal sanction in subtle, multi-

> dimensional ways. This legislation is just that - a complex mixture of criminal and electoral law which creates a disqualification following criminal conviction, a type of measure which is not unknown to federal legislation. Parliament may pass the scrutiny of section 1 of the Charter by considering alternative means and by choosing a law which 'falls within a range of reasonable alternatives."

34. In the next section of his judgment Linden JA turned to the question of proportionality, and in paragraph 135 he said -

> "There can be no doubt that, in addition to electoral considerations, the main motivations in passing this law were retributive and denunciatory aspects of the penal sanction. While many penologists may disapprove of these goals, these are important and legitimate objects for Parliament, in its wisdom, to pursue. The courts cannot prevent Parliament from proportionately compromising Charter rights in the name of denouncing crime, even if they disagree with Parliament's penal philosophy."

35. In paragraph 137 he continued -

> "The main salutary effect of this legislation is a complex but important one. The legislation dramatically expresses the sense of societal values of the community in relation to serious criminal behaviour and the right to vote in our society. It is not merely symbolic. This legislation sends a message signalling Canadian values, to the effect that those people who are found guilty of the most serious crimes will, while separated from society, lose access to one of the levers of electoral power. This is an extremely important message, one which is not sent by incarceration alone."

36. If one substitutes English for Canadian one can see a clear reflection of the point made by the Secretary of State on 22nd February 2001 in the passage cited earlier in this judgment. Later in the same paragraph Linden JA said that disqualification from voting -

> ".. signals a denunciation of the criminal's anti-societal behaviour and sends the message that those people convicted of causing the worst forms of indignity to others will be deprived of one aspect of the political equality of citizens - the right to vote."

37. At paragraph 139 he went further, saying -

> "Where someone, by committing a serious crime, evinces contempt for our basic societal values, their right to vote may be properly

suspended. Indeed, not to do so undermines our democratic values."

38. In paragraph 144 he made the point that the legislation "can be seen as a gentler, more human alternative to the alternative of a additional incarceration". I would not myself attach much weight to that consideration, but I do accept the point made in paragraph 145 that in so far as disqualification is linked to time in custody it is individualised to some extent.

South African decision

39. Mr Rabinder Singh also invited our attention to August v Electoral Commission [1999] 3 SA 1 but, as he points out, the background was different in that Parliament had done nothing to limit the constitutional entitlement of prisoners to vote, so I am unable to derive any assistance from that case.

Conclusion - Article 3

40. So I return to what was said by the European Court in paragraph 52 of its judgment in Mathieu-Mohin. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and "the free expression of the opinion of the people in the choice of the legislature". If an individual is to be disenfranchised that must be in pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.

41. The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature. It is easy to be critical of a law which operates across a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life sentence prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities those states which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and, like McLachlin J in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As Mr Rabinder Singh submits, there is a broad spectrum

of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was done recently in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the "hard cases" of post-tariff discretionary life sentence prisoners who attracted a good deal of attention during the argument in the case. They have all been convicted, and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear.

Article 14

42. In relation to post-tariff discretionary life sentence prisoners Mr Fitzgerald also invoked Article 14 of the European Convention which provides that the rights and freedoms set forth in the Convention shall be secured without discrimination. In the Belgian Linguistic case (No 1) [1967] 1 EHRR 241 the European Court at 284 paragraph 10 considered the scope of Article 14 and said -

> "The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of the right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

43. It is true that Martinez and Hirst if released on licence would, after the period necessary to obtain registration, be able to vote, but there is objective and reasonable justification for their continuing custody, and that, as it seems to me, simply brings one back to Article 3 of the First Protocol. If section 3(1) of the 1983 Act can meet the challenge of Article 3, then Article 14 has nothing to offer, anymore than Article 10. That, it will be recalled, accords with the view of the Commission in X v the Netherlands cited earlier in this judgment.

Finally

44. Mr Fitzgerald did make some reference to the delay in registration after discharge from prison, but he recognised that a challenge to the Representation of the People Act 2000 by reference to that delay would lie outside the scope of these proceedings.

45. For the reasons which I have given I would dismiss these applications.