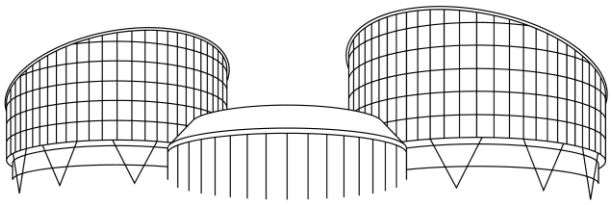
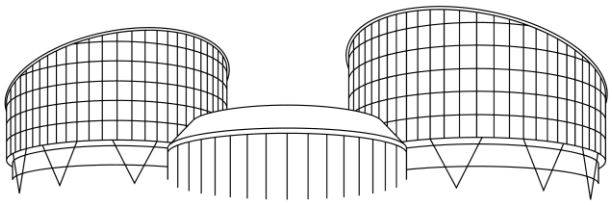


EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SCOPPOLA v. ITALY (No. 3)

(Application no. 126/05)



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

JUDGMENT

STRASBOURG

22 May 2012

This judgment is final but may be subject to editorial revision.

In the case of Scoppola v. Italy (no. 3),
The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Peer Lorenzen,
Karel Jungwiert,
Lech Garlicki,
David Thór Björgvinsson,
Ineta Ziemele,
Mark Villiger,
George Nicolaou,
Işıl Karakaş,
Mihai Poalelungi,
Guido Raimondi,
Vincent A. de Gaetano,
Helen Keller, *judges,*
and Erik Fribergh, *Registrar,*

Having deliberated in private on 2 November 2011 and on 28 March 2012,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 126/05) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Franco Scoppola ("the applicant"), on 16 December 2004.

2. The applicant was represented by Mr N. Paoletti and Mr C. Sartori, lawyers practising in Rome. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora, and their co-Agents, Ms P. Accardo and Ms S. Coppari.

3. The applicant alleged that his disenfranchisement following his criminal conviction was in violation of Article 3 of Protocol No. 1.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 24 March 2009 it was declared partly admissible by a Chamber of that Section composed of the following judges: Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė, András Sajó, Nona Tsotsoria, Işıl Karakaş, and also of Sally Dollé, Section Registrar.

5. On 18 January 2011 a Chamber of the Second Section, composed of Judges Françoise Tulkens,

Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó and Nona Tsotsoria, and of Stanley Naismith, Section Registrar, delivered a judgment in which it found, unanimously, that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

6. On 15 April 2011 the Government made a request for the case to be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73. A panel of the Grand Chamber accepted that request on 20 June 2011.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Nicolas Bratza succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

8. The applicant and the Government each filed observations on the merits of the case.

9. Comments were also received from the Government of the United Kingdom, who exercised their right to intervene (Article 36 § 2 of the Convention and Rule 44 § 1 (b)).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 November 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
MS P. ACCARDO, *co-Agent*;

(b) *for the applicant*
MR N. PAOLETTI, *Counsel*;
MR C. SARTORI, *Counsel*;

(c) *for the Government of the United Kingdom*
MR D. WALTON, *Agent*;
MS A. SORNARAJAH, *Agent*;
MR D. GRIEVE, QC, *Attorney General*;
MR J. EADIE, QC *Counsel*;
MS J. HALL, *Counsel*;
MS P. BAKER, *Counsel*.

The Court heard addresses by Mr Paoletti, Ms Sartori, MS Accardo and Mr Grieve.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1940 and is currently in compulsory residence at San Secondo Hospital – Fidenza (Parma).

A. The criminal proceedings against the applicant

12. On 2 September 1999, after a violent family dispute, the applicant killed his wife and injured

one of his sons. He was arrested the following day.

13. At the end of the preliminary investigation the Rome prosecution service asked for the applicant to be committed to stand trial for murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm.

14. On 24 November 2000, under the summary procedure under which the applicant had elected to stand trial, the Rome preliminary hearings judge (*giudice dell'udienza preliminare*) found the applicant guilty of all the charges and noted that he should be sentenced to life imprisonment. However, because the summary procedure had been used, he sentenced the applicant to thirty years' imprisonment and a lifetime ban from public office within the meaning of Article 29 of the Criminal Code (see paragraph 36 below).

15. The judge noted that the applicant had first attempted to strangle his wife with the cable of the telephone she had used to call the police. Then, when his wife and children ran out of the flat and down the stairwell of the building, he had fired several shots at his wife at close range, and at one of his sons, who had initially been ahead of his mother but had gone back to help her.

16. In fixing the sentence the judge took into account certain aggravating circumstances, namely the fact that the applicant's criminal behaviour had been against his own family and had been triggered by so trifling an incident as his children having allegedly broken his mobile phone.

17. The judge made no allowance for the fact that the applicant had no previous criminal record, an argument the applicant had relied on as a mitigating circumstance. He found that the applicant's attitude in denying some of his actions and blaming his family, who he claimed were guilty of rebelling against his authority, showed that he felt no remorse whatsoever.

18. Lastly, the judge noted that according to witness statements the applicant had been responsible for other episodes of violence over the past twenty years, such as insults, physical violence and threats against his wife and children, including with weapons.

19. Both the Public Prosecutor's Office and the applicant appealed against that judgment, and in a judgment of 10 January 2002 the Rome Assize Court of Appeal sentenced the applicant to life imprisonment, upholding the conclusions of the preliminary hearings judge as to which aggravating and mitigating circumstances should be taken into account.

20. The applicant appealed on points of law, and in a judgment deposited with its registry on 20 January 2003 the Court of Cassation dismissed the appeal.

21. Under Article 29 of the Criminal Code, the life sentence imposed on the applicant entailed a lifetime ban from public office, which in turn led to the permanent forfeiture of his right to vote, in conformity with section 2 of Presidential Decree no. 223 of 20 March 1967 ("Decree no. 223/1967" – see paragraph 33 below).

22. The applicant's disenfranchisement was not mentioned in the judgments against him.

B. Proceedings initiated by the applicant to recover the right to vote

23. In application of section 32 of Decree no. 223/1967 (see paragraph 35 below), on 2 April 2003 the electoral committee deleted the applicant's name from the electoral roll.

24. On 30 June 2004 the applicant lodged a complaint with the electoral committee. Referring to the *Hirst v. the United Kingdom (no. 2)* judgment (no. 74025/01, 30 March 2004), amongst other authorities, he alleged that depriving him of the right to vote was incompatible with Article 3 of Protocol No. 1 to the Convention.

25. The complaint was rejected, and on 16 July 2004 the applicant lodged an appeal with the Rome Court of Appeal. He contended that the fact that the removal of his name from the electoral roll, as an automatic consequence of his life sentence and lifetime ban from public office, was incompatible with his right to vote guaranteed by Article 3 of Protocol No. 1 to the Convention.

26. By a judgment deposited with its registry on 29 November 2004 the Court of Appeal dismissed the appeal. It pointed out that, unlike in the *Hirst (no. 2)* case (cited above), where every person sentenced to imprisonment was divested of the right to vote, with no assessment of the competing

interests or the proportionality of the measure, in Italian law the impugned measure was applied only where the offence was punishable with a particularly heavy sentence, including life imprisonment. The court found that the automatic aspect of the application of the voting ban to any custodial sentence was lacking in the applicant's case.

27. The applicant appealed on points of law, alleging, *inter alia*, that his disenfranchisement was a consequence of the ancillary penalty banning him from public office (which was itself the result of the main penalty imposed on him). In his view the impugned ban had nothing to do with the offence committed and the courts had no power to decide to apply such a measure.

28. In a judgment deposited with its registry on 17 January 2006 the Court of Cassation dismissed the applicant's appeal. First, it referred to the *Hirst (no. 2)* judgment of 6 October 2005 (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 77, ECHR 2005-IX), where the Grand Chamber considered that the withdrawal of voting rights in the United Kingdom "concern[ed] a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity". It then noted that in Italian law, under Article 29 of the Criminal Code, only those offenders sentenced to at least three years' imprisonment were deprived of the right to vote. Where the offence attracted a sentence of less than five years, the disenfranchisement lasted only five years, a lifelong ban on voting being reserved for offenders sentenced to between five years and life.

C. Reduction of the applicant's sentence following the *Scoppola v. Italy (no. 2)* judgment

29. On 24 March 2003, the applicant lodged an application with the Court alleging, *inter alia*, that his life sentence had breached Articles 6 and 7 of the Convention.

30. In a judgment of 17 September 2009 the Grand Chamber of the Court found violations of those Articles (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, 17 September 2009).

31. Ruling on Article 46 of the Convention, the Grand Chamber indicated that "Having regard to the particular circumstances of the case and the urgent need to put an end to the breach of Articles 6 and 7 of the Convention, the Court therefore considers that the respondent State is responsible for ensuring that the applicant's sentence of life imprisonment is replaced by a penalty consistent with the principles set out in the present judgment, which is a sentence not exceeding thirty years' imprisonment." (see *Scoppola (no. 2)*, cited above, § 154).

32. Consequently, by a judgment deposited with its registry on 28 April 2010, the Court of Cassation reversed its judgment of 20 January 2003 (see paragraph 20 above), set aside the judgment of the Rome Assize Court of Appeal of 10 January 2002 (see paragraph 19 above) and fixed the applicant's sentence at thirty years' imprisonment.

II. RELEVANT DOMESTIC LAW

A. Loss of the right to vote

33. In the Italian legal system a ban from public office is an ancillary penalty (Article 28 of the Criminal Code) which entails forfeiture of the right to vote (Presidential Decree no. 223/1967) and for which express provision is made by law in connection with a series of specific offences, irrespective of the duration of the sentence imposed – such as embezzlement of public funds, by a public official (*peculato*) or otherwise, extortion, and market abuse (punishable, respectively, under Articles 314, 316 *bis*, 317 and 501 of the Criminal Code); certain offences against the judicial system, such as perjury by a party, fraudulent expertise or interpretation, obstructing the course of justice and "disloyal counsel" (*consulenza infedele*) (punishable, respectively, under Articles 371, 373, 377 and 380 of the Criminal Code); and offences involving abuse and misuse of the powers inherent in public office (Article 31 of the Criminal Code).

34. Conviction for any offence punishable by imprisonment also results in the offender being banned from public office. The ban from public office may be temporary (where the sentence is three years or more) or permanent (for sentences of five years or more and life imprisonment). The relevant domestic legal provisions are the following.

35. Presidential Decree no. 223/1967 (on the Unified Code governing the active electorate and the maintenance and revision of the electoral rolls) reads as follows, in so far as relevant:

Section 2

"1. The following persons shall not vote: ...

(d) persons who have been sentenced to penalties entailing a lifetime ban from public office...

(e) persons under a temporary ban from public office, for the duration of that ban.

2. Judgments in criminal cases shall entail the loss of voting rights only once they have become final."

Section 32

"No change may be made to the electoral rolls ... save ...:

(3) where the right to vote has been lost as a result of a judgment or other measure by a judicial authority. ...

(7) appeals against decisions to change the electoral rolls may be lodged with the relevant electoral committee within a ten-day time-limit. The committee shall decide within fifteen days ..."

Section 42

"The decisions of the electoral committee ... may be challenged by appeal to the appropriate Court of Appeal."

36. The Criminal Code provides as follows, in so far as relevant:

Article 28
(Ban from public office)

"The ban from public office may be for life or temporary.

In the event of a lifetime ban from public office, unless the law provides otherwise, the convicted person shall be deprived of:

(1) the right to vote or stand for election in any electoral body (*comizio elettorale*) and all other political rights."

...

Article 29
(Sentences which entail a ban from public office)

"A sentence to life imprisonment or to imprisonment for no less than five years shall entail a lifetime ban from public office for the convicted person; sentencing to imprisonment for not less than three years shall entail a five-year ban from public office ..."

B. Sentencing

37. Articles 132 and 133 of the Criminal Code lay down sentencing guidelines for the trial courts

and read as follows:

Article 132
(Limits to the court's discretion when determining the sentence)

"Within the limits set by the law, the court shall apply the sentence at its discretion; it shall justify its use of this discretionary power with proper reasoning.

In increasing or decreasing the sentence the court shall not overstep the statutory limits for each type of sentence, save where expressly provided for by law."

Article 133
(Gravity of the offence: assessment of the effects of the sentence)

"In exercising the discretionary power mentioned in the preceding Article the court shall take into account the gravity of the offence, having regard to:

(1) the nature, type, means, object, time, place and any other attribute of the action;

(2) the gravity of the harm done or the danger caused to the victim of the offence;

(3) the level of intent or the degree of guilt.

The court shall also take into account the offender's propensity to commit crime (*capacità a delinquere*), based on:

(1) the motives behind the offence (*motivi a delinquere*) and the character of the offender (*reo*);

(2) the offender's past criminal and judicial record and, in general, the person's life and conduct prior to committing the offence;

(3) the offender's conduct at the time of, or after, the offence;

(4) the offender's personal, family and social situation."

C. Rehabilitation

38. Articles 178 and 179 of the Criminal Code provide for the rehabilitation of offenders and read as follows:

Article 178
(Rehabilitation)

"Rehabilitation shall terminate any ancillary penalties and other penal effect of the conviction, unless otherwise provided by law."

Article 179
(Conditions of rehabilitation)

"Rehabilitation may be granted three years after the day on which the main penalty has been completed or otherwise extinguished, provided that the offender has displayed consistent and genuine good conduct. ..."

D. Law no. 354 of 1975

39. Law no. 354 of 26 July 1975 provides, *inter alia*, for the possibility of early release. The relevant part of section 54 (1) reads as follows:

"In order to facilitate reintegration into society, convicted prisoners who take part in the re-education scheme may have their sentence reduced by forty-five days for every six months served

..."

III. RELEVANT INTERNATIONAL AND EUROPEAN DOCUMENTS

A. International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations on 16 December 1966)

40. The relevant provisions of the International Covenant on Civil and Political Rights read as follows:

Article 10

"1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation ..."

Article 25

"Every citizen shall have the right and the 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 the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

B. United Nations Human Rights Committee

41. In its General Comment no. 25 (1996) on Article 25 of the International Covenant on Civil and Political Rights, the Human Rights Committee expressed the following view:

"14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote."

42. In its views on the *Yevdokimov and Rezanov v. Russian Federation* case (21 March 2011, no. 1410/2005), the Human Rights Committee, referring to the Court's judgment in *Hirst (no. 2)* [GC] (cited above), stated:

" 7.5 ... the State party, whose legislation provides a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment, did not provide any arguments as to how the restrictions in this particular case would meet the criterion of reasonableness as required by the Covenant. In the circumstances, the Committee concludes there has been a violation of article 25 alone and in conjunction with article 2, paragraph 3, of the Covenant..."

C. American Convention on Human Rights of 22 November 1969

43. Article 23 of the American Convention, under the heading "Right to Participate in Government", provides:

"1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."

D. Venice Commission Code of Good Practice in Electoral Matters

44. This document, adopted by the European Commission for Democracy through Law ("the Venice Commission") at its 51st plenary session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002, lays out the guidelines developed by the Commission concerning the circumstances in which people may be deprived of the right to vote or to stand for election. The relevant passages read as follows:

"i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law."

IV. COMPARATIVE LAW

A. The legislative framework in the Contracting States

45. Nineteen of the forty-three Contracting States examined in a comparative law study place no restrictions on the right of convicted prisoners to vote: Albania, Azerbaijan, Croatia, Cyprus, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Moldova, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.

46. Seven Contracting States (Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and the United Kingdom) automatically deprive all convicted prisoners serving prison sentences of the right to vote.

47. The remaining sixteen member States (Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Romania, San Marino,

Slovakia and Turkey) have adopted an intermediate approach: disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence. Italy's legislation on the subject resembles that of this group of countries.

48. In some of the States in this category the decision to deprive convicted prisoners of the right to vote is left to the discretion of the criminal court (Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Poland, Portugal, Romania and San Marino). In Greece and Luxembourg, in the event of particularly serious offences disenfranchisement is applied independently of any court decision.

B. Other relevant case-law

1. Canada

49. In 1992 the Supreme Court of Canada unanimously struck down a legislative provision barring all prisoners from voting (*Sauvé v. Canada (no. 1)*, Supreme Court Report, 1992, vol. 2, p. 438). Amendments were introduced limiting the ban to prisoners serving sentences of two years or more. The Federal Court of Appeal upheld that provision. However, on 31 October 2002 the Supreme Court held by five votes to four, in the case of *Sauvé v. Attorney General of Canada (no. 2)*, that section 51 (e) of the 1985 Canada Elections Act, denying the right to vote to all persons serving sentences of two years or more in a correctional institution, was unconstitutional as it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, which provide:

> "1. The Canadian Charter of Rights and Freedoms 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."

> "3. 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."

50. The majority opinion given by Beverly McLachlin CJ considered that the right to vote was fundamental to democracy in Canada and the rule of law and could not be lightly set aside. Limits on this right required not deference, but careful examination. The majority found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives of enhancing civic responsibility and respect for the rule of law and imposing appropriate punishment.

51. The minority opinion given by Gonthier J found that the objectives of the measure were pressing and substantial and based upon a reasonable and rational social or political philosophy (for further details of these opinions, particularly concerning the objectives of the impugned measure, see *Hirst (no. 2)* [GC], cited above, §§ 36-37).

2. South Africa

(a) *August and Another v. Electoral Commission and Others* (CCT8/99:1999 (3) SA 1)

52. On 1 April 1999 the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. It noted that, under the South African Constitution, the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms, and it underlined the importance of that right:

> "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that

everybody counts."

53. The Constitutional Court found that the right to vote by its very nature imposed positive obligations upon the legislature and the executive and that the Electoral Act must be interpreted in a way that gave effect to constitutional declarations, guarantees and responsibilities. It noted that many democratic societies imposed voting disabilities on some categories of prisoners. Although there were no comparable provisions in the Constitution, it recognised that limitations might be imposed upon the exercise of fundamental rights, provided they were, *inter alia*, reasonable and justifiable.

54. The question whether legislation barring prisoners would be justified under the Constitution was not raised in the proceedings and the court emphasised that the judgment was not to be read as preventing Parliament from disenfranchising certain categories of prisoners. In the absence of such legislation, prisoners had the constitutional right to vote and neither the Electoral Commission nor the Constitutional Court had the power to disenfranchise them. It concluded that the Commission was under the obligation to make reasonable arrangements for prisoners to vote.

(b) *Minister of Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* (no. 3/04 of 3 March 2004)

55. The Constitutional Court of South Africa examined whether the 2003 amendment to the Electoral Act, depriving of the right to vote those prisoners serving sentences of imprisonment without the option of a fine, was compatible with the Constitution.

56. The Constitutional Court found the measure unconstitutional, by nine votes to two, and ordered the Electoral Commission to take the necessary steps to allow prisoners to vote in elections.

57. Chaskalson CJ, for the majority, concluded that in a case such as this where the government sought to disenfranchise a group of its citizens and the purpose was not self-evident, there was a need for it to place sufficient information before the court to enable it to know exactly what purpose the disenfranchisement was intended to serve. Moreover, in so far as the Government relied upon policy considerations, there should be sufficient information to enable the court to assess and evaluate the policy that was being pursued (see paragraphs 65 and 67 of the judgment). Chaskalson CJ further noted that this was a blanket exclusion aimed at every prisoner sentenced to imprisonment without the option of a fine, and that there was no information about the sort of offences concerned, the sort of persons likely to be affected and the number of persons who might lose their vote for a minor offence.

58. Madala J, for the minority, considered that the temporary removal of the vote and its restoration upon the prisoner's release was in line with the Government's objective of balancing individual rights and the values of society, particularly in a country like South Africa with its very high crime rate (see paragraphs 116 and 117 of the judgment).

3. Australia

59. The High Court of Australia found by four votes to two against the general voting ban that had been introduced in the place of the previous legislation, which had provided for the loss of the right to vote only in connection with prison sentences of three years or more (see *Roach v. sElectoral Commissioner* [2007] HCA 43 (26 September 2007)).

60. The High Court noted, *inter alia*, that the earlier legislation took into account the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process, beyond the bare fact of imprisonment (see paragraph 98 of the judgment).

THE LAW

ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

61. The applicant complained that, following his criminal conviction, he had been deprived of the right to vote.

He relied on Article 3 of Protocol No. 1, which reads as follows:

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

A. The Chamber judgment

62. The Chamber found that the disenfranchisement of the applicant was of the general, automatic and indiscriminate nature referred to in the *Hirst (no. 2)* [GC] judgment (cited above) and that there had accordingly been a violation of Article 3 of Protocol No. 1. It noted, in particular:

> "48. The lifetime ban on voting imposed on the applicant in the instant case was a consequence of the application of the ancillary penalty banning him from public office, which in turn derived automatically from the main penalty sentencing him to life imprisonment. Clearly, therefore, the application of the impugned measure was of an automatic nature. It should be noted in this connection that, as the applicant pointed out, no mention of this measure was made in the court decisions convicting him.
>
> 49. As to the general and indiscriminate nature of its application, the Court notes that the criterion laid down in the law was merely a temporal one in this case, as the applicant was deprived of the right to vote because of the length of his custodial sentence, irrespective of the offence committed or of any examination by the trial court of the nature and gravity of the offence (see *Frodl v. Austria*, cited above, §§ 34 and 35). In the Court's opinion, in this context, the assessment made by the trial court in fixing the applicant's sentence and the possibility of his future rehabilitation mentioned by the Government (see paragraph 30 above) do not change that fact."

B. The parties' submissions

1. The Government

63. The Government essentially reiterated the submissions they made to the Chamber (*Scoppola v. Italy (no. 3)*, no. 126/05, §§ 29-33, 18 January 2011 – hereinafter "the Chamber judgment").

64. They pointed out that the Contracting States enjoyed a wide margin of appreciation where the right to vote was concerned (referring to *Hirst (no. 2)* [GC], cited above, §§ 61-62) and that, as the Court had implicitly assumed in paragraph 45 of its Chamber judgment, the denial of the applicant's right to vote pursued the legitimate aims of preventing crime and upholding the rule of law.

65. It also met the proportionality requirement, the Government argued: the Court had already made a similar finding in *M.D.U. v. Italy* ((dec.), no. 58540/00, 28 January 2003), where disenfranchisement was provided for, as in the instant case, by Article 29 of the Criminal Code.

66. The Government further observed that unlike in the United Kingdom legal system, in which the *Hirst (no. 2)* case had been set, in Italian law the loss of the right to vote did not depend on a subjective condition like detention, but on judgments in criminal cases becoming final.

67. In addition, the ban from public office that led to the disenfranchisement was the result of the assessment made by the trial court, which, based on the penalty prescribed by law (*pena edittale*), fixed the penalty applicable to a particular case, as prescribed by Articles 132 and 133 of the Criminal Code (see paragraph 37 above), taking into account any aggravating and mitigating circumstances.

68. In the Government's opinion, therefore, disenfranchisement could not be said to be a measure that was applied automatically.

69. Furthermore, the Government noted that under Articles 178 and 179 of the Criminal Code (see paragraph 38 above), an application for rehabilitation could be made three years after the date on which the principal penalty had been completed. If the application was accepted, any ancillary penalties ceased to apply. The Government also pointed out that when a convicted prisoner was granted early release (under section 54 of Law no. 354 of 1975 – see paragraph 39 above), the length of the sentence could be reduced by forty-five days for every six months served.

70. Lastly, the Italian legal system was designed, according to the Government, to avoid the discrimination that could arise if courts were free to make decisions on a case-by-case basis in such a sensitive area as that of political rights.

2. The applicant

71. The applicant also reiterated the submissions he made to the Chamber (see paragraphs 34-36 of the Chamber judgment).

72. In addition, he noted that disenfranchisement, as an ancillary penalty, should serve the purpose of reforming the convicted person. Here, however, it was merely an expression of moral indignation and social opprobrium that clashed with the generally accepted principle of respect for human dignity.

73. Applied in a general, automatic manner to any individual sentenced to five years' imprisonment or more, the measure had no direct link with the type of crime committed by the applicant or the particular circumstances of his case; it therefore served no preventive or deterrent purpose. In addition, as it was not the result of a discretionary decision by the court, it did not meet the proportionality requirement.

74. Lastly, the applicant disputed that his situation resembled that in the *M.D.U.* decision (cited above). In that case the disenfranchisement had been the result of the application of section 6 of Law no. 516 of 1982, providing for a ban from public office of between three months and two years in the event of conviction for certain tax offences. The duration of the ban had thus been fixed by the court in the light of the circumstances of the particular case.

3. The Government of the United Kingdom, third-party intervener ("the third-party intervener")

75. Referring to the *Hirst (no. 2)* [GC] judgment (cited above, § 61), to the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in that case, and to the *Greens and M.T. v. the United Kingdom* judgment (nos. 60041/08 and 60054/08, § 113-114, 23 November 2010), the third-party intervener first stressed the wide margin of appreciation afforded to the Contracting States in respect of the right to vote. Each State should be free to adopt its own legal system in keeping with its social policy, and to choose which arm of the State (legislature, executive or judiciary) should have the power to take decisions concerning prisoners' voting rights.

76. A system that stripped all convicted prisoners of the right to vote for as long as they were serving their sentence was not a "blunt instrument" (*Hirst (no. 2)* [GC], cited above, § 82). First, there was no doubt that the impugned measure pursued a legitimate aim, namely enhancing civic responsibility and respect for the rule of law and encouraging citizen-like conduct (ibid., § 74). Also, because only those individuals guilty of offences serious enough to warrant imprisonment were deprived of the right to vote, the correlation between the offence committed and the aim pursued was established.

77. In that sense the system in the United Kingdom, where a group of people – convicted prisoners serving sentences – were deprived of the right to vote, fell within the margin of appreciation afforded to the States in the matter. So their disenfranchisement could not be classified as manifestly arbitrary.

78. Accordingly, the third-party intervener submitted that the Court's findings in the *Hirst (no. 2)* [GC] judgment (cited above) were wrong and that the Court should revisit its decision.

79. On this point, they indicated that the compatibility of the legislation of the United Kingdom

with the guidelines established in that case had been debated on 10 February 2011 in the House of Commons. The House had voted by 234 to 22 against narrowing the scope of section 3 of the Representation of the People Act 1983.

80. The third-party intervener also noted that there was no requirement under Article 3 of Protocol No. 1 for the courts to make a decision on voting rights on a case-by-case basis. In the *Frodl v. Austria* judgment (no. 20201/04, 8 April 2010), the Court had never suggested that it was seeking to expand or develop *Hirst (no. 2)*, as was apparent from paragraph 28, where it was expressly stated that a disenfranchisement measure should "preferably" be imposed not by operation of a law but by the decision of a judge following judicial proceedings. This was also confirmed in the *Greens and M.T.* judgment (cited above, § 113).

C. The Court's assessment

1. *General principles*

81. The Court reiterates that Article 3 of Protocol No. 1 guarantees subjective rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

82. It further notes that the rights guaranteed by this Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst (no. 2)* [GC], cited above, § 58). In addition, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the basic principle (see *Mathieu-Mohin and Clerfayt*, cited above, § 51, and *Hirst (no. 2)* [GC], cited above, § 59). The same rights are enshrined in Article 25 of the International Covenant on Civil and Political Rights (see paragraph 40 above).

83. Nevertheless, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a margin of appreciation in this sphere. The Court has repeatedly affirmed that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). 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 (see *Hirst (no. 2)* [GC], cited above, § 61).

84. However, it is for the Court to determine in the last resort whether the requirements of Article 3 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 (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any conditions imposed must not thwart the free expression of the people in 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 suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see *Hirst (no. 2)* [GC], cited above, § 62).

85. The Court examined the question of the right of convicted prisoners to vote in *Hirst (no. 2)*. It considered that where Contracting States had adopted a number of different ways of addressing the question, the Court must confine itself "to determining whether the restriction affecting all convicted prisoners in custody exceed[ed] 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" (see *Hirst (no. 2)* [GC], cited above, § 84; see also *Greens and M.T.*, cited above, §§ 113 and 114).

86. In examining the particular circumstances of the *Hirst (no. 2)* case, the Court considered that the legislation of the United Kingdom depriving all convicted prisoners serving sentences of the right to vote (section 3 of the 1983 Act) was "a blunt instrument [which stripped] of their Convention right to vote a significant category of persons and it [did] so in a way which [was] indiscriminate". It found that the provision "impose[d] a blanket restriction on all convicted prisoners in prison. It applie[d] automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances." It concluded that "such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1" (see *Hirst (no. 2)* [GC], cited above, § 82). The Court also noted that "[the voting bar] concern[ed] a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity" (ibid., § 77).

87. Lastly, the Court reiterates that it was later called upon, in the *Frodl* case, to examine the compatibility of the disenfranchisement of a convicted prisoner in Austria with Article 3 of Protocol No. 1. On that occasion it expressed the view that it was an "essential element" when assessing the proportionality of such a measure that the decision on disenfranchisement should be taken by a judge and accompanied by specific reasoning (see *Frodl*, cited above, §§ 34-35).

2. Application of these principles to the present case

88. The Court must ascertain whether, in the instant case, depriving Mr Scoppola of the right to vote was compatible with Article 3 of Protocol No. 1. To do this it must first determine whether there was interference with the applicant's rights under that provision. In the affirmative, it will then have to consider whether that interference pursued one or more legitimate aims and whether the means employed to achieve them were proportionate.

(a) Interference

89. The Court observes that as a result of the ancillary penalty imposed on him the applicant was deprived of the possibility to vote in parliamentary elections. It is not disputed by the parties that this constituted an interference with his right to vote, enshrined in Article 3 of Protocol No. 1. It remains to be seen whether this interference pursued a legitimate aim and was proportionate in conformity with the Court's case-law.

(b) Legitimate aim

90. The Court has already acknowledged that the disenfranchisement of convicted prisoners serving prison sentences may be considered to pursue the aims of preventing crime and enhancing civic responsibility and respect for the rule of law (see *Hirst (no. 2)* [GC], cited above, §§ 74 and 75, and *Frodl*, cited above, § 30).

91. It has also found that in Italian law the disenfranchisement of a person barred from public office as an ancillary penalty pursued the legitimate aim of the proper functioning and preservation of the democratic regime (see *M.D.U.* (dec.), cited above).

92. The Court sees no reason to depart from those conclusions in the instant case, and therefore accepts that the applicant's disenfranchisement pursued the legitimate aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime.

(c) Proportionality

(i) Whether the principles set forth in the Hirst *judgment should be confirmed*

93. In its observations, the third-party intervener affirmed that the Grand Chamber's findings in the *Hirst (no. 2)* case were wrong and asked the Court to revisit the judgment. It argued in particular that whether or not to deprive a group of people – convicted prisoners serving sentences – of the right to vote fell within the margin of appreciation afforded to the member States in the matter. The impugned

measure could therefore not be classified as manifestly arbitrary, as it affected only those individuals guilty of offences serious enough to warrant imprisonment. In that connection the third-party intervener indicated that the compatibility of the United Kingdom's legislation with the guidelines established by the Court had recently been debated in Parliament (see paragraphs 75-80 above).

94. The Court reiterates that while it is not formally bound to follow its previous judgments, "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved" (see, among many other authorities, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI, and *Bayatyan v. Armenia* [GC], no. 23459/03, § 98, ECHR 2011-..., and the case-law cited in those judgments).

95. It does not appear, however, that anything has occurred or changed at the European and Convention levels since the *Hirst (no. 2)* judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined. On the contrary, analysis of the relevant international and European documents (see paragraphs 40-44 above) and comparative-law information (see paragraphs 45-60 above) reveals the opposite trend, if anything – towards fewer restrictions on convicted prisoners' voting rights.

96. The Court accordingly reaffirms the principles set out by the Grand Chamber in the *Hirst* judgment (see paragraphs 85 and 86 above), in particular the fact that when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1 (ibid., § 82).

(ii) Whether the decision to deprive convicted prisoners of the right to vote should be taken by a court

97. The Court observes that the Chamber found a violation of Article 3 of Protocol No. 1 in the instant case, noting the lack "of any examination by the trial court of the nature and gravity of the offence" (see paragraph 62 above). In so doing it based itself, *inter alia*, on the Court's findings in the *Frodl* judgment, cited above.

98. In that judgment, in listing the criteria to be taken into account when examining the proportionality of a disenfranchisement measure for the purposes of Article 3 of Protocol No. 1, besides ruling out automatic and blanket restrictions the Court said that it was an essential element "that the decision on disenfranchisement should be taken by a judge". It also considered that such a measure should be accompanied by specific reasoning "explaining why in the circumstances of the specific case disenfranchisement was necessary" (see *Frodl*, cited above, §§ 34-35).

99. That reasoning takes a broad view of the principles set out in *Hirst*, which the Grand Chamber does not fully share. The Grand Chamber points out that the *Hirst* judgment makes no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. The relevant criteria relate solely to whether the measure is applicable generally, automatically and indiscriminately within the meaning indicated by the Court (see paragraphs 85, 86 and 96 above). While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.

100. It is true that in answering certain of the arguments put forward by the United Kingdom Government in the *Hirst (no. 2)* case the Court noted that "when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link

between the facts of any individual case and the removal of the right to vote" (see *Hirst (no. 2)* [GC], cited above, § 77 *in fine*). But these are considerations of a general nature: they did not concern the applicant's particular situation and, unlike the arguments based on the general, automatic and indiscriminate nature of the disenfranchisement, they are not reiterated in paragraph 82 of the *Hirst* judgment, where the criteria for assessing the proportionality of the impugned measure are set out.

101. In addition, according to the comparative-law data in the Court's possession (see paragraphs 45-48 above), arrangements for restricting the right of convicted prisoners to vote vary considerably from one national legal system to another, particularly as to the need for such restrictions to be ordered by a court. Only nineteen of the States examined impose no restrictions on the voting rights of convicted prisoners. Of the remaining twenty-four States, which do apply restrictions to varying degrees, eleven require a decision of the criminal court on a case-by-case basis (with some exceptions where the most serious sentences are concerned – as in Greece and Luxembourg).

102. This information underlines the importance of the principle that each State is free to adopt legislation in the matter in accordance with "historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision" (see *Hirst (no. 2)* [GC], cited above, § 61). In particular, with a view to securing the rights guaranteed by Article 3 of Protocol No. 1 (see *Hirst (no. 2)* [GC], cited above, § 84, and *Greens and M.T.*, cited above, § 113), the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. It will then be the role of the Court to examine whether, in a given case, this result was achieved and whether the wording of the law, or the judicial decision, was in compliance with Article 3 of Protocol No. 1.

(iii) Whether the right enshrined in Article 3 of Protocol No. 1 was respected in the applicant's case

103. Looking at the circumstances of the instant case, the Court observes first of all that the matter of the applicant's permanent disenfranchisement was not examined by the trial court. There is no mention of the impugned measure in the judgments by which he was convicted (see paragraph 22 above). The removal of the applicant's right to vote was the result of his being barred from public office, an ancillary penalty applied, under Article 29 of the Criminal Code, to any individual sentenced, like the applicant, to life imprisonment or a prison sentence of five years or more (see paragraphs 21 and 36 above).

104. However, as the Court has pointed out above (see paragraphs 97-102), removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3 of Protocol No. 1. The impugned measure must also be found to be disproportionate – in terms of the manner in which it is applied and the legal framework surrounding it – to the legitimate aims pursued, namely enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime (see paragraph 92 above).

105. As to the legal framework, it should be noted that in the Italian system the measure is applied to individuals convicted of a series of specific offences for which express provision is made by law, irrespective of the duration of the sentence imposed (offences against the interests of the State administration, for example – see paragraph 33 above), or to people sentenced to certain terms of imprisonment specified by law. In this latter case, prisoners sentenced by the courts to three years' imprisonment or more forfeit the right to vote temporarily, for five years, while those sentenced to five years or more, or to life imprisonment, permanently forfeit the right to vote (see paragraphs 34 and 36 above).

106. In the Court's opinion the legal provisions in Italy defining the circumstances in which

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

107. In the instant case the applicant was convicted of murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm (see paragraphs 13 and 14 above). These are serious offences which led the Rome Court of Appeal to impose a life sentence (see paragraph 19 above), which was later reduced to thirty years' imprisonment (see paragraph 32 above).

108. In the circumstances the Court cannot conclude that the Italian system has the general, automatic and indiscriminate character that led it, in the *Hirst (no. 2)* case, to find a violation of Article 3 of Protocol No. 1. In Italy there is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years' imprisonment or more, regard being had to the circumstances in which they were committed and to the offender's personal situation. The Court of Cassation rightly pointed this out (see paragraph 28 above). As a result, a large number of convicted prisoners are not deprived of the right to vote in parliamentary elections.

109. Furthermore, the Court cannot underestimate the fact that under Italian law it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right. Three years after having finished serving his sentence, he can apply for rehabilitation, which is conditional on a consistent and genuine display of good conduct and extinguishes any outstanding ancillary penalty (Articles 178 and 179 of the Criminal Code – see paragraph 38 above). In addition, the length of the sentence actually served may be reduced in accordance with the early release mechanism provided for in section 54 (1) of Law no. 354 of 1975, under the terms of which a reduction of forty-five days for every six months served is granted if the detainee takes part in the re-education scheme (see paragraph 39 above). This means that he can apply for rehabilitation and, where applicable, recover the right to vote at an earlier date. In the Court's opinion this possibility shows that the Italian system is not excessively rigid.

3. Conclusion

110. Taking the above considerations into account, the Court finds that, in the circumstances of the present case, the restrictions imposed on the applicant's right to vote did not "thwart the free expression of the people in the choice of the legislature", and maintained "the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage" (see *Hirst (no. 2)* [GC], cited above, § 62). The margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped.

Accordingly, there has been no violation of Article 3 of Protocol No. 1.

FOR THESE REASONS, THE COURT

Holds, by sixteen votes to one, that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 May 2012.

Erik Fribergh
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Björgvinsson is annexed to this judgment.

N.B.
E.F.

DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

I share the finding of a violation in the Chamber judgment of 18 January 2011, which I believe presents a prudent and logical follow-up to the Grand Chamber judgment in the *Hirst* case. I have therefore voted against finding no violation in this case.

I would like to add the following remarks in support of my opinion:

In the context of this case Article 3 of Protocol No.1 has two important aspects to it. One relates to the organisation of the electoral system in a given country, that is, the organisation of the electoral process, division into constituencies, the number of representatives for each constituency, and so on. The other relates to the rights of individuals to vote in general elections. As regards the former, the Contracting States have, and should have, wide discretion or a wide margin of appreciation in the organisation of the electoral system and the electoral process in general. However, as to the latter point, which relates directly to the individual's right to participate in the electoral process, the margin is much narrower. It follows that the necessity of limitations on the rights of citizens in a democratic society to vote in the election of the legislative body must be subject to close scrutiny by the Court.

In paragraph 90 of the judgment it is stated that disenfranchisement of convicted prisoners serving prison sentences may be considered to pursue the aims of preventing crime and enhancing civil responsibility and respect for the rule of law. Moreover, in paragraph 91 it is held to pursue the legitimate aim of the proper functioning and preservation of the democratic process.

To some extent, with respect to the first aim, disenfranchising a convicted person may possibly be justified as a penal measure for certain well-defined crimes; and in principle, like punishments in general, it may serve some preventive purpose. This may be seen as a legitimate aim. However, if disenfranchisement is to be understood as a form of punishment, this entails requirements as to the firmness and clarity of the legal basis upon which disenfranchisement is based, and judicial intervention in each individual case, as is the case where other forms of penal sanction are applied. From this penal perspective, any kind of automatic disenfranchisement as a result of criminal conviction, without any assessment of the individual case, should be avoided.

The other aim, namely that the restrictions may be seen as contributing to the proper functioning and preservation of the democratic process is, in my opinion, much more problematic. This aim is of course legitimate in itself. However, I do not believe that disenfranchising a whole sector of the population, which is clearly the result of the contested Italian legislation, contributes to the proper functioning and preservation of the democratic process. In my opinion the Italian legislation is just as likely to have exactly the opposite effect. While I accept that the proper functioning and preservation of the democratic process is clearly a legitimate aim, I fail to see how the Italian legislation contributes to it. By contrast, the inclusion of prisoners and a wider acceptance of their right to vote is much more likely to serve this important aim.

My main reason for voting against the majority is simply that I find the position taken in this judgment incompatible with the Court's findings in the *Hirst* judgment.

I would start by pointing out that the concrete situation of the applicants in the *Hirst* case and the present case is exactly the same: both are serving very long prison sentences, one for manslaughter and the other for murder. Although the legislation upon which their forfeiture of their voting rights is based differs in some respects, the concrete effect of it for both applicants is the same, namely the automatic forfeiture of their right to vote as result of a life sentence. For this

reason particularly strong arguments are needed to explain why one of them has suffered a violation of Article 3 of Protocol No. 1 as a result of his disenfrachisement but not the other.

The following are the main elements upon which the finding of a violation in the *Hirst* judgment is based:

- When sentencing the applicant, the criminal courts in England and Wales made no reference to disenfranchisement and it was not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there was any direct link between the facts of any individual case and the removal of the right to vote (*Hirst*, § 77).

- The relevant United Kingdom legislation was found to be a blunt instrument, stripping of their Convention right to vote a significant category of persons, and doing so in an indiscriminate manner. Moreover, the legislation was found to impose a blanket restriction on all convicted prisoners in prison. It was found to apply automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances (*Hirst*, § 82).

- There was no evidence that the British Parliament ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote (*Hirst*, § 79). Nor did the courts undertake any assessment of the proportionality of the measure itself (*Hirst*, § 80).

All these arguments, with minor reservations which will be explained below, are equally applicable in the present case, and should lead to the same finding of a violation.

As to the first point, paragraph 100 of the present judgment brushes it aside as being a consideration of a general nature which does not concern the specific situation of the applicant. In further support of this opinion it is noted that the argument is not repeated in the recapitulation of the main arguments in § 82 of the *Hirst* judgment.

This is a very unconvincing and unsatisfactory argument since the other decisive grounds listed above for finding a violation in the *Hirst* case do not relate specifically to the applicant's situation either, but rather to the general nature of the legislation as such and its automatic general effect on a large group of individuals, including the applicant in this case, rather than the concrete effect of it for the applicant himself. The fact that in its recapitulation of the arguments in paragraph 82 of the *Hirst* judgment the Court does not repeat this argument does not in my view in any way diminish its relevance and importance in the finding of a violation. It is to be noted in this connection that in sentencing the applicant in the present case the Italian courts did not make any specific reference to his disenfranchisement, and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of his case and the removal of his right to vote.

As to the second point, just like the United Kingdom legislation, Italy's legislation, is a blunt instrument stripping of their Convention right to vote a significant number of persons and doing so in an indiscriminate manner and to a large extent regardless of the nature of their crimes, the length of their sentences and their individual circumstances. In this regard it is worth recapitulating the differences between the two States' legislation. In the United Kingdom section 3 of the Representation of the People Act 1983 ("the 1983 Act") provides that a convicted person, during the time he is detained in a penal institution, is legally incapable of voting in any parliamentary or local election. This disqualification does not apply to persons imprisoned for contempt of court (section 3(2)(a)) or to those imprisoned only for default in, for example, paying a fine (section 3(2)(c)) (see *Hirst*, §§ 21 and 23). Moreover, under this legislation prisoners automatically regain their right to vote on release from prison (Hirst § 51). In Italy Section 2 of Decree 223/1967 provides that persons sentenced to penalties entailing a ban from public office may not vote. The consequence of this is that persons sentenced to less than three years in prison continue to enjoy the right to vote. Those sentenced to three to five years forfeit their right to vote for five years, and lastly, persons sentenced to five years or more are deprived of

their right to vote for life. Thus the loss of the right to vote under the Italian system is an automatic consequence of deprivation of the right to hold public office.

The main difference between the two is that the Italian legislation deprives of voting rights only those who are sentenced to three years or more in prison, while the United Kingdom's legislation deprives all persons sentenced to imprisonment, for the duration of their time in prison. While the Italian legislation may seem for this reason to be more lenient in comparison with that of the United Kingdom, it is stricter in the sense that it deprives prisoners of their right to vote beyond the duration of their prison sentence and, for a large group of prisoners, for life. Therefore, unlike the majority, I find that these differences are not sufficient to reach a different conclusion. In fact the Italian legislation is just as blunt as the legislation in the United Kingdom, albeit for slightly different reasons. The fact that a former prisoner may, under Articles 178 and 179 of the Italian Criminal Code, apply for rehabilitation three years after the date on which the principal penalty was completed does not alter that. Moreover, I find that it makes no difference that disenfranchisement under Italian law follows from a ban on holding public office. The result is nonetheless automatic forfeiture of the right to vote as a result of a prison sentence. Furthermore, there is not necessarily any link between the right of an individual to hold public office and his right to vote in general elections.

As to the third point, it also applies in the present case. No sufficient assessment of proportionality has been made in the present case, either by the legislature or by the courts, as regards the justification for depriving all these prisoners in Italy of their voting rights beyond the end of their prison sentence, and many of them for life, as a result of their forfeiture of the right to hold public office.

In sum, I find the distinction made in this judgment between these two cases as a ground for justifying different conclusions to be unsatisfactory. The present judgment offers a very narrow interpretation of the *Hirst* judgment and in fact a retreat from the main arguments advanced therein. Regrettably the judgment in the present case has now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners' voting rights in Europe.