Case Note

Prisoner Disenfranchisement in the United Kingdom and the Scope of EU Law

United Kingdom Supreme Court

R (on the application of Chester) v. *Secretary of State for Justice*
McGeoch v. *The Lord President of the Council and another (Scotland)*
[2013] UKSC 63

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On 16 October 2013 the United Kingdom Supreme Court delivered judgment in two conjoined cases that considered the legality of prisoner disenfranchisement. The Court considered both the compatibility of the disenfranchising provisions with the European Convention on Human Rights ('the Convention'), and whether those provisions breached a right to vote acquired by the appellants under European Union law. In a unanimous judgment the Supreme Court dismissed the appeals, acknowledging the incompatibility of the relevant legislation with Article 3 of Protocol No. 1 of the Convention but declining to issue a declaration of incompatibility. The Supreme Court further held that EU law does not confer upon EU Citizens a substantive right to vote in European Parliamentary elections.

The cases are significant on a number of levels. First, the nuanced arguments advanced before the Court tested the jurisdictional scope of EU law and its capacity to confer rights upon EU Citizens in the absence of cross-border movement. The claims thus held the potential to widen the jurisdiction of EU law along the trajectory outlined by such ECJ case-law as *Ruiz Zambrano* and *Fransson*. Secondly, those arguments probed the extent to which the European Charter of Fundamental Rights ('the Charter') imports Strasbourg jurisprudence into EU law and thus creates an alternative mechanism through which to enforce Convention rights. Finally, the decision evidences the constitutional tensions that emanate

* PhD, University of Edinburgh. With thanks to Aidan O'Neill QC (counsel for McGeoch) for sharing his insight into the cases, and to Bastian Michel for helpful comments on an earlier draft.

European Constitutional Law Review, 10: 126–142, 2014
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doi: 10.1017/S1574019614001072

https://doi.org/10.1017/S1574019614001072 Published online by Cambridge University Press

from discordant interpretations of fundamental rights by national and supranational courts.

The following case note opens with a brief summary of Strasbourg jurisprudence on prisoner disenfranchisement. It then proceeds to examine in detail the arguments presented to the Supreme Court in *Chester* and *McGeoch*, and the basis upon which the Justices dismissed the appeals. Finally, the note considers the implications of the decision for the respective roles of national and supranational courts in the adjudication of fundamental rights.

Prisoner disenfranchisement and the European Court of Human Rights

Convicted prisoners in the United Kingdom are 'legally incapable' of voting at parliamentary, local government and European Parliamentary elections by virtue of s.3(1) of the Representation of the People Act 1983 ('the 1983 Act').[1] The European Court of Human Rights (ECtHR) held in *Hirst* that the 1983 Act violates Article 3 of Protocol 1 of the Convention ('A3-P1'), which requires Contracting States to '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'.[2] The Court considered that the 1983 Act

> imposes a blanket restriction on all convicted prisoners in prison. It applies 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. 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.[3]

[1] s.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'. The right to vote in European Parliamentary elections is, by virtue of s.8(2) European Parliamentary Elections Act 2002, conditional upon an entitlement to vote in UK parliamentary elections.

[2] Successive case-law of the ECtHR has interpreted A3-P1 as conferring a right of universal suffrage capable of being relied upon by individuals against their Contracting State. This right is not absolute, but may be subject to conditions that pursue a legitimate aim through proportionate means (ECtHR 2 March 1987, Appl. No. 9267/81, *Mathieu-Mohin and Clerfayt* v. *Belgium*, paras. 51-52).

[3] ECtHR 6 Oct. 2005, Appl. No. 74025/01, *Hirst* v. *United Kingdom (No. 2)*, para. 82. The Grand Chamber held unanimously that the finding of a violation constitutes in itself sufficient just

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Two years after the decision in *Hirst* the Scottish Registration Appeal Court in *Smith* v. *Scott* issued a declaration of incompatibility in respect of the 1983 Act.[4] No action was taken by the UK Government to remedy the incompatibility, with the result that the issue returned to the ECtHR in 2009.[5] In *Greens and MT* the Court stipulated that the UK must bring forward legislative proposals to amend the 1983 Act in compliance with the ruling in *Hirst* within six months of the date on which the judgment became final, and must enact the required legislation within a timetable to be determined by the Committee of Ministers.[6] The Court further ruled that it would suspend examination of similar complaints pending the enactment of legislative amendments, without prejudice to its power to restore those applications if the UK failed to enact an amendment capable of achieving compliance within the stipulated period.[7]

The Voting Eligibility (Prisoners) Draft Bill was published on 22November 2012, the day on which the deadline imposed in *Greens and MT* was due to expire.[8] The Bill puts forwards three options to face full Parliamentary scrutiny: a ban for prisoners sentenced to four years or more; a ban for prisoners sentenced to more than 6 months; and a ban for all convicted prisoners (a restatement of the existing ban).

The claims of Chester and McGeoch thus arrived at the Supreme Court in the wake of a line of judicial decisions that clearly had considered the 1983 Act to be incompatible with A3-P1, and amidst a political reluctance to take action to remedy that incompatibility. The unique aspect of the claims advanced by Chester and McGeoch lay in their reliance upon EU law to challenge their disenfranchisement from European Parliamentary elections, and to secure an effective remedy in respect of that disenfranchisement.[9]

satisfaction for any non-pecuniary damage sustained by the applicant, and did not award any damages for suffering and distress (paras. 91-94 and 99).

[4] *Smith* v. *Scott* [2007] SLT 137.

[5] ECtHR 23 Nov. 2010, Appl. Nos. 60041/08 and 60054/08, *Greens and MT* v. *United Kingdom.*

[6] The judgment became final on 11 April 2011. The deadline was extended pending the decision of the ECtHR in *Scoppola* (ECtHR 22 May 2012, Appl. No. 126/05, *Scoppola* v. *Italy (No. 3)*), and the United Kingdom was given a further six months from the date of delivery of that judgment within which to bring forward the necessary legislative proposals.

[7] *Greens and MT* v. *United Kingdom*, *supra* n. 5, para. 121.

[8] *See supra* n. 6.

[9] McGeoch advanced his claim also in respect of municipal elections, relying upon EU law to challenge his disenfranchisement from both local government and Scottish Parliamentary elections.

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Factual background to the proceedings

Both of the appellants are serving terms of life imprisonment for murder. At the time of issuing his claim Chester had served the entirety of the tariff period fixed by the sentencing judge, but remained in custody at the discretion of the Parole Board. McGeoch, having committed intervening offences whilst serving his tariff, was at the time of issuing his claim not eligible for parole.

Chester issued a claim for judicial review in respect of his disenfranchisement from voting in UK Parliamentary and European Parliamentary elections in December 2008, seeking a declaration that the 1983 Act is incompatible with his right to vote under A3-P1 and/or EU law.[10] He also requested that the Court 'read down' s.8 of the European Parliamentary Elections Act 2002 so as to enable his inclusion on the electoral register in respect of European Parliamentary elections, and enforce that section so interpreted.[11] His claim was dismissed by the High Court of Justice of England and Wales on 28 October 2009, and a subsequent appeal to the Court of Appeal was dismissed in 2010.[12]

McGeoch issued a claim for judicial review in 2011. He sought a declaration from the Outer House of the Court of Session that the 1983 Act is incompatible with his rights under EU law, an order mandating his inclusion on the register of electors in advance of local government and Scottish Parliamentary elections, and damages in respect of the contravention of his EU law rights in the event that the elections proceed whilst he remained disenfranchised. The Outer House dismissed McGeoch's application on 8 April 2011,[13] and his subsequent appeal was dismissed by the Inner House of the Court of Session on 8 November 2011.[14]

Issues under consideration by the Supreme Court

Two primary issues can be distilled from the arguments presented to the Supreme Court in support of the appellants' claims: whether the 1983 Act is compatible with A3-P1, and whether that Act breaches an EU law right to vote and thus entitles the appellants to effective remedy.

Issue 1: is the 1983 Act compatible with A3-P1?

In so far as Chester applied for a declaration pursuant to the Human Rights Act 1998, his counsel invoked arguments that had been well-rehearsed before both

[10] *R (on the application of Chester)* v. *Secretary of State for Justice* [2009] EWHC Admin 2923.

[11] Ibid., para 20.

[12] *Chester* v. *Secretary of State for Justice* [2010] EWCA Civ 1439.

[13] *George McGeoch* v. *Lord President of the Council* [2011] CSOH 65.

[14] *George McGeoch* v. *Lord President of the Council* [2011] CSIH 67.

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domestic courts and the ECtHR regarding the incompatibility of the 1983 Act (and consequently the European Parliamentary Elections Act 2002) with A3-P1. A second declaration of incompatibility in respect of the 1983 Act was, counsel argued, desirable in light of the lack of remedial steps achieved by the Government and as vindication of the rights asserted.[15] Moreover, the declaration of incompatibility issued in *Smith v Scott* pertained only to the 1983 Act, and a further declaration was necessary to recognise the incompatibility of s.8(2) of the European Parliamentary Elections Act 2002 with A3-P1.[16]

Appearing on behalf of the Secretary of State, the Attorney General (AG) withdrew the concession that had been made at earlier stages of the claim that the 1983 Act was incompatible with A3-P1. He noted that the Supreme Court's obligation under s2(1) of the Human Rights Act 1998 is limited to 'taking into account' Strasbourg case-law, and argued that that obligation could be discharged by both considering and rejecting the view taken by the ECtHR. It would be appropriate to do so in the given case, the Attorney General argued, on three grounds.[17] First, the scheme of disenfranchisement in place in the United Kingdom ought to be considered as falling within the wide margin of appreciation that is appropriate given the range of reasonable responses to the issue and the varying legislative attitudes in other Contracting States.[18] Secondly, the decision in *Hirst* placed substantial weight on the lack of any recent Parliamentary debate capable of reaffirming the legitimate aims of disenfranchisement. This could no longer be considered true: there had since been three formal debates on the issue of prisoner disenfranchisement, including a debate in the Commons on 10 February 2011 in which MPs voted 234 to 22 to maintain the existing prohibition on prisoner voting.[19] Finally, the Attorney General submitted that it was wrong to consider the disenfranchising provisions in place under the 1983 Act as 'general, automatic and indiscriminate' simply because they apply to all prisoners irrespective of the length of their sentence, given that a sentencing court takes into account the nature and gravity of the offence when deciding whether imprisonment is required.[20]

[15] Counsel further argued that a reasoned decision of the Court would provide the parties with a better understanding of the violation of A3-P1 as it relates to in particular to Chester's status as a post-tariff indeterminate sentence prisoner.

[16] *See supra* n. 1.

[17] *R (on the application of Chester)* v. *Secretary of State for Justice* and *McGeoch* v. *The Lord President of the Council and another (Scotland)* [2013] UKSC 63 ['*Chester* and *McGeoch*'], paras. 25 and 30-33.

[18] The AG argued that the ECtHR had acknowledged, but failed to respect, this wide margin of appreciation (ibid., para. 30).

[19] Ibid., para. 32.

[20] In support of this argument the Attorney General drew parallels with the Court's reasoning in *Scoppola*: '[a]s the Grand Chamber pointed out in relation to the Italian legislation in Scoppola

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Issue 2: does the 1983 Act breach an EU law right to vote?

Both appellants further claimed that they had a right under EU law to vote in European Parliamentary elections (and, in McGeoch's case, municipal elections)[21] that was of the same scope as that defined by Strasbourg jurisprudence. The appellants claimed that application of the 1983 Act breached this right, and that EU law required effective remedy to be afforded in respect of that breach.

Counsel for McGeoch argued that Article 20(2)(b) TFEU, which provides that Citizens of the Union shall have 'the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State' must, in light of ECJ case-law on electoral rights, necessarily be understood as conferring upon EU Citizens a substantive right to vote in both municipal and European Parliamentary elections. That right is, he argued, enforceable against an EU Citizen's Member State of nationality in the absence of cross border movement.

In support of this argument counsel cited the cases of *Eman and Sevinger*[22] and *Spain* v. *United Kingdom*.[23] He made reference to the Joined Opinion of Advocate General Tizzano (delivered in respect of both cases), in which the Advocate General considered that 'the principle of universal suffrage [...] "has become the basic principle" in modern democratic States and is also codified within the Community legal order'.[24] This Opinion, counsel argued, was implicitly adopted by the ECJ in *Eman and Sevinger*, in which Dutch nationals resident in Aruba (an overseas dependency of the Netherlands) were able to rely upon EU law principles of equal treatment to claim the right to vote in European Parliamentary elections against the Dutch Government. This outcome necessarily was predicated upon a substantive right to vote, without which the jurisdictional link necessary to trigger principles of equal treatment in an otherwise 'wholly internal situation' would have been absent. Counsel further argued that Article 20(2)(b) TFEU was created by the Treaty of Lisbon in order to codify the self-standing right to vote recognised by the ECJ in *Eman and Sevinger*, and is distinct from the narrower right expressed in Article 22 TFEU (formerly Article 19 EC) referred to in that case.[25]

(para. 106), so also in the United Kingdom a sentencing court takes into account the nature and gravity of the offence as well as individual circumstances when deciding in the first place whether any and if so what sentence of imprisonment is required' (Lord Mance's summary of the AG's submissions, ibid., para 33).

[21] *See supra* n. 9.

[22] ECJ 12 Sept. 2006, Case C-300/04, *Eman and Sevinger* v. *College van burgemeester en wethouders van Den Haag*.

[23] ECJ 12 Sept. 2006, Case C-145/04, *Spain* v. *United Kingdom*.

[24] Joined Opinion of AG Tizzano, Cases C-145/04 *Spain* v. *United Kingdom* and C-300/04 *Eman and Sevinger* v. *College van burgemeester en wethouders van Den Haag*, para. 69.

[25] *See Chester* and *McGeoch*, *supra* n. 17, para. 59.

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Having advanced the submission that Article 20(2)(b) TFEU confers a self-standing right to vote on EU Citizens, counsel for McGeoch proceeded to argue that the United Kingdom is bound by the Charter of Fundamental Rights of the European Union ('the Charter') when giving effect to this right.[26] Articles 39 and 40 of the Charter mirror the right to vote set out in the treaty,[27] and the scope of those rights must by virtue of Article 52(3) of the Charter be interpreted in line with Strasbourg jurisprudence.[28] As the ECtHR has held that the 1983 Act constitutes a disproportionate infringement of the right to vote, that Act breaches the correlative right to vote granted under EU law. A breach of EU law in these circumstances, counsel argued, requires the 1983 Act to be disapplied so as to restore the 'default' position of universal suffrage for prisoners. The principle of effective remedy also requires 'reading down' of statutory provisions so as to facilitate administrative arrangements necessary to exercise that right, and the grant of *Francovich* damages.

Counsel for Chester adopted the submissions made on behalf of McGeoch. In respect of European Parliamentary elections he additionally argued that the Charter is engaged by those treaty articles that provide for universal suffrage in European Parliamentary elections,[29] the effect of which is to incorporate Strasbourg jurisprudence into European Union law in respect of those elections.[30] Those same treaty provisions serve also to trigger the general EU law principle of equal treatment, which then binds Member States when allocating the right to vote in European Parliamentary elections. The 1983 Act is in breach of the principle of equal treatment, he argued, because it arbitrarily distinguishes between those serving indeterminate sentences who are post-tariff and have been released (who are eligible to vote), and those serving indeterminate sentences who are post-tariff and who remain in prison at the discretion of the Parole Board (who are not). This difference in treatment, counsel argued, cannot objectively be justified.

[26] *See* Art. 51(1) CFR: '[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'; and Art. 6.1 TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […] which shall have the same legal value as the Treaties.'

[27] Art. 39 CFR sets out the right to vote and to stand as a candidate at elections to the European Parliament, and Art. 40 CFR sets out the right to vote and to stand as a candidate at municipal elections.

[28] Art. 52(3) CFR states that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

[29] *See* Art. 14.3 TEU (the equivalent provisions at time of issue of claim were Arts. 190.1 and 190.4 EC).

[30] *See Chester* and *McGeoch*, *supra* n. 17, para. 46.

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Both counsel argued that, as a court of last instance, the Supreme Court was obliged under Art 267 TFEU to make a preliminary reference to the ECJ if there was any doubt as to the correct interpretation of EU law in respect of these issues.

In response to the appellants' claims, the Attorney General submitted that EU law does not confer an independent right to vote in municipal and European Parliamentary elections, but rather secures a right for persons residing in a Member State other than that of which they are nationals to be treated under the national electoral law on equal terms with nationals of that Member State. Moreover, the Attorney General argued that, even if he were wrong on this point, the appellants' claim would nevertheless fail on the basis that the 1983 Act does not contravene A3-P1 and thus there had been no breach of any correlative right under EU law.

Judgment

The case was considered by seven Justices: Lord Hope, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption and Lord Hughes. The leading judgment was delivered by Lord Mance, with whom Lord Hope, Lord Hughes and Lord Kerr agreed.

On the question of the compatibility of the 1983 Act with A3-P1, Lord Mance rejected the Attorney General's invitation to refuse to apply the decision in *Hirst* when determining whether there had been a contravention of A3-P1.[31] Whilst the margin of appreciation that the ECtHR had afforded to Italy in *Scoppola* was wider than might have been anticipated following the decision in *Hirst*, there was, he considered, nothing in that case to suggest that the Grand Chamber would revise its view with regard to the blanket ban in force in the United Kingdom subsequent to that decision.[32] Moreover, though the range of reasonable responses to the issue of prisoner disenfranchisement are indeed broad, the 'haphazard effects' of the current scheme of disenfranchisement are difficult to deny.[33]

Lord Mance went on to note that a declaration of incompatibility is a discretionary remedy. There was no point, he considered, in issuing a second declaration in the given circumstances. He noted also that it was possible to state with a degree of confidence that Chester's disenfranchisement would be maintained whatever amendments were passed in order to comply with *Hirst*.[34] Highlighting the limits of the role of the judiciary in resolving the incompatibility, Lord Mance concluded that:

[31] Ibid., para. 34.
[32] Ibid., para. 34.
[33] Ibid., para. 35.
[34] Ibid., para. 40.

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> it is now therefore for Parliament as the democratically elected legislature to complete its consideration of the position in relation to both RPA section 3 and EPEA section 8. There is no further current role for this Court, and there is no further claim, for a declaration or, in light of the incompatibility, for damages which the appellant Chester can bring.[35]

Turning to the arguments raised by the appellants under European Union law, Lord Mance first considered that Scottish Parliamentary elections are not 'municipal elections' for which a right to vote under European Union law may be acquired under the treaties.[36] Proceeding to consider whether the appellants have an EU law right to vote in European Parliamentary elections, Lord Mance noted the absence of any indication in ECJ case-law of an intention to import Strasbourg jurisprudence into the right contained in Articles 20 and 22 TFEU.[37] He concluded that the decisions of the ECJ in the cases of *Spain* v. *United Kingdom* and *Eman and Sevinger* reflected a right of EU Citizens to be treated equally under national electoral legislation, rather than a self-standing right to vote under EU law:

> Eligibility to vote is under the Treaties and the 1976 Act[38] a matter for national Parliaments, one of considerable national interest. There is no sign that the European Commission has ever sought to involve itself in or take issue with voting eligibility in Member States or specifically with the restrictions on prisoner voting which apply in a number of such States. The Strasbourg jurisprudence operates as the relevant control […] It would not only unnecessarily duplicate that control at the European Community or Union level, it could also lead to further conflict and uncertainty.[39]

Lord Mance further considered that the principle of non-discrimination that had assisted Eman and Sevinger was not engaged in the current claims. The jurisdictional link with EU law in *Spain* v. *United Kingdom* and *Eman and Sevinger* had, Lord Mance concluded, been established not by reference to an EU law right to vote, but rather by virtue of the 'different treatment of comparable situations in a context which fell within the scope of European law, that is voting by nationals residing outside their own Member State'.[40] The current claims, being ones made

[35] Ibid., para. 42.

[36] Ibid., para. 45.

[37] Ibid., paras. 47 and 56.

[38] Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 Sept. 1976.

[39] *See Chester* and *McGeoch*, *supra* n. 17, para. 58.

[40] Ibid., para. 63. *See* further text *infra*, n. 53,.

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by EU Citizens resident in their Member State of nationality, did not fall within the scope of European law.

Lord Mance proceeded to elaborate upon the position in which the appellants would have found themselves had he concluded differently on these points. If a general right of non-discrimination *had* been engaged, he considered, there would nevertheless have been no discrimination because convicted prisoners are not in a comparable situation to free persons or those on remand.[41] Moreover, the only relief available to the appellants in the event of a breach of a self-standing right to vote in European Parliamentary elections would have been a generally phrased declaration that the legislative provisions are inconsistent with Union law.[42] The Supreme Court could not 'read-down' the provisions necessary to rectify any breach, as it would be

> impossible for the Supreme Court itself to devise an alternative scheme of voting eligibility that would or might pass muster in a domestic or a supra-national European Court. Equally, the Court could not determine or implement the practical and administrative arrangements that would need to be made to enable any convicted prisoners eligible under such a scheme to have the vote.[43]

Lord Mance concluded that it was unnecessary to make a preliminary reference to the ECJ on the issue of whether EU law conferred upon the appellants a right to vote in European Parliamentary elections, as the conclusions reached are *acte clair.*[44]

Lady Hale agreed with the judgment delivered by Lord Mance, and delivered an additional judgment (with which Lord Hope and Lord Kerr agreed) that emphasised the importance of the role of the judiciary in safeguarding the rights of unpopular minorities.[45] Lady Hale expressed some sympathy for the view of the Strasbourg Court that the current law is arbitrary and discriminate, highlighting that application of the custody threshold to determine disenfranchisement does not explain the legitimate aim that disenfranchisement pursues; that shifts in sentencing policy undermine the suggestion that application of the custody threshold is sufficient to produce justice tailored to the individual case; and that the legislation has a 'random impact' depending on whether a given individual happens to be in prison on polling day.[46] Notwithstanding these observations, Lady Hale considered that neither appellant would be granted the right to vote under

[41] Ibid., para. 68.
[42] Ibid., para. 72.
[43] Ibid., para. 74.
[44] Ibid., para. 84.
[45] Ibid., paras. 88-90.
[46] Ibid., paras. 92-98.

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whichever scheme may be developed to comply with the judgment in *Hirst*. The Court should, she considered, 'be extremely slow to make a declaration of incompatibility at the instance of the individual litigant with whose own rights the provision in question is not incompatible'.[47]

Lord Sumption and Lord Clark each delivered further judgments. Lord Sumption (with whom Lord Hughes agreed) was more critical of the jurisprudence of the Strasbourg Court than were the other Justices, noting the 'curious position' in which it is open to a Contracting State to fix a minimum threshold of gravity which warrants disenfranchisement; that that gravity may be determined by reference to the nature of the sentence; that disenfranchisement may be automatic once that threshold has been passed; but that it is not permissible for that threshold to correspond to the threshold of imprisonment.[48] Lord Sumption nevertheless considered it necessary to follow established case-law of the Grand Chamber. Lord Clark adopted the reasoning of both Lord Mance and Lord Sumption, but was less critical of the Strasbourg case-law than was Lord Sumption.

The reluctance of the Supreme Court to make a preliminary reference

The decision in *Chester* and *McGeoch* serves to highlight the constitutional tensions that emanate from discordant interpretations of fundamental rights by national and supranational courts. The Supreme Court declined an invitation from the Attorney General to depart from Strasbourg jurisprudence, stating that: 'It would have […] to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.'[49]

By comparison, the Court determined conclusively that the issue of prisoner disenfranchisement falls outwith the scope of EU law, and refused to make a preliminary reference to the ECJ on the basis that the correct application of Union law is so obvious as to leave no scope for any reasonable doubt.[50] That conclusion was heavily reliant upon Lord Mance's interpretation of *Eman and Sevinger*. The ECJ had in that case, he concluded, 'confined its reasoning to a well-established core principle of treaty law, that of non-discrimination'.[51] The problem with this

[47] Ibid., para. 102.
[48] Ibid., para. 135.
[49] Ibid., para. 27.
[50] ECJ 6 Oct. 1982, Case 283/81, *Srl CILFIT and Lanificio di Gavardo ApA* v. *Ministry of Health*, para. 21 (setting out the *acte clair* doctrine upon which the Supreme Court relied).
[51] *See Chester* and *McGeoch*, *supra* n. 17, para. 58.

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interpretation of *Eman and Sevinger* is, as Lord Mance conceded, that 'for the general principle of non-discrimination to apply, the context must fall within the scope of Community or now Union law'.[52] What, then, provided the jurisdictional link with EU law upon which Dutch nationals resident in Aruba could rely, if not a substantive right to vote in European Parliamentary elections? Lord Mance provided the following explanation at paragraph 63 of the judgment (emphasis added):

> additional rights falling within the general scope of any Convention right for which the state has voluntarily decided to provide must in that event be provided without discrimination […] This principle in my opinion clearly underlies *Eman and Sevinger*. As the Court noted (para 53), article 19 EC (now article 22 TFEU) only **covered nationals resident in another Member State**. But the Dutch legislator had chosen to extend the right to vote to its nationals resident outside any Member State – but not the Dutch Antilles or Aruba. There was no justification for this different treatment of comparable situations **in a context which fell within the scope of European law, that is voting by nationals residing outside their own Member State**.[53]

Lord Mance thus reasoned that because the Dutch Government was required under EU law to grant the right to vote in European Parliamentary elections to non-Dutch EU Citizens resident in the Netherlands on equal terms with its own nationals, general principles of EU law continued to apply when it chose voluntarily to extend the right to vote to Dutch nationals living outside the Netherlands. This logic is somewhat strained in that it piggybacks an EU law obligation owed towards Dutch nationals residing outside the Netherlands, upon an obligation owed towards non-Dutch EU Citizens resident in the Netherlands. It does so by grouping both together as instances of an exercise by the Dutch Government of competence relating to 'voting by nationals residing outside their own Member State', despite the term 'national' necessarily having apposite connotations in the two scenarios.

Lord Mance's explanation of *Eman and Sevinger* not only supports his conclusion that there exists no substantive right to vote in European Parliamentary elections, but also is necessary to explain why the EU law principle of non-discrimination that assisted Eman and Sevinger does not apply to Chester and McGeoch (who are not 'nationals residing outside their own Member State'). That the logic of this reasoning is open to critique suggests that the interpretation of EU law it supports is not 'so obvious as to leave no scope for any reasonable doubt', and indicates that the issue perhaps ought properly to have been referred to the ECJ for determination. Indeed, recent case-law of the ECJ suggests that,

[52] Ibid., para. 62.
[53] Ibid., para. 63.

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had a preliminary reference been made, the ECJ may well have acknowledged a substantive right to vote in European Parliamentary elections. This conclusion would follow the trajectory of recent decisions such as *Ruiz Zambrano* and *Fransson*, in which the jurisdiction of EU law has been expanded by the Court outwith previously accepted limits in furtherance of European citizenship and fundamental rights.[54] Refusal by the Supreme Court to make a reference, when the supporting logic is less than unassailable and where there is at least some reason to believe that the ECJ may adopt an alternative view, evidences a generous application of the *acte clair* doctrine in circumstances in which the Supreme Court arguably has a particularly strong view on how the issues under consideration should be resolved.[55]

Fundamental rights and the supremacy of EU law

Lord Mance devoted substantial consideration in his judgment to the position in which the appellants would have found themselves, had they succeeded in establishing a breach of an EU law right to vote in European Parliamentary elections. He concluded that the only relief available to the appellants in that instance would have been a 'generally phrased declaration' that the relevant legislative provisions were inconsistent with EU law. This conclusion was supported by two observations: the Supreme Court should not disapply the legislative prohibition on prisoner voting as that prohibition is justified in large proportion of cases,[56] and in any event could not 'read down' the 1983 Act in manner compatible with EU law.

It is not clear why the Court would be released from its obligation to disapply incompatible legislation simply because a number of prisoners would remain disenfranchised in a compliant scheme. The second observation put forward by Lord Mance nevertheless apparently is sufficient to justify his conclusion that the Supreme Court would have been unable to give effect to an EU law right to vote in European Parliamentary elections. In order to give effect to such a right, Lord Mance reasoned, it would be necessary not only for the Court to disapply the disenfranchising legislation, but also for it to take positive action to furnish the

[54] ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi (ONEm)* and ECJ 26 Feb. 2013, Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*.

[55] For an early study of the practice of English Courts in requesting preliminary rulings *see* A. Arnull, 'The Use and Abuse of Article 177 EEC', 52 *Modern Law Review* (1989) p. 622, and in particular at p. 637: 'English cases where CILFIT was mentioned but no reference made […] illustrate how it can be used to justify refusing to make a reference where the national court has formed a view as to how the points of Community law at issue should be resolved.'

[56] *See Chester* and *McGeoch*, *supra* n. 17, para. 73.

https://doi.org/10.1017/S1574019614001072 Published online by Cambridge University Press

appellants with an administrative route through which they are able to exercise that right. Such action is, he considered, outwith the jurisdiction of the Court.[57]

This conclusion is not overtly at odds with the principle of the supremacy of EU law. Referencing *Kükükdeveci* and *Mangold*, Lord Mance stressed that the obligation on national courts to give effect to EU rights is not unbounded: a national court is required to provide protection only 'within the limits of its jurisdiction'.[58] Lord Mance thus concluded that, as a matter of EU law, the Supreme Court would have been required only to grant a declaration in the form that he outlined.[59] Though this logic ostensibly serves to discharge the Court's obligations under EU law, Lord Mance's reasoning is predicated upon his assertion that it is outwith the jurisdiction of the Court to implement an alternative, ECHR compliant, scheme of prisoner disenfranchisement. It would, however, fall within the jurisdiction of the Court to disapply the current, non-compliant scheme of disenfranchisement. The Court would be required to take no positive action for this purpose – it would need simply to disapply the statutory restriction that prohibits prisoners from designating the prison as their place of residence for the purpose of inclusion on the electoral register,[60] thereby rendering the appellants eligible to be included in the register and to exercise a postal vote from prison.[61]

Despite effectively denying the appellants any remedy under EU law, Lord Mance thus was careful in his judgment not to suggest that the Supreme Court could do anything other than apply EU law in preference to incompatible national provisions. This is unsurprising, given that the principle of supremacy is integrated within the national constitutional framework of the United Kingdom.[62]

[57] Ibid., para. 74. *See* further *supra* at n. 43.

[58] Ibid., para. 74. By a similar token it is a well-established principle of EU law that the interpretative obligation placed on national courts does not require a *contra legem* interpretation of national law (*see* e.g., ECJ 16 Dec. 1993, Case C-334/92 *Teodoro Wagner Miret* v. *Fondo de Garantía Salarial*, para. 22).

[59] Lord Mance adopted a similar approach in his consideration of the appellants' entitlement to damages, applying the *Francovich* criteria in such a way as would have rendered the appellants ineligible to receive any compensation in respect of their disenfranchisement (*see Chester* and *McGeoch*, *supra* n. 17, para. 82).

[60] s.5(3) Representation of the People Act 1983 states that 'a person who is detained at any place in legal custody shall not, by reason of his presence there, be treated for the purposes of [inclusion in the electoral register] as resident there'.

[61] This is the very mechanism by which prisoners on remand have been furnished with the means by which to exercise their right to vote: s.5 of the Representation of the People Act 2000 amended the 1983 Act so as to allow prisoners on remand to be 'regarded for the purposes of [inclusion in the electoral register] as resident at the place at which [they are] detained' (s.7A of the 1983 Act).

[62] *Factortame Ltd* v. *Secretary of State for Transport (No. 2)* [1991] 1 AC 603. *See*, however, recent comments by Lord Neuberger and Lord Mance in *HS2 Action Alliance Limited* (a Supreme Court judgment that post-dates *McGeoch* and *Chester*), which allude to the possibility that the supremacy

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Instead, Lord Mance founded his conclusions upon a decisive interpretation of EU law that incorporated within it a protected sphere of discretion for the UK parliament.[63]

The practice of generously interpreting ECJ case-law in a manner that safeguards national constitutional principles has recently found favour in the German Constitutional Court. In its response to *Fransson*, noted by Lord Mance during the hearing in *Chester* and *McGeoch*, the German Court considered that '[a]s part of a cooperative relationship, [the decision in Fransson] must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order'.[64]

The approach adopted by Lord Mance falls short of the bold statement of the German Constitutional Court, yet arguably demonstrates an implicit alignment with its stance against the expanding scope of EU law into the adjudication of fundamental rights.

The supremacy of EU law over national law in the United Kingdom means that it would not be open for the Supreme Court openly to refuse to apply a judgment of the ECJ on the grounds that it is ultra-vires. This provides some explanation for the reluctance of the Supreme Court to make a preliminary reference on the issues before it: if the ECJ *had* acknowledged a self-standing right to vote, and *had* required the Supreme Court to read down the 1983 Act and/or to grant damages, then the Supreme Court would as a matter of both European and national law have been obliged to grant such a remedy. The supremacy of EU law in an area of such sensitivity would likely have resulted in a significant political backlash at a time at which the future of the United Kingdom within the European Union remains uncertain. By putting forward an interpretation of EU law favourable to national interests, and by declaring that interpretation to be *acte clair*, the Supreme Court has averted the more overt constitutional tension that would ensue from a discordant adjudication of fundamental rights by the ECJ.

of EU law may not be absolute (*R (on the application of HS2 Action Alliance Limited)* v. *The Secretary of State for Transport and another* [2014] UKSC 3, paras. 206-207).

[63] This is seen most obviously in Lord Mance's statement that the Court of Justice did not endorse Advocate General Tizzano's view because it recognised that 'eligibility to vote is under the treaties and the 1976 Act a matter for national parliaments' (*see supra* text at n. 39).

[64] BVerfG 24 April 2013, 1 BvR 1215/07; Press release No. 31/2013 of 24 April 2013, <www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html>, visited 7 Jan. 2014.

https://doi.org/10.1017/S1574019614001072 Published online by Cambridge University Press

Further legal challenge to prisoner disenfranchisement?

The ECJ's jurisdiction to arbitrate on prisoner disenfranchisement in the United Kingdom has not necessarily been conclusively ousted by the decision in *Chester* and *McGeoch*. A further claim in respect of disenfranchisement in European Parliamentary elections has been lodged with the High Court of England and Wales by a Dutch national who was formerly imprisoned in (and has now been deported from) the United Kingdom.[65] Counsel for the claimant contends that this claim is distinct from those raised by Chester and McGeoch, as it is brought by an EU Citizen who has exercised his right of free movement throughout the Union. In these circumstances, counsel argues, the claimant clearly is able to rely upon the right contained in Article 22 TFEU, and a preliminary reference to the ECJ is necessary to conclusively determine the scope of that right as a matter of EU law.

The claimant undoubtedly faces an uphill struggle to establish his claim in light of the comprehensive judgment of Lord Mance. He is unlikely to succeed in substantiating his claim exclusively by reference to a right of equal treatment: he was subject to the same restrictions as British prisoners, and the Supreme Court has rejected the suggestion that comparison can be drawn between prisoners and non-prisoners for this purpose.[66] The claimant may have more success in arguing that, as his situation is undoubtedly one that falls within the scope of EU law (unlike Chester and McGeoch, who were not resident outside their own Member State), application of the Charter prohibits the United Kingdom from acting in a manner incompatible with A3-P1 whilst implementing Article 22 TFEU. This argument also is problematic in light of Lord Mance's conclusion that Strasbourg jurisprudence has not been incorporated into EU law and that, in any event, the only remedy available to the claimant in such circumstances would be a 'generally worded declaration'. The comprehensive interpretation of EU law offered by Lord Mance thus is likely to block many possible avenues by which future litigants may attempt to have the issue referred to the ECJ by subordinate national courts.[67]

Conclusion

The decision in *Chester* and *McGeoch* shines a spotlight not only on the respective boundaries of national and supranational judicatures, but also on the respective limits of the court and legislature: '[i]n the domestic constitutional scheme', Lord Mance concluded, 'any scheme conferring partial eligibility to vote on some con-

[65] *R (on the application of Solomon Teshome)* v. *Secretary of State for Justice* (unreported).

[66] *See supra* text at n. 41.

[67] The Secretary of State has applied to have the claim struck out in light of the findings of the Supreme Court, and a hearing date for the claim has yet to be fixed.

https://doi.org/10.1017/S1574019614001072 Published online by Cambridge University Press

victed prisoners is quintessentially a matter for the United Kingdom Parliament to consider, determine and arrange'.[68] Compliance with Convention rights thus ultimately will be secured not through the courts, but through political channels.

Since judgment was delivered in *Chester* and *McGeoch* tentative steps have been taken in this regard: reporting in December 2013, the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill has recommended that all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections.[69] The recommendations anticipate legislative proposals being laid before Parliament at the start of the 2014-2015 session (beginning in May 2014). The 'unfreezing' in October 2013 of complaints pending before the ECtHR is likely to exert significant pressure on the UK Government to press ahead with this agenda,[70] but whether such reforms will suffice to make the UK scheme of prisoner disenfranchisement Convention compliant remains to be seen.

[68] *R (on the application of Chester)* v. *Secretary of State for Justice* and *McGeoch (AP)* v. *The Lord President of the Council and another (Scotland)*, *supra* n. 17, para. 74.

[69] *Joint Committee Report on the Draft Voting Eligibility (Prisoners) Bill* (HC 924) p. 62 and 67.

[70] The claims were unfrozen following the failure of the United Kingdom to comply with the requirements of *Greens and MT* (*see supra* n. 6).

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