



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 10 October 2013

MEMORANDUM

To: Mr Nick Gibb MP
Chair

From: Nils Muižnieks
Council of Europe Commissioner for Human Rights

Re: Observations for the Joint Committee on the Draft
Voting Eligibility (Prisoners) Bill

Voting rights for prisoners

The stance of the European Court of Human Rights (the Court) is clear – an automatic and indiscriminate ban on voting rights for prisoners contradicts the European Convention on Human Rights (the Convention). The Court recently reiterated this stance in judgments against Russia (*Anchugov and Gladkov v. Russia*) and Turkey (*Söyler v. Turkey*). This means that these countries, as well as the United Kingdom and all other Council of Europe member states with blanket bans on voting rights for prisoners are all at risk of generating many applications before the Court and should change their legislation.

In fact, the Court has clarified that states have a considerable margin of appreciation in how they restrict the voting rights of prisoners: it has left to them to determine which categories of prisoners, if any, could be deprived of the right to vote and how to apply the agreed criteria for such decisions.

My own opinion is that if the deprivation of voting rights is to be introduced as a punishment there should be a logical connection between the offence and this particular sanction. Furthermore, such decisions should be individual, for the duration of the imprisonment only and be based on a judicial procedure.

The Court has already issued several judgments on this issue in the UK, including a pilot judgment, whose implementation is now overdue. The Court temporarily adjourned the examination of all similar cases from the UK, which now number more than 2,500, pending the execution of the judgment. However, the expiry of the deadline for execution, which has already been extended several times, means that the Court may now examine all of the UK cases on an individual basis and award compensation to each of the applicants.

Execution of judgments

As Commissioner for Human Rights of the Council of Europe, I travel to many member states and push for the execution of the Court's judgments and the implementation of reforms aimed at addressing the root causes of repeat applications. In my dialogue with member states, as well as with the Committee of Ministers and external partners, I have drawn special attention to pilot judgments. Pilot judgments address whole categories of cases reflecting a similar, systemic problem, and should thus be treated as a matter of priority. Efficient functioning of the pilot judgment procedure is absolutely essential to addressing the long-term backlog of repetitive cases lodged with the Court, a problem underscored at the Brighton Conference on the Future of the European Court of Human Rights organised by the UK Chairmanship of the Committee of Ministers in 2012.

Judgments of the Court often concern issues which are not popular with mainstream voters – the integration of Roma into mainstream education, granting lesbian, gay, bisexual and transgender persons equal rights to freedom of assembly, the need for effective investigations into police violence, etc. No matter how unpopular, these judgments must still be executed. Non-compliance of a member state with a judgment of the Strasbourg Court is irreconcilable with its obligation, as a state party to the Convention, to execute the Court's judgments fully and effectively. The only way of reconciling non-compliance with international law would be for that member state to formally denounce the Convention and withdraw from the Council of Europe. Selective

non-compliance by one member state would undermine the system as a whole. If a member state decides which judgments to implement, leaving some allegedly “political” or exceptionally “sensitive” judgments without execution, the effectiveness of the entire system is reduced and may eventually collapse as other countries would follow the non-compliance path.

In my year-and-a-half in office, I have come to appreciate that a unique and highly valuable contribution of the Council of Europe to the broader European human rights architecture is the existence of the Court and of our legally binding standards. I have also become increasingly aware of the extent to which such an essential and unique architecture ultimately rests on the continuing and unambiguous commitment of the member states which set it up in the first place. If the UK, a founding member of the Council of Europe and one which has lost relatively few cases at the Court, decides to “cherry-pick” and selectively implement judgments, other states will invariably follow suit and the system will unravel very quickly. Thus, my message is clear: the Court’s judgments have to be executed and the automatic and indiscriminate ban on voting rights for prisoners should be repealed. If the Court system is to continue to provide protection, there is no alternative to this for member states, other than leaving the system itself.

The impact of non-compliance and/or a future UK withdrawal

In my view, the UK’s non-compliance with the *Hirst (No. 2)* and *Greens and M.T.* judgments has thus far not caused irreparable damage to the Court, the Council of Europe, or the UK’s international reputation. However, I believe continued non-compliance would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK’s lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe.

I think that any member state should withdraw from the Council of Europe rather than defy the Court by not executing judgments. Withdrawal, however, is not where the responsibility of the concerned member state ends. Article 58 of the Convention stresses that a denunciation shall not release the High Contracting Party concerned from its obligations under the Convention “in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective”. This means that the UK, even if it withdrew, would still be accountable to the applicants in the *Hirst* and similar cases, as well as to others currently seeking redress for alleged Convention violations.

My experience in seeking to promote human rights in various Council of Europe countries suggests that governments are highly sensitive to any real or perceived double standards. Whereas member states of the Council of Europe are generally willing to subject themselves to criticism or “peer review” by other member states, they are less receptive to such criticism by non-member states who have not undertaken the same human rights obligations. If the UK does withdraw from the Council of Europe, other European countries will likely be far less receptive to the UK’s interventions on human rights related matters, including on issues pertaining to the interests of UK citizens living in Council of Europe member states.

It seems likely that the UK's voice in the broader UN human rights system would also be negatively affected by a withdrawal from the Council of Europe. As a permanent member of the Security Council, the UK has additional responsibilities within the UN system. A withdrawal from the ECHR would cast doubt on the UK's commitment to UN values and acceptance of UN mechanisms such as the Universal Periodic Review and treaty monitoring bodies. The UK's voice with regard to human rights issues in other countries would clearly be less credible.

The role of the Court

In your letter inviting me to engage in a discussion with the Joint Committee, you raise questions about the role of the Court in interpreting the Convention and "democratic oversight of the Court". In my view, these questions reflect some misleading premises as to how the Council of Europe system functions. The Court is a product of democratic delegation - after having been proposed by democratically elected member state governments, judges are democratically elected by members of the Parliamentary Assembly of the Council of Europe (PACE), where UK MPs sit. Just as in national settings, so in the Council of Europe there is a separation of powers between the judiciary (the Court), the legislative (PACE), and the executive (the Committee of Ministers). Any additional "democratic oversight" of the Court beyond the selection procedure of judges would constitute a threat to the independence and impartiality of the Court.

The Convention explicitly extends the jurisdiction of the Court to all matters concerning the interpretation and application of the Convention, and grants the Court full discretion to decide on any disputes concerning its jurisdiction. Any detracting from this principle, i.e. allowing an external body to limit the Court's jurisdiction, would render the human rights protection system set up under the Convention meaningless. This is not to say, however, that the Court does not exercise any caution in interpreting the Convention. It does so by granting a margin of appreciation to states on those issues in which there is no broader consensus or which touch upon issues of culture or tradition that the member state government is best placed to evaluate. The optimal form of subsidiarity is when human rights issues are resolved at the national level in line with the case-law of the Court. The UK Human Rights Act, a sovereign act of Parliament, is in this sense a good example of how Convention rights can be incorporated into domestic law.

I sincerely hope that this Memorandum is useful and will assist you in resolving the issue of voting rights for prisoners at national level in line with the case-law of the Court.