Prisoner voting rights and the European Court of Human Rights: time for a definitive ruling from the Grand Chamber?

Kalda v Estonia (No. 2), Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022

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Introduction

The question whether prisoners should have the right to vote during their sentence, and indeed after their sentence is complete, has engaged both national and international law, with the European Court of Human Rights making a number of important rulings with respect to the compatibility of national law with Article 3 of the First Protocol to the European Convention, which provides for an indirect and limited right to vote in elections.[1]

The European Court has rejected the notion of automatic forfeiture of prisoners' rights,[2] but has allowed each state to impose ordinary and reasonable restrictions on the enjoyment of prisoners' rights, consistent with the management of prison life.[3] Further, with respect to prisoner enfranchisement, the case law of the Strasbourg Court suggests that states may impose restrictions on grounds that would not be acceptable if imposed outside the prison environment, allowing states a good deal of discretion in deciding not only whether they wish to impose restrictions on prisoner voting rights, but the extent to which they do, including the grounds on which those restrictions are based. Accordingly, the European Court has decided to interfere only when the state has exceeded its broad and flexible discretion granted via the margin of appreciation.[4]

Despite this broad discretion, the Strasbourg Court has ruled that national law and practice should not impose an arbitrary and blanket ban on prisoner voting,[5] insisting that the national authorities formulate disenfranchisement rules based on all relevant circumstances, including the offence for which the individual was incarcerated and the length and type of the sentence. In that respect, the recent decision of the European Court in *Kalda v Estonia (No. 2),* where the Court upheld a lifelong ban on a prisoner sentenced for murder, raises a number of interesting issues concerning national disenfranchisement law and its compatibility with the Court's jurisprudence. On the one hand, the ban appeared, in law at least, to be a blanket ban of the type previously ruled incompatible with the Convention, but on the other hand, the rule was applied to a particularly dangerous prisoner, and where the national Supreme Court had considered the constitutionality of the application of the legal rule to the particular individual.

The case has been appealed to the Grand Chamber of the Court, and if the Grand Chamber accepts jurisdiction of the case it will be interesting to see whether the Court's ruling in this case is upheld, or whether the Grand Chamber insists that national rules, as opposed to judicial discretion, have to embody the necessary discretion.

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[1] Article 3 of Protocol No 1 is detailed below, as are leading judgments of the Grand Chamber of the European Court in this area, including *Hirst v United Kingdom* (No. 2) (2004) 38 EHRR 40 and (2006) 42 EHRR 41 (Grand Chamber), and, in particular *Scoppola v Italy* [2012] ECHR 868, discussed in detail below.

[2] *Golder v United Kingdom* (1975) 1 EHRR 524.

[3] See the European Court of Human Rights decision in *Boyle and Rice v United Kingdom* (1983) 10 EHRR 425.

[4] For example in, n 1.

[5] See *Hirst v United Kingdom,* n 1, and *MT and Greens v United Kingdom*, Application Nos. 60041/08 and 60054/08, decision of the European Court of Human Rights, 23 November 2010.

Facts and domestic proceedings in *Kalda v Estonia (No. 2)*

The applicant is detained in Viru Prison, Estonia, having been convicted of numerous criminal offences, including twice for murder (one of them being the murder of a police officer), twice for illegal possession, use, storage or transfer of a firearm or ammunition, twice for escaping from custody or from the place of serving a sentence, and twice for robbery. He was sentenced to life imprisonment and has been serving his sentence since 1996, during which time he was convicted of inciting the murder of another prisoner in a 'tortuous or cruel manner'. The applicant was generally considered highly dangerous and the domestic courts, although noting a certain improvement in his behaviour, dismissed his request for parole in 2020.

Article 58 of the Estonian Constitution provides that participation in voting may be restricted by law for Estonian citizens who have been convicted by a court and are serving a sentence in a penal institution, and s.4(3)(2) of the European Parliament Election Act provides that a person who has been convicted of a criminal offence by a court and is serving a prison sentence does not have the right to vote.[6] Despite those provisions, in April 2019 he applied to the Rural Municipal Government requesting to be allowed to vote in the European Parliament Elections, but that request was dismissed and his subsequent appeals to the Administrative Court was dismissed. On appeal to the Court of Appeal, the Court refused to depart from the Supreme Court's previous ruling in 2015 on whether he should vote in national and European elections, the Supreme Court finding, that although domestic law imposed a blanket ban on prisoners' voting rights, such a prohibition had been proportionate in the applicant's specific case, given his criminal record and sentence. The Supreme Court explained that the prisoners' voting ban served the purpose of temporarily preventing persons who had seriously undermined the fundamental values of society (including those protected by the Penal Code) from exercising State power through participating in the elections of the legislature. In addition, this restriction protected the rights of those who had not demonstrated such disrespect towards the values underlying collective life, and promoted the rule of law. Although the Supreme Court emphasised that the right to vote could not be restricted lightly, and that mere technical difficulties could not be sufficient to justify voting restrictions in prison, it found against the prisoner in this case.

In a similar judgment with respect to the applicant's right to vote in parliamentary elections (governed by an identical provision in the Riigikogu Election Act, the Supreme Court overruled the Court of Appeal's declaration that the ban was unconstitutional. In that case, the Supreme Court stressed that it interpreted Article 57 of the Constitution in a manner similar to how the Strasbourg Court interpreted Article 3 of Protocol No. 1 to the Convention, agreeing that the ban, according to which no one who was serving a prison sentence could vote at the parliamentary elections, was, in principle, unconstitutional. However, the Supreme Court explained that it could only assess the constitutionality of a certain legal norm within the framework of a specific procedure and in accordance with the request made to it, and that in the proceedings under consideration it had to assess whether the legislature had used its discretion to restrict voting rights in a proportionate manner *in the specific circumstances of the applicant's case*. It then explained that an absolute voting ban which applied to a certain defined group of individuals and did not allow any balancing of interests to take place could nonetheless prove to be proportionate with respect to certain persons belonging to that group. Listing all the offences of which the applicant had been convicted, and noting that the Constitution permitted restricting the voting rights of at least some prisoners and taking into account the number, nature and gravity of the offences committed by the applicant, as well as the fact that he had been sentenced to life imprisonment and had

[6] Section 20(3)(1) of the same Act provides that a person who, according to information in the criminal records database, has been convicted of a criminal offence by a court and whose prison sentence will last until election day (as assessed on the thirtieth day before the elections) will not be entered in the list of voters.

continued committing offences while in prison, the Supreme Court concluded that the voting ban was proportionate in his case.[7]

In another previous ruling, made in 2015, concerning the applicant's right to vote in the 2014 European Parliament elections, the Supreme Court overruled the decision of the Court of Appeal who considered the ban to be in violation of European Union law and had refused to apply it. In that case the Supreme Court reiterated that in the proceedings at hand the proportionality of the prisoners' voting ban had to be assessed from the perspective of the specific applicant, and found that banning the applicant from exercising his voting rights at the European Parliament elections did not restrict the right under Article 3 of Protocol No. 1 to the Convention to the extent that it undermined free elections in a manner that thwarted the free expression of the people in the choice of the legislature. Thus, although the ban clearly violated the rights of many prisoners, the applicant could not rely on the violation of the rights of others in demanding to be granted the right to vote.[8]

The Supreme Court refused to hear the appeal in the present case and the applicant brought a case under the Convention, claiming a breach of Article 3 of the First Protocol, which provides:

> 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

The decision of the European Court of Human Rights in *Kalda v Estonia (No. 2)*

The Court first considered the application admissible, rejecting the Government's argument that the previous claims made in the domestic courts pertaining to different elections made his claim out of time and otherwise inadmissible as manifestly ill founded.[9]

Dealing with the merits of the application, the Court noted that the applicant's claim, that as the criminal offences had been committed some ten to twenty years earlier the ban was disproportionate; and that the absolute ban on voting rights also violated EU law.[10] It then reiterated that the rights guaranteed by Article 3 were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law, and that in the twenty-first century, the presumption in a democratic state in favour of inclusion and universal suffrage has become the basic principle.[11] Affirming that the margin of appreciation for each state was wide in this area, it stated that there were numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision.[12] Nevertheless it was for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; satisfying itself that the conditions do not curtail the rights in question to such an extent as to impair their very

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[7] The Supreme Court added that the Chancellor of Justice could initiate constitutional review proceedings that would enable it to assess the constitutionality of the provisions in question in an abstract manner, and that Parliament also had the power to amend the unconstitutional provisions of its own motion.

[8] In addition, the European Court of Justice has held, in *Delvigne v Commune de Lesparre-Medoc* (C-650/13, EU: C: 2015: 648, judgment of 6 October 2015, that French domestic law was compatible with Article 39 (2) of the Charter of Fundamental Rights of the European Union by excluding persons convicted of a serious crime from those entitled to vote in elections to the European Parliament. The Court of Justice held that the French limitation of prisoners' voting rights did not call into question the essence of those rights since it had the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled. In addition the French limitation was proportionate in so far as it took into account the nature and the gravity of the criminal offence committed and the duration of the penalty (at [48-49]).

[9] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [30-32].

[10] *Kalda v Estonia (No. 2)*, at [35].

[11] *Kalda v Estonia (No. 2)*, at [38], citing *Hirst (No 2*) and *Scoppola*, n 1.

[12] *Kalda v Estonia (No. 2)*, at [39].

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.[13]

In particular, any conditions imposed 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 elected legislature and the laws it promulgates, and exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of the Article.[14] Reiterating that removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3, it stressed that 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. Accordingly, in the latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction).[15]

Applying those principles to the facts, the Court stressed that under the terms of Articles 19 and 32 (1) of the Convention it was not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention.[16]

Finding that there was no dispute that there had been an interference with Article 3 and that it pursued a legitimate aim,[17] the Court noted that the domestic law restricting convicted prisoners' right to vote in the European Parliament elections was indiscriminate in its application in that it did not take into account the nature or gravity of the offence, the length of the prison sentence or the individual circumstances of convicts. Nor had Government put forward any evidence that the Estonian legislature had ever sought to balance the competing interests or assess the proportionality of a blanket ban on the right of convicted prisoners to vote.[18] Further, while the Court accepted that when sentencing someone to prison, the domestic courts would have to have regard to all the various circumstances before choosing a sanction, there was no evidence whether those courts, in the instant case, took into account – at the time of deciding on a sentence – the fact that a prison sentence would involve the disenfranchisement of the applicant.[19] Thus, the circumstances of the present case appear to the Court, on the face of it, similar to those examined in earlier cases where a blanket ban on prisoners' voting rights was in question.[20] However, unlike the previous cases where the Court found a violation of Article 3, it noted that in the present case the domestic courts assessed the proportionality of the application of the voting ban in the specific circumstances pertaining to the applicant and concluded that it had indeed been proportionate.[21] Therefore, it was important to reiterate that in cases arising from individual

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[13] *Kalda v Estonia (No. 2)*, ibid.
[14] *Kalda v Estonia (No. 2)*, at [40].
[15] *Kalda v Estonia (No. 2)*, at [41], citing *Anchugov and Gladkov v. Russia*, Application Nos. 11157/04 and 15162/05, decision of the European Court, 4 July 2013, and *Kulinski and Sabev v. Bulgaria*, Application No. 63849/09, decision of the European Court, 21 July 2016.
[16] *Kalda v Estonia (No. 2)*, at [43].
[17] *Kalda v Estonia (No. 2)*, at [44].
[18] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [45].
[19] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [46].
[20] *Kalda v Estonia (No. 2)*, at [47], citing *Hirst,* n1; *Anchugov and Gladkov;* and *Kulinski and Sabev,* n15. See also *Söyler v. Turkey*, Application No. 29411/07, decision of the European Court, 17 September 2013, considered below.
[21] *Kalda v Estonia (No. 2)*, at [48], comparing and contrasting, respectively, *Strøbye and Rosenlind v. Denmark*, Application Nos. 25802/18 and 27338/18, decision of the European Court, 2 February 2021, where the domestic court had thoroughly examined the justification and proportionality of the limitation of the applicants' voting rights; in contrast to *Hirst (No. 2)*, where the Court and Grand Chamber had noted that the domestic courts, when addressing the question of the voting ban, had themselves not undertaken any assessment of proportionality of the ban.

applications the Court's task was not to review the relevant legislation in the abstract, but to confine itself, as far as possible, to examining the issues raised by the case before it.[22]

Stating that it would require strong reasons to substitute its own view for that of the domestic courts, particularly when the latter have carried out their review in a manner consistent with the criteria established by the Court's case-law,[23] it noted that the domestic courts reasoned that the voting ban had been proportionate in respect of the applicant, given the number, nature and gravity of the offences he had committed, his continued criminal behaviour while in prison, as well as the fact that as a result he had been sentenced to life imprisonment. In that connection, the Court observed that the seriousness of the offences committed was also one of the factors taken into account by the Grand Chamber in the case of *Scoppola* in reaching its conclusion that the Convention had not been violated.[24] Further, the Estonian Supreme Court – despite deeming the voting ban to be constitutional with respect to the applicant – took an overall critical stance against the blanket ban on prisoners' voting rights, referring extensively to the Convention and the Court's case-law, and ruling that the ban clearly violated the rights of many prisoners.[25]

Accordingly, the Court found that, in the circumstances of the present case, there was no basis for finding that the domestic courts, when assessing the proportionality of the voting ban with respect to the applicant, overstepped the margin of appreciation afforded to them. It followed, therefore, that there has been no violation of Article 3 of Protocol No. 1.[26]

Prisoner voting rights in Europe and the decision in Kalda v Estonia (No. 2)

Nearly forty years ago, in *Mathieu-Mohin and Clerfayt,*[27] the European Court of Human Rights confirmed that Article 3 included an implied right for individuals to vote, but also stressed that the right was subject to implied limitations, as long as any conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.[28] Thus, neither the Convention nor the Court expect a common European standard in this area, provided the restriction corresponds to a legitimate aim (however flexible and fluid that aim is), and is proportionate to such aim.

In *Hirst v United Kingdom (No 2)*, the European Court accepted that this was an area in which a wide margin of appreciation should be granted to the national legislature both in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. However, it observed that that there was no evidence that the United Kingdom Parliament had ever sough to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners. Thus, the Court could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation.[29] On appeal to the Grand

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[22] *Kalda v Estonia (No. 2)*, at [49].
[23] *Kalda v Estonia (No. 2)*, at [50].
[24] *Kalda v Estonia (No. 2)*, at [51], comparing and contrasting *Scoppola*, with *Söyler*, n 20, where the Court referred to the relatively minor nature of the offence.
[25] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [52].
[26] *Kalda v Estonia (No. 2)*, Application No. 14581/20, decision of the European Court of Human Rights 6 December 2022, at [53-54].
[27] (1987) 10 EHRR 1.
[28] *Mathieu-Mohin and Clerfayt,* at [52].
[29] See also the subsequent judgment in *Anchugov and Gladkov v Russia,* decision of the European Court, 4 July 2013, concerning the blanket ban on prisoner voting in Russia, as set out in Article 32(3) of the 1993 Constitution The Russian government argued that the case was distinguishable from *Hirst,* because its ban was enshrined in a Constitutional provision which had been adopted only after a nationwide vote, and after its terms had been subject to extensive public debate at various levels of Russian society. However, the Court observed that no attempt had been made to weigh the competing interests or to assess the proportionality of a blanket ban on convicted prisoner's voting rights (at para 109)). See also *Kulinski and Sabev v Bulgaria*, decision of the European Court 21 July 2016, which found a violation on similar grounds (in other words, a blanket ban).

Chamber,[30] it was stressed that the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned.[31] However, the Grand Chamber in *Hirst (No 2)* accepted that the domestic provision might be regarded as pursuing the aims pleaded by the government, in so far as it was aimed at preventing crime, enhancing civic responsibility and respect for the rule of law, and of conferring a punishment in addition to the sentence.[32] Despite that, it noted that the domestic provisions affected approximately 48,000 prisoners and that it applied in a blanket fashion to the full range of offences which warranted imprisonment.

Although the decisions of the European Court of Human Rights and the Grand Chamber in *Hirst (No 2)* failed to establish strict and exact criteria for satisfying the element of legitimacy in prisoner disenfranchisement cases, they did at least stress the need for the proportionality, dismissing measures which arbitrarily disenfranchise prisoners without reference to the gravity or nature of the offence and any legitimate aims of disenfranchisement. Thus, in *Söyler v. Turkey*,[33] the European Court held that there had been a violation of Article 3 when it found that the ban on convicted prisoners' voting rights in Turkey was automatic and indiscriminate and did not take into account the nature or gravity of the offence, the length of the prison sentence or the prisoner's individual conduct or circumstances. In the Court's view, the application of such a harsh measure on a vitally important Convention right had to be seen as falling outside of any acceptable room for manoeuvre of a State to decide on such matters as the electoral rights of convicted prisoners.[34]

However, the subsequent decision of the Grand Chamber in *Scoppola v Italy (No 3)*,[35] indicated that an extended discretion would be given to member states in this area. A chamber of the European Court had decided that Italian law that provided for lifetime disenfranchisement of those sentenced to more than five years imprisonment was contrary to Article 3.[36] However, although the Grand Chamber held that the decisions in the UK cases were still good law and must be complied with, it pronounced that member states have a wider margin of appreciation in this area than had been ruled in previous cases. Accepting that there was no dispute as to whether there had been an interference with the applicant's rights in this case, but, significantly, or that the interference pursued the legitimate aims of preventing crime and enhancing civic responsibility and respect for the rule of law, the Grand Chamber consider the proportionality of that interference.[37] Upholding the Grand Chamber's ruling in *Hirst* with respect to automatic and indiscriminate bans, the Grand Chamber then went on to rule that the decision in *Frodl v Austria*,[38] which required judicial involvement in the decision to disenfranchise a prisoner was not good law.[39] Thus, the wide variety of approaches taken by the different legal systems in this area meant that States could decide either to leave it to the courts to determine the proportionality of any measure restricting prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied.[40]

The Grand Chamber then considered the compatibility of the relevant Italian Law as it affected the applicant's case. In this respect, it noted that in contrast to the position of the United Kingdom as examined in *Hirst (No 2)*, that the provisions showed the national legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. Further, the measures were only applied in connection with certain offences against the State or the judicial

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[30] (2006) 42 EHRR 41.
[31] *Hirst v United Kingdom No 2*, Grand Chamber at [71].
[32] *Hirst v United Kingdom No 2*, Grand Chamber at [74].
[33] Decision of the European Court of Human Rights, 17 September, 2013.
[34] *Söyler v. Turkey*, at [25].
[35] Application no. 126/05, *decision of the Grand Chamber of the European Court 22 May 2012.*
[36] *Scoppola v Italy,* Application No. 126/05, decision of the European Court of Human Rights 18 January 2011 (the Chamber noted that 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 (at para 49).
[37] *Scoppola v Italy* (Grand Chamber), at [92].
[38] (2011) 52 EHRR 5
[39] *Scoppola v Italy* (Grand Chamber), at [100].
[40] *Scoppola v Italy* (Grand Chamber), at [102].

system, or to offences which the courts considered to warrant a sentence of at least three years' imprisonment.[41] On the facts, the Grand Chamber noted that the applicant had been found guilty of serious offences and sentenced to life imprisonment,[42] and that in those circumstances it could not conclude that the disenfranchisement provided by Italian law had the general, automatic and indiscriminate character that had led it in *Hirst (No 2)* to find a violation of Article 3.[43] Thus, unlike the position highlighted in *Hirst (No 2*), a large number of convicted prisoners in Italy were not deprived of the right to vote in parliamentary elections.[44] Further, under Italian law a prisoner could, three years after finishing their sentence and displaying good conduct, apply for rehabilitation so as to recover the right to vote.[45] Accordingly, the Grand Chamber found that the government's margin of appreciation in this sphere had not been overstepped and that therefore there had been no violation of Article 3.[46]

The effect of the decision in *Scoppola (No 3)* was that each state is provided with a wider margin of appreciation with respect to choosing which prisoners they are going to disenfranchise. This wider margin is apparent in the *Scopolla* case itself, as the Grand Chamber have overruled the Chamber's decision to the effect that a life time ban was arbitrary and thus in violation of Article 3 of the First Protocol.

In assessing the impact of the decision in the present case on prisoner disenfranchisement and the jurisprudence of the European Court of Human Rights, a number of points need to me made. First, despite the flexibility provided by the Court and Grand Chamber in this area, the case law continues to be clear in its rejection of indiscriminate and arbitrary blanket bans on prisoner voting. Thus the jurisprudence insists that restrictions on all prisoners voting in national and European elections, irrespective of the seriousness and type of the prisoner's crime and the (related) length of sentence. In this respect, it is astounding that the Council of Europe accepted the United Kingdom's paltry reform of its disenfranchisement laws, whereby only those already released on temporary license were allowed to vote.[47]

Despite this executive acceptance, UK domestic law is clearly inconsistent with *Hirst (No 2)* and even *Scoppola*, however one views the discretion granted by the Strasbourg Court to each Member State in this area. However, given the Committee of Ministers' approval, future challenges to UK law would face the difficulty of ignoring such approval, despite the law still being in conflict with the continuing letter and spirit of the Court's past and subsequent rulings. Surely it cannot be conducive to the role of the Court (and the aims of the Convention) that one state is allowed to continue with rules that are out of line with Strasbourg jurisprudence, and where that case law is being applied other states whose laws are being challenged under the Convention's judicial mechanism. In this respect, a further challenge to UK law before the Court would be welcome, as would a Grand Chamber ruling in the case of *Kalda*.

Second, both the Strasbourg Court and the UK domestic courts have insisted that they will not deal with a challenge to specific national law *in abstracto*. Therefore, in *Kalda*, both the national courts and then the European Court refused to look at the national law's general compatibility with Article 3, choosing

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[41] *Hirst (No 2)*, at [106].
[42] *Hirst (No 2)*, at para.107.
[43] *Hirst (No 2)*, at para. 108.
[44] *Hirst (No 2)*, at para 108.
[45] *Hirst (No 2)*, at para. 109.
[46] *Hirst (No 2)*, at para. 110. The European Court of Justice has also offered a similar margin of appreciation with respect to the right to vote under EU Law: *Delvigne v Commune de Lesparre-Medoc* (C-650/13) EU:C:2015:648
[47] Following calls from the Council of Europe's Committee of Ministers to resolve the impasse created by the Government's refusal to change the law following the decision in *Hirst*, the government published proposals in November 2017, allowing prisoners on Temporary Licence to vote. These are now contained in a Ministry of Justice policy framework: Restrictions on Prisoner Voting Policy Framework. 11 August 2020, allowing prisoners already in the community on home detention curfew or released on temporary licence to vote. In December 2017, the Council of Europe agreed to these changes as an acceptable compromise that would address the criticisms raised by *Hirst (No 2)*: 1302nd meeting (December 2017) (DH); Action plan (02/11/2017) Communication from the United Kingdom concerning the case of HIRST (No. 2) v. the United Kingdom (Application No. 74025/01) https://dm.coe.int/dg1/execution/documents_execution/UK Hirst Action Plan November 2017.docx f.

instead to examine whether its application to the applicant was consistent with the constitution, Article 3 of the First Protocol, and the accompanying case law of the European Court of Human Rights. This accords with the role of the European Court, to rule on specific challenges and claims made by specific victims; although both the national and European Court were of the strong opinion that the law, at least on the face of it, was inconsistent with the Convention. This is useful if, of course, the national judiciary has the power to receive constitutional challenges, particularly if they can use the Convention and its case law to make its decision, as they did in *Kalda*. The position is more complex where the member state's judiciary do not have such powers, in which case we would have to wait for an individual to make a challenge under the Convention. Thus, in *Chester v Ministry of Justice,*[48] the UK Supreme Court refused to make a declaration of incompatibility of the 1983 Representation of the People Act 1983 in terms of its application to life sentence prisoners, as it was for Parliament to make an appropriate response to the judgments of the European Court of Human Rights.[49] In that case, therefore, the domestic courts were powerless to rule on whether the exclusion from the vote of life sentence prisoners who had served their minimum terms, as the European Court had made no ruling on that specific issue. This serves as a stark warning of the consequences of repealing the Human Rights Act 1998, or indeed of withdrawing from the Convention itself.[50]

Third, the approach adopted in *Kalda* – to examine the strict legal provision in the light of the wider constitutional rules and ideals and in their application to a specific applicant – begs the question whether the European Court should tolerate ostensibly blanket bans in this area, or whether they should rule them incompatible with Article 3 in that they send a clear message that Parliament's intention is to deny prisoners the right to vote in a discriminatory manner. In *Kalda*, the European Court noted that the (arbitrary) domestic provision had been interpreted and applied in a manner that was consistent with the domestic constitution and the jurisprudence of the European Court, so in this case there was little to concern it. However, it could be argued that domestic legislatures should be encouraged to construct and maintain clear and Convention compliant rules in this area, subject of course, to the margin of appreciation allowed by the Strasbourg Court.

Conclusions

The decision in *Kadla* joins a number of other rulings from the European Court and Grand Chamber on the issue of prisoner enfranchisement and the compatibility of various practices of individual member states of the Council of Europe. These practices range from blanket bans (with individual exceptions) both during and after the sentence, to complete prisoner enfranchisement. The Court has accepted that each state can choose their own laws, adopting any relevant penological, criminal justice and public policy theory within that state's legal and political system. However, despite providing increasing flexibility in terms of the aims and proportionality of such measures, the case law appears to insist on provisions that take into account the individual circumstances of the prisoner, including their crime and length of sentence. In that sense, UK law stands out as incompatible with Article 3 despite the Council of Europe's executive acceptance of its modest reforms of its primary legislation.

Whilst the European Court's approval in *Kadla* of the judicial oversight of what is on the face of it a blanket ban was acceptable given the national court's approach to the case, it is uncertain whether such clear and arbitrary provisions, subject to constitutional and human rights interpretation by the national judiciary, should be encouraged by the European Court. Such an approach leaves prisoners in certain states vulnerable, forcing them to take expensive and lengthy proceedings in Strasbourg. Further, the dependence on judicial supervision does not sit well with the Grand Chamber's ruling in *Scopolla,* that judicial involvement in the decision to disenfranchise a prisoner is not a condition of the national law's compatibility with Article 3.

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[48] [2012] UKSC 63.

[49] See Elizabeth Adams, 'Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases' [2021] *Public Law* 311

[50] See Steve Foster and Steve Foster, 'Reforming the Human Rights Act 1998 and the Bill of Rights Bill 2022' (2022) 27 (1) *Coventry Law Journal* 1.

These concerns could best be dealt with by another ruling from the Grand Chamber in this case, as well as by a more robust approach to enforceability of Court judgments by the Council of Europe,