

## Referendum (Scotland) Bill Committee

### Possible vires issue in relation to section 3 of the Scottish Independence Referendum (Franchise) Bill

Stephen Tierney, Adviser to the Committee

#### Competence Issue: Background

There is a possible vires issue in relation to draft Section 3 of the Scottish Independence Referendum (Franchise) Bill ('the Franchise Bill') which the Committee may wish to consider.

Section 3 provides: 'A convicted person is legally incapable of voting in an independence referendum for the period during which the person is detained in a penal institution in pursuance of the sentence imposed on the person.'

The Committee may seek to satisfy itself that this provision is within the competence of the Parliament in terms of s29(2)(d) of the Scotland Act 1998 (compatibility with ECHR rights) in light of a decision by European Court of Human Rights in 2005 that the United Kingdom's general ban on prisoner voting was incompatible with the Convention.

**Summary:** I think it more likely than not that the draft section 3 is within vires but there are possible question-marks.

#### Law on Prisoners' Voting Rights

In light of the 2005 case *Hirst (No.2)*<sup>1</sup> the UK Government has asked a Joint Committee of the UK Parliament to consider the implications of this decision and may recommend a change to the law.<sup>2</sup>

However, the Scottish Government in its Policy Memorandum published with the Franchise Bill makes clear 'convicted prisoners will not be able to vote in the referendum irrespective of whether UK electoral law is amended to extend the vote to prisoners for parliamentary elections before the referendum in 2014.'<sup>3</sup>

There is a strong argument that section 3 of the Bill can be distinguished from the situation in *Hirst (No.2)*. The relevant provision of the ECHR is Article 3 of Protocol 1 ("A3P1") which states: "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*." (emphasis added).

In light of the specific reference to 'choice of the legislature' the European Court has found that A3P1 does not apply to referendums, leaving states free to determine the limit of the franchise for referendums.<sup>4</sup> It has distinguished referendums from

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<sup>1</sup> *Hirst v the United Kingdom (No 2)* [2005] ECHR 681.

<sup>2</sup> <http://www.justice.gov.uk/downloads/legislation/bills-acts/voting-eligibility-prisoners/voting-eligibility-prisoners-command-paper.pdf>

<sup>3</sup> Franchise Bill Policy Memorandum, para 13.

<sup>4</sup> See reference to this distinction in Franchise Bill Policy Memorandum, para 41.

parliamentary elections in these cases: *Bader v Austria* 1996<sup>5</sup>; *Niedzwiedz v Poland* 2008<sup>6</sup>. In the latter, the Court stated: ‘... the obligations imposed on the Contracting States by Article 3 of Protocol 1 are limited to “the choice of the legislature” and do not apply to the election of a Head of State or to referendums.’<sup>7</sup>

It is also the case that a challenge to UK law in relation to the 1975 referendum on continued membership of the EEC (*X v United Kingdom*, Application No.7096/75) was unsuccessful, with the European Commission on Human Rights ruling the application inadmissible precisely because it was concerned with a referendum and not an election.

It can, furthermore, be noted that the Court in *Hirst (No.2)* provided the UK with a wide margin of appreciation in terms of how the right to vote issue should be resolved (Grand Chamber para. 61), provided the restriction is not ‘general, automatic and indiscriminate’ (para 82).

Can section 3 be seen as a ‘general, automatic and indiscriminate restriction’? Possibly. But even if it is viewed in this way there is still a strong argument that it would be saved by the precise nature of the obligation in A3P1 – i.e. its focus on choice of the legislature and not referendums.

## Caveats

While the distinction between a referendum and an election to the legislature does seem to be a convincing defence of the vires of section 3 there are a number of reasons why the outcome of any legal challenge may be unpredictable:

1. Domestic courts *take account* of ECHR case law, they do not necessarily follow it (Human Rights Act 1998 s2). It would be open a domestic court to read the implications of A3P1 differently than did the European Court of Human Rights. They are generally not inclined to do so (the so-called ‘Ullah Principle’) but there have been strong criticisms of the UK position by legal commentators: <http://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/>  
<http://ukconstitutionallaw.org/2012/06/03/colm-ocinneide-prisoners-votes-again-and-the-constitutional-illegitimacy-of-the-echr/>  
<http://ukconstitutionallaw.org/2013/03/13/paul-reid-independence-the-referendum-the-franchise-and-prisoners-stormy-waters-ahead/>
2. One of the reasons that the application in *X v United Kingdom* was deemed inadmissible was that the referendum on the EEC was deemed to be of a ‘purely consultative character’. Will the independence referendum be seen to be purely consultative and if not could that lead to a different reading of A3P1? I would suggest that in light of *Bader v Austria* there would not be a different reading of A3P1, but the position is perhaps open to question.
3. It might be argued that the law has moved on and the European Court is becoming more protective of the right to vote; could this lead to a more ‘purposive’ interpretation of A3P1 which might catch referendums within its remit? (This argument was advanced by Paul Reid, Advocate in a blog of 12

<sup>5</sup> *Bader v Austria* (1996) 22 EHRR CD213, see No. 7096/75, Dec. 3.10.75, D.R. 3 p.165.

<sup>6</sup> (2008) 47 E.H.R.R. SE2, Application no. 1345/06, 11 March 2008.

<sup>7</sup> In this case the Court also referred to a number of other cases in which the same limitation applied.

March, citing the recent case of Scoppola 2013<sup>8</sup> <http://ukconstitutionallaw.org/2013/03/13/paul-reid-independence-the-referendum-the-franchise-and-prisoners-stormy-waters-ahead/>).

4. It has been argued that it is logically incongruous that the ECHR guarantees to prisoners a right to vote in parliamentary elections but not on such an important issue as independent statehood, and on this basis that a court might read such a right into A3P1. (See for example <http://ukhumanrightsblog.com/2013/03/12/no-prisoner-votes-in-scottish-independence-referendum-andrew-tickell/>  
See also <http://ukconstitutionallaw.org/2013/03/13/paul-reid-independence-the-referendum-the-franchise-and-prisoners-stormy-waters-ahead/>)
5. The European Union Charter of Fundamental Rights Articles 39 and 40 provide for the right of every citizen to vote respectively in elections to the European Parliament and in municipal elections. In other words, this too does not seem to cover referendums. However, if we also take into account the International Covenant on Civil and Political Rights to which the United Kingdom is a party, Article 25 provides a broader right: 'To take part in the conduct of public affairs'. The Human Rights Committee which interprets the Covenant has interpreted this to include the right to vote in referendums: 'Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum' (General Comment 25, para 6); and any restrictions on this right should be 'objective and reasonable' (General Comment 25, para 4).<sup>9</sup> The Scottish Parliament is not bound to act compatibly with this Covenant but its terms could be considered by a court in interpreting A3P1 of the ECHR.

## Conclusion

Challenges could be brought either by way of a SA section 33 reference by a law officer or post-enactment by way of a judicial review application. I am not persuaded that either challenge would be successful but the caveats I mention should be considered.

18 March 2013

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<sup>8</sup> Scoppola v Italy (2013) 56 EHRR 19.

<sup>9</sup> General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25):12/07/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).

## Appendix

### Franchise Bill Explanatory Notes

#### *Offenders in prison etc. not to be entitled to vote*

9. Section 3 provides that convicted prisoners who are detained in a penal institution are debarred from voting in an independence referendum. Prisoners held on remand who have not been convicted will be able to vote, although they will need to do so using a postal or proxy vote. This is identical to provision made, in relation to parliamentary and local government elections, by section 3 of the 1983 Act. It has been included in the Bill because the UK Parliament is considering proposals to alter section 3 of the 1983 Act and the Scottish Government would not wish any alteration to apply for the purposes of an independence referendum.

### Franchise Bill Policy Memorandum

13. Convicted prisoners detained in a penal institution will not be eligible to vote in the referendum. Prisoners held on remand who have not been convicted will be able to vote, although they will need to do so using a postal or proxy vote. While the franchise at the referendum is a matter for the Scottish Parliament to determine, the franchise at elections in Scotland (as throughout the UK) is a matter for the UK Parliament. The UK Government announced in November 2012 that it would ask a committee of parliamentarians to consider a range of options set out by the Government in response to successive rulings by the European Court of Human Rights that the UK's current blanket ban on prisoners voting in elections to state legislatures breaches the European Convention on Human Rights. The committee will report later in 2013. The ECHR ruling (and human rights case law) does not relate to referendums, and convicted prisoners will not be able to vote in the referendum irrespective of whether UK electoral law is amended to extend the vote to prisoners for parliamentary elections before the referendum in 2014.

40. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). The publicly available register of local government electors is used, in line with election law and subject to the necessary safeguards to prevent impersonation and ensure a fair referendum. The Bill also applies existing criminal offences for the purposes of the RYV, where necessary, none of which are incompatible with Convention rights.

41. The Bill prohibits convicted prisoners who are detained in pursuance of their sentence from voting in the referendum. As discussed in paragraph 13, the Scottish Government is satisfied that this approach is compatible with the ECHR. Article 3 of Protocol 1 to that Convention, the right to free elections, does not create rights that would apply to an independence referendum.'