

## Voting Rights

In **R (Chester) v SSJ [2010] EWHC Civ 1439 [judgment](#)** the Court of Appeal dismissed an appeal against the refusal of the lower court to require parliament to interpret the voting legislation in a manner compatible with the European Convention. The Court conceded that whilst such an advisory function could be exercised in proper circumstances, the nature of the particular subject matter was so sensitive and controversial that it remained a political responsibility better dealt with by the legislature.

However in **Greens & MT v United Kingdom [2010] ECHR 1826 (23 November 2010) [judgment](#)** the Strasbourg Court awarded 5000 Euro to the applicant prisoners to compensate them for being disenfranchised at the local and general elections, the court commenting in fairly strong terms that [97]:

*“It is a cause for regret and concern that in the five years which have passed since the judgment of the Grand Chamber in Hirst, no amending measures have been brought forward by the Government, a matter to which the Court returns below (see paragraphs 103-122).....In light of the lengthy delay which has already occurred and the results of the delay in terms of follow-up applications, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees. The question therefore arises whether it is now appropriate for the Court to provide the respondent Government with some guidance as to what is required for the proper execution of the present judgment.”*

Accordingly the court created a more cunning method of ensuring the enforcement of its judgment in *Hirst*: awarding damages to the applicants in the test case and

imposing a six-month deadline for the government to bring forward amending legislation. The court proposed to strike out any remaining claims for compensation in the event that the May 2011 deadline is met; if it is not then the claims will be restored, which likely explains the current haste of the government to act: see last weeks' article in The Guardian (5.1.11) [“28,000 Prisoners will have the right to vote”](#)

## Oral Hearings

In **R (Osborn & Booth\*) v The Parole Board [2010] EWCA Civ 1409 [judgment](#)** the Court of Appeal considered two issues:

1. What criteria should the Parole Board apply in deciding whether to direct an oral hearing?
2. What approach should the Court adopt in reviewing a decision by the Parole Board's not to grant an oral hearing?

The Court [34] rejected the Appellants' argument that an oral hearing should be granted on a much wider basis than previously thought (i.e. whenever characteristics pertaining to a prisoner's personality and level of maturity are of importance in deciding his dangerousness.) It also refused to accept the Appellants' argument that the strength of the prisoner's application for release was necessarily irrelevant to the question of whether an oral hearing should be granted: drawing a distinction between cases involving speculation as to the outcome of an oral hearing, and those where an oral hearing would not assist in determining the merits of the case, which are sufficiently obvious on the papers (per Carnwath LJ at [35].)

However the Court nonetheless recognised the need for flexibility in the Parole Board's approach to cases that do not have a realistic prospect of success or which do not turn on a dispute of fact (per Moses LJ at [54 & 55]) and

observed that that the Parole Board's policy may well have to be amended to reflect the need for flexibility, particularly given the apparent contradiction within its policy as to oral hearings only being granted to prisoners with a realistic prospect of success.

The court also considered the correct approach to the judicial review of Parole Board decisions on oral hearings, determining that what fairness requires on is ultimately an appellate function; e.g. see Sedley LJ at [58]:

*"...whether a step or decision was unfair is an appellate question, not a review question, and so is not to be approached by simply asking whether it went outside a broad band of discretion."*

#### Comment

It is likely that the Parole Board's policy in respect of oral hearings will have to be changed in consequence of the judgment. Indeed during argument, the Court expressed concern that the Parole Board was relying on 'practice guidance' that was not available in the public domain: see [24].

The Appellants have applied for permission to appeal to the Supreme Court on the question of the criteria to be adopted by the Parole Board in deciding whether to grant an oral hearing.

\*Mr. Osborn and Mr. Booth were represented by Hugh Southey QC of Tooks Chambers and [Vijay Jagadesham](#) of Garden Court North, instructed by Ranjit Kaur Sandhu of [Harrison Bunday](#) and Jen Regan of [Scott-Moncrief, Harbour and Sinclair](#) .

[For more details on this case see also [4/1/11 Court of Appeal Guidance on Parole Board oral hearings](#)].

## Delay – Damages

In **R (Faulkner) v SSJ [2010] EWCA Civ 1434** [judgment](#) the Court of Appeal awarded damages for a breach of the Appellant's Article 5 (4) rights occasioned by the

delay in his parole review being heard. The delay had been caused by the failure of the Secretary of State to prepare the parole dossier and amounted to a period of some ten months.

The court rejected the surprising conclusion of Blair J in the lower court that the judgment in **James [2009] UKHL 22** required there to be breakdown in the entire process before a breach of Article 5 (4) could be said to have occurred. Of particular interest is that the court was also prepared to find, on the balance of probabilities, that the Appellant would have been released had his hearing been earlier, which necessitated an award of damages.

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11<sup>th</sup> January 2011