



17 December 2014

PRESS SUMMARY

Moohan and another (Appellants) v The Lord Advocate (Respondent) [2014] UKSC 67
On appeal from [2014] CSIH 56

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEALS

Under the Scottish Independence Referendum (Franchise) Act 2013 (“the Franchise Act”), convicted prisoners were not eligible to vote in the Scottish independence referendum on 18 September 2014 [2]. The Appellants were Scottish prisoners who challenged that exclusion through judicial review proceedings [1]. They relied on previous case law establishing that a general and automatic prohibition that bars prisoners from participating in *general* elections will violate article 3 of Protocol No 1 (“A3P1”) of the European Convention on Human Rights (“ECHR”) [3]. A3P1 is entitled “*Right to free elections*” and reads:

“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 appellants’ judicial review applications were refused by Lord Glennie in the Outer House of the Court of Session on 19 December 2013. The First Division of the Inner House of the Court of Session refused a reclaiming motion on 2 July 2014 [4]. The Supreme Court heard and decided the appellants’ appeal on 24 July 2014, in order that the matter be resolved promptly in advance of the then imminent referendum [1]. This judgment sets out the reasons for that decision.

JUDGMENT

The Supreme Court dismisses the appeal by a majority of five to two. It holds that the statutory disenfranchisement of convicted prisoners from voting in the Scottish referendum was lawful.

REASONS FOR THE JUDGMENT

Lord Hodge gives the substantive judgment of the majority (comprising himself, Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed). In their view, the words of A3P1 on their ordinary meaning refer to an obligation to hold periodic elections to a democratically elected legislature. However, the requirement that such elections take place “*at reasonable intervals*” suggests that the drafters did not have referendums in mind [8]. There is unequivocal case law from the European Court of Human Rights (“ECtHR”) to show that the reach of A3P1 is limited to periodic general elections to the legislature [14]. Four cases are cited as examples of referendums not covered by A3P1: the UK’s 1975 referendum on whether to remain in the EEC in *X v United Kingdom* (Application No 7096/75, 3 October 1975); referendums on accession to the EU by Latvia (*Ž v Latvia* (Application No 14755/03, 26 January 2006)) and Poland (*Niedźwiedź v Poland* (2008) 47 EHRR SE6) [10]; and the UK’s nationwide referendum on the alternative vote (*McLean & Cole v United Kingdom* (2013) 57 EHRR SE95) [11]. Although the Supreme Court is not bound to follow ECtHR authority, it will ordinarily do

so when, as here, there is a “*clear and constant line of decisions*” delineating the scope of a Convention right [13]. These cases also show that the political importance of a democratic decision is the not the criterion for its inclusion within A3P1 [17].

The appellants advanced several arguments as to why the Franchise Act was unlawful, which are not accepted. Article 10 of the ECHR, protecting freedom of expression, does not confer any wider right to vote than is provided by A3P1 [19]. The prohibition on prisoners voting does not breach EU law because: (i) the outcome of the referendum would not in itself have been determinative of voters’ EU citizenship [23]; and (ii) EU law does not incorporate any right to vote [24]. The appellants relied on Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”), which protects the right to participate in referendums on self-determination, both as an aid to interpreting A3P1 and as a free-standing international law obligation [26]. Neither point succeeded. Article 25 ICCPR is different in wording and scope from and does not inform the interpretation of A3P1 [28]. The ICCPR is not incorporated into UK domestic law and therefore Article 25 does not affect the legislative competence of the Scottish Parliament [30]. The right to vote is a basic or constitutional right [33] but the common law has not developed so as to recognise a right of universal and equal suffrage from which any derogation must be provided for by law and proportionate [34]. Neither is the right to vote inherent in the rule of law on a separate basis from a statutory franchise [38].

Lord Neuberger gives a concurring judgment focussing on the natural meaning of the words of A3P1 [44-46]. Lady Hale gives a concurring judgment expressing her view that A3P1 does not require the holding of a referendum, even on such an important issue as Scottish independence [54] and hence does not have a bearing on the right to vote in such a referendum [55].

Lord Kerr and Lord Wilson dissent from the majority. Lord Kerr, with whom Lord Wilson agrees [90], considers that the natural meaning of the words of A3P1 not only encompasses elections *to* the legislature but also elections that will determine the form of the legislature [65]. The ECHR is a living instrument and A3P1 may apply to situations which were not in the contemplation of its original drafters [67]. A fundamental purpose of the ECHR is to guarantee an effective political democracy; that purpose would be frustrated by preventing the safeguards applicable to ordinary legislative elections from applying to this most fundamental of votes [68]. The requirement to hold elections at “regular intervals” is secondary to the primary aim of A3P1 which is to ensure that citizens should have a full participative role in the selection of those who will govern them [69]. The ECtHR case law has not, so far, considered a referendum that will determine the type of legislature that a country’s people will have [71]. Lord Wilson adds that the words “*ensure the free expression of the opinion of the people in the choice of the legislature*” are dominant in A3P1 (and particularly apt to describe the Scottish independence referendum) [93] while the words “*at regular intervals*” are subservient [94] and must not be interpreted to contrary effect to the object and purpose of the provision [96]. The ECtHR authorities on referendums are not directly on point [103] and it is open to the Supreme Court to go further than the Strasbourg case law in developing a Convention right [105].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.uk/decided-cases/index.html