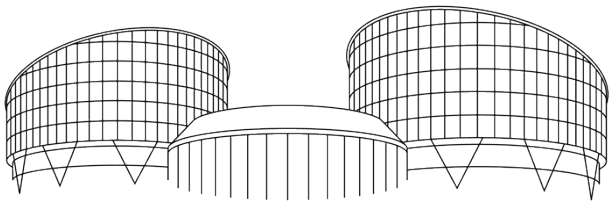

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FRODL v. AUSTRIA

(Application no. 20201/04)

JUDGMENT

STRASBOURG

8 April 2010

FINAL

04/10/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Frodl v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 18 March 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20201/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Helmut Frodl ("the applicant"), on 25 May 2004.

2. The applicant, who had been granted legal aid, was represented by Ms N. Mole, of the AIRE Centre, a non-governmental organisation in London. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that his disenfranchisement because he was serving a term of imprisonment of more than one year constituted a breach of his rights under Article 3 of Protocol No. 1.

4. By a decision of 8 January 2009 the Court declared the application admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1957 and is currently detained in Garsten Prison.

7. On 22 December 1993 the applicant was convicted of murder by the Vienna Regional Criminal Court, sitting as an assize court, and sentenced to life imprisonment.

8. On 18 October 2002 the applicant filed an objection (*Einspruch*) against the local electoral register (*Wählerverzeichnis*) with the Local Electoral Authority (*Gemeindewahlbehörde*), complaining that his name had not been entered in the register although he met the general conditions such as minimum age, citizenship and residence in the community. He alleged that his exclusion from the electoral register under section 22 of the National Assembly Election Act (*Nationalratswahlordnung*) was unlawful as this provision was unconstitutional. He invoked, *inter alia*, Article 3 of Protocol No. 1 to the Convention.

9. The Local Electoral Authority dismissed the applicant's objection on 30 October 2002 and, referring to section 22 of the National Assembly Election Act, refused to enter the applicant's name in the electoral register. On the same day the applicant appealed.

10. On 7 November 2002 the District Electoral Authority (*Bezirkswahlbehörde*) dismissed the appeal. It found that the Local Electoral Authority had acted correctly in refusing to enter the applicant's name in the electoral register and that it was not the task of these authorities to express a position on the alleged unconstitutionality of the law applied.

11. On an unspecified date the applicant requested the Constitutional Court to grant him legal aid to lodge a complaint with that court against the District Electoral Authority's decision.

12. On 3 December 2003 the Constitutional Court refused to grant legal aid as it found that the applicant's complaint lacked any prospect of success. It referred in that connection to a previous decision of 27 November 2003 in which it had found that section 22 of the National Assembly Election Act was not unconstitutional.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions of constitutional and ordinary law

13. Article 26 of the Federal Constitutional Act, as in force at the time of the events and in so far as relevant, reads as follows:

> "(1) The National Council is elected by the nation in accordance with the principles of proportional representation on the basis of an equal, direct, secret and personal vote for men and women who by the date of the election have completed their eighteenth year.
>
> ...

(4) All men and women who on the date of the election are in possession of Austrian nationality and have completed their nineteenth year shall be eligible for election.

(5) Forfeiture of the right to vote and to stand for election can only ensue from a court sentence.

...

(7) The electoral register shall be drawn up by the municipalities as part of their assigned sphere of competence."

14. Section 22 of the National Assembly Election Act reads as follows:

"(1) Anyone who has been convicted by a domestic court of one or more criminal offences committed with intent and sentenced with final effect to a term of imprisonment of more than one year shall forfeit the right to vote. Disenfranchisement shall end six months later. Time shall start to run once the sentence has been enforced and any preventive [detention] measure combined with the deprivation of liberty has been enforced or dropped; if the sentence is enforced with the period of detention on remand being counted towards the sentence, time shall start to run when the judgment becomes final.

(2) If the legal consequences [of a conviction] are suspended under other legal provisions or have lapsed or if all legal consequences or the forfeiture of the right to vote have been pardoned, the convicted person shall not forfeit the right to vote; nor shall he or she forfeit the right to vote if the court has imposed a conditional sentence. If the condition is revoked, disenfranchisement shall take effect from the day that decision becomes operative."

Section 44 of the Criminal Code, entitled "conditional suspension of concurrent sanctions" (*Bedingte Nachsicht bei Zusammentreffen mehrerer Strafen*), as in force until 31 December 1996, read as follows:

"(1) If a term of imprisonment and a fine are imposed concurrently, both sanctions shall be conditionally suspended if the relevant requirements are met. If it can be expected that enforcement of one sanction alone or of part of one sanction will suffice, sections 43 [conditional remission of sentence] and 43a [conditional remission of part of a sentence] may be applied.

(2) Confiscation cannot be the subject of conditional remission. If another subsidiary sanction is imposed it shall be conditionally suspended if the main sanction is also conditionally suspended and independent enforcement of the subsidiary sanction is not necessary. The same shall apply in respect of the legal consequences of a conviction."

By the Criminal Law Amendment Act 1996, Federal Law Gazette no. 1996/762 (*Strafrechtsänderungsgesetz 1996, BGBl. Nr. 1996/762*), paragraph 2 of Section 44 was replaced by the following wording:

"(2) Subsidiary sanctions and the legal consequences of a conviction may be the subject of conditional remission of a sentence independently from the main sanction."

B. The case-law of the Constitutional Court

15. In its decision of 27 November 2003 (B669/02 Slgnr. 17058) the Constitutional Court examined the constitutionality of the conditions of the disenfranchisement under section 22 of the National Assembly Election Act of a person convicted of aggravated fraud and serving a six-year prison term.

The Constitutional Court held in particular as follows:

> "The enactment of legislation providing for disenfranchisement under section 22(1) of the [National Assembly Election Act] on the basis of a final sentence (imposed by a domestic court for one or more offences committed with intent) carrying a term of imprisonment of more than one year lies, in the Constitutional Court's view, within the margin of appreciation afforded to the legislature in matters of election of the legislature. The fact that as a consequence of this rule citizens who are sentenced to just over a year's imprisonment for an offence committed with intent are stripped of their right to vote, whereas citizens who are sentenced to just under one year's imprisonment (for an intentionally committed offence) are not, does not make the legal provision in question unconstitutional (cf. VfSlg. 13.822/1994 mwH). Nor do the factual submissions advanced by the complainant in this connection (for instance with reference to the Youth Courts Act) alter this conclusion in any way."

In its decision of 27 September 2007 (B1842/06) the Constitutional Court again examined the constitutionality of section 22 of the National Assembly Election Act. The complainant had been convicted of aggravated robbery and kidnapping and sentenced to nineteen and twelve years' imprisonment respectively. In its decision, after referring at length to the judgment of the European Court of Human Rights in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), it held that in view of that judgment it maintained the findings adopted in its decision of 27 November 2003. It stated in particular as follows:

> "In respect of the present complaint it is established that the legal position in the United Kingdom at issue in the judgment in the *Hirst* case differs decisively from the one in Austria that is relevant here: section 22 of the National Assembly Election Act does not provide for blanket forfeiture of the right to vote in respect of all convicted prisoners, irrespective of the type or seriousness of the offence they have committed or their individual circumstances. The precondition for imposing forfeiture of the right to vote is a final sentence for one or more intentionally committed offences carrying a prison sentence of more than one year; sentences to a fine, sentences to less than one year's imprisonment and conditional prison sentences do not result in forfeiture of the right to vote. Moreover, section 44(2) allows the judge to conditionally suspend the legal consequences of the conviction, including therefore disenfranchisement; in this respect the Austrian legal system also makes legal provision for consideration to be given to the individual circumstances of the person concerned."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

16. The applicant complained that his disenfranchisement on the ground of his criminal conviction violated his rights under Article 3 of Protocol No. 1, which reads as follows:

> "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."

A. Arguments of the parties

1. The applicant

17. The applicant submitted that a limitation on the right to vote had to be supported by solid reasons and to be proportionate. In his view, the Government had not put forward convincing arguments defending the necessity of the restriction imposed on him and, in particular, had failed to point to any legitimate aim pursued by disenfranchisement, which in itself was a breach of Article 3 of Protocol No. 1. Instead, they had merely relied on the gravity of the crime of which the applicant had been convicted in order to justify his disenfranchisement and pointed to differences between the Austrian provision and the one at issue in the *Hirst* case (cited above).

18. Basing the grounds for denial of voting rights solely on the severity of the sentence imposed was too indiscriminate, as it did not take account of the specific circumstances of each case. In particular, no apparent link between the disenfranchisement and the conduct and personal circumstances of the applicant had been shown, such as whether there was a close connection between the offence committed by the applicant and the functioning of democratic institutions. However, as the Court had found in the case of *Hirst* (cited above, § 70), the principle of proportionality was not respected in the absence of such a "discernible and sufficient link".

19. In so far as the Government had relied on section 44(2) of the Criminal Code, which permitted the sentencing judge to suspend the legal consequences of the conviction, the applicant argued that this provision had only come into force in 1997 and the Government had failed to provide any evidence to show that such a possibility had been open to a person in his position in 1994.

2. The Government

20. The Government submitted that the Constitutional Court had examined the question whether disenfranchisement under section 22 of the National Assembly Election Act was compatible with Article 3 of Protocol No. 1 and, in its decision of 27 November 2003, had come to the conclusion that the relevant provision was compatible with the Federal Constitution, including Article 3 of Protocol No. 1, which, under Austrian law, formed part of the constitutional order. The Constitutional Court had concluded that the provision at issue was within the margin of appreciation afforded to the domestic legislature in matters of election of the legislature. This approach had been confirmed by the Court in the case of *Hirst*. In that case the Court had concluded that a provision imposing a blanket restriction on all convicted prisoners regarding the right to vote, which applied automatically to prisoners irrespective of the length of their sentence and irrespective of the nature or severity of the offence and their individual circumstances, was in breach of Article 3 of Protocol No. 1 (*Hirst*, cited above, § 82).

21. The legal situation at issue in the *Hirst* case, however, differed in important respects from the legal situation in Austria as under Austrian law there was no indiscriminate disenfranchisement of all detainees. The precondition for any restriction of the right to vote was a final conviction for one or several intentionally committed criminal acts carrying a prison sentence of more than one year; the imposition of fines or of prison sentences of less than one year did not lead to disenfranchisement. Nor was there disenfranchisement in the event of a conditional conviction. Moreover, section 44(2) of the Criminal Code gave the judge an opportunity to conditionally suspend the legal consequences of the conviction, such as disenfranchisement, thus allowing the individual circumstances and the specific situation of the person concerned to be taken into account. Accordingly, the Austrian legal situation was in full compliance with the criteria established by the Court for disenfranchisement.

B. The Court's assessment

1. General principles

22. The Court observes that, while this might not be obvious from its wording, Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective democracy and is accordingly of prime importance in the Convention system. Democracy constitutes a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see,

most recently and among many other authorities, *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 105, ECHR 2008-...).

23. Free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113, and *Lingens v. Austria*, 8 July 1986, §§ 41 and 42, Series A no. 103). The rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a wide margin of appreciation in this sphere since there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (see *Lykourezos v. Greece*, no. 33554/03, § 51, ECHR 2006-VIII).

24. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very 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 (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they 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 legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V).

25. As regards the status of the right to vote of convicted prisoners who are detained, the Court reiterates that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable, therefore, that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion (see *Hirst*, cited above, § 70).

26. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1,

which enshrines the individual's capacity to influence the composition of the legislature, does not therefore exclude the possibility of restrictions on electoral rights being imposed on an individual who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations (see, for example, *X v. the Netherlands*, cited above, and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports 18, where the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

2. Application in the present case

27. Turning to the application in the present case, the Court observes that the applicant, who had been convicted of murder and sentenced to life imprisonment, was disenfranchised. The Court will therefore determine whether the measure in question pursued a legitimate aim in a proportionate manner, having regard to the principles identified above.

28. The Court observes at the outset that the present case has certain similarities with the case of *Hirst* (cited above). In that case the Court found a breach of Article 3 of Protocol No. 1 on account of Mr Hirst's disenfranchisement as a prisoner following his conviction for manslaughter. While the Court accepted in principle that the member States had a wide margin of appreciation and left it to them to decide which restrictions on the right of prisoners to vote could legitimately be imposed, it nevertheless set out several criteria which had to be respected by member States in imposing such restrictions (see *Hirst*, cited above, §§ 61 and 82). Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law but by the decision of a judge following judicial proceedings (ibid., §§ 77-78). In finding a breach of Article 3 of Protocol No. 1, the Court put much emphasis on the fact that the disenfranchisement operating under United Kingdom law was a “blunt instrument”, imposing a blanket restriction on all convicted prisoners in prison and doing so in a way which was indiscriminate, applying to all prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances (ibid., § 82).

As regards the existence of a legitimate aim, the applicant emphasised that the Government did not explicitly list specific aims pursued by the disenfranchisement of prisoners in Austrian law and argued that for that reason alone the measure at issue must be regarded as not being in accordance with Article 3 of Protocol No. 1.

29. The Court points out that Article 3 of Protocol No. 1 does not, like other provisions of the Convention, specify or limit the aims which a restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see, for example, *Podkolzina v. Latvia*, no. 46726/99, § 34, ECHR 2002-II).

30. It is true that the Government did not structure their submissions by explicitly setting out first the legitimate aims pursued by the measure at issue and then demonstrating the proportionality of the manner in which those aims were pursued. However, given the less formal structure of the necessity test under Article 3 of Protocol No. 1, the Court nevertheless considers that it transpires from the arguments relied on by the Government and the specific references to those relied on in the *Hirst* case (cited above), that they consider that the provisions on disenfranchisement of prisoners under Austrian law pursued the legitimate aims of preventing crime by punishing the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law. Having regard to its findings in *Hirst*, the Court finds no reason to regard these aims as untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1.

31. As regards the proportionality of the measures, the Government argued that the Austrian provisions on disenfranchisement were more narrowly defined than the rules applicable in the *Hirst* case and, moreover, that section 44(2) of the Criminal Code granted the sentencing judge far-reaching discretion in deciding whether or not disenfranchisement should be imposed as an additional sanction on the accused.

32. As to the latter argument, based on section 44 of the Criminal Code, the Court observes that this provision entered into force only on 1 March 1997 and was therefore not applicable in the applicant's case. The Court therefore sees no need to examine whether or not the kind of discretion thus afforded to a sentencing judge would be a sufficiently discerning means of allowing a differentiated application of the rules on disenfranchisement, as is required by Article 3 of Protocol No. 1.

33. As regards the conditions for disenfranchisement set out in section 22 of the National Assembly Election Act, the Court finds that the provision in question is more detailed than the ones applicable in *Hirst* (cited above). It does not apply automatically to all prisoners irrespective of the length of their sentence and irrespective of the nature or gravity of their offence, but restricts disenfranchisement to a more narrowly defined group

of persons since it applies only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.

34. Nevertheless, the Court agrees with the applicant that section 22 of the National Assembly Election Act does not meet all the criteria established in *Hirst* (cited above, § 82). Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions (ibid., § 82).

35. The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned (ibid., § 71). However, no such link exists under the provisions of law which led to the applicant's disenfranchisement.

36. The Court therefore concludes that there has been a breach of Article 3 of Protocol No. 1 in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

38. Since the applicant does not claim any damage the Court cannot make an award under this head.

B. Costs and expenses

39. The applicant sought reimbursement of the costs and expenses incurred both in the domestic proceedings and in the proceedings before the Court, in the amount of 12,713.06 euros (EUR).

40. In the Government's view the amount claimed was excessive and not sufficiently specified. As regards the domestic proceedings, they noted in

particular that the applicant merely claimed a lump-sum figure of EUR 5,000 without giving any details.

41. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum.

42. As regards the claim concerning the domestic proceedings the applicant has neither specified which lawyer had assisted him nor submitted any breakdown of his costs. Moreover, representation by a lawyer in proceedings before the District Electoral Authority is not mandatory and in the proceedings before the Constitutional Court the applicant had merely applied, unsuccessfully, for legal aid. Therefore the Court cannot make any award under this head.

43. As regards the proceedings before the Court, the applicant was assisted by a senior lawyer and three junior lawyers; moreover, a substantial amount of EUR 1,880 was claimed for visiting the applicant in prison and for communication with him. From the material in the Court's possession the necessity of these expenses is not clear. Having regard to the fact that the applicant has received legal aid and to the awards made in similar cases (see *Hirst*, cited above, § 98) the Court grants EUR 5,000, plus any tax that may be chargeable to the applicant on this amount.

C. Default interest

44. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 3 of Protocol no. 1 to the Convention;

2. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following declaration of Judge Kovler is annexed to this judgment.

C.L.R.
S.N.

DECLARATION BY JUDGE KOVLER

I voted against finding a violation of Article 3 of Protocol No. 1 to the Convention in the present case for the reasons expressed in the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in the case of *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX).