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

GRAND CHAMBER

CASE OF ROCHE v. THE UNITED KINGDOM

(Application no. 32555/96)

JUDGMENT

STRASBOURG

19 October 2005

In the case of Roche v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr I. CABRAL BARRETO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr S. PAVLOVSCHI, *judges*,

and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 20 October 2004 and 7 September 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 32555/96) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Thomas Michael Roche ("the applicant"), on 31 January 1996.

2. The applicant, who had been granted legal aid, was represented by Mr J. Welch, a lawyer practising with Liberty, a civil liberties non-governmental organisation based in London. The United Kingdom Government ("the Government") were represented by their successive Agents, Mr C. Whomersley and Mr J. Grainger, both of the Foreign and Commonwealth Office.

3. The applicant alleged that he is suffering from the effects of his exposure to toxic chemicals during tests carried out on him at Porton Down barracks in 1962 and 1963. He mainly complained, under Articles 8 and 10

of the Convention, that he had had inadequate access to information about the tests and, under Article 6 § 1, that he had not had adequate access to a court as a result of the certificate issued by the Secretary of State under section 10 of the Crown Proceedings Act 1947. He also relied on Article 1 of Protocol No. 1 together with Articles 13 and 14 of the Convention in this latter respect.

4. In October 1997 the Commission communicated the application. It was adjourned in September 1998 pending domestic proceedings.

5. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

6. The application was initially allocated to the Third Section. Having decided in January 2001 to resume its examination of the case, on 23 May 2002 a Chamber of that Section (composed of Mr G. Ress, President, Mr I. Cabral Barreto, Sir Nicolas Bratza, Mr P. Kūris, Mr B. Zupančič, Mr J. Hedigan and Mr K. Traja, judges, and Mr V. Berger, Section Registrar) declared admissible the complaints described in paragraph 3 above. On 25 March 2004 the Chamber (composed as before but without Mr Ress and with Mr L. Caflisch) relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72 of the Rules of Court).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. (Mr J.-P. Costa later withdrew and was replaced by the first substitute judge, Mr R. Maruste, in accordance with Rule 24 § 3.)

8. The applicant and the Government each filed a memorial on the merits. The parties replied to each other's memorials at the oral hearing which took place in public in the Human Rights Building, Strasbourg, on 20 October 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. GRAINGER, *Agent*,
Mr J. EADIE, *Counsel*,
Mr S. CAVE,
Mr G. REGAN, *Advisers*;

(b) *for the applicant*

Mr R. GORDON QC,
Ms J. STRATFORD,
Mr F. PILBROW, *Counsel*,
Mr J. WELCH,
Ms J. DRANE, *Solicitors*,

Ms V. WAKEFIELD, *Adviser*.

The Court heard addresses by Mr Gordon and Mr Eadie as well as their answers to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1938 and currently lives in Lancashire.

10. In 1953 he joined the British army at 15 years of age. He served with the Royal Engineers between February 1954 and April 1968, when he was discharged for reasons unrelated to the present application.

In 1981 he was diagnosed as suffering from hypertension and late onset bronchial asthma and in 1989 he was found to have high blood pressure and chronic obstructive airways disease (bronchitis – COAD). He has not worked since 1992 or thereabouts and is registered as an invalid.

A. The Porton Down tests

11. The Chemical and Biological Defence Establishment at Porton Down ("Porton Down") was established during the First World War in order to conduct research into chemical weapons with a view to advancing the protection of the United Kingdom's armed forces against such weapons. The research included tests of gases on humans as well as on animals. Servicemen who participated in the tests were paid extra wages.

12. The applicant participated in such tests at Porton Down. While there was some debate as to whether he attended in 1962, it was not disputed that he did so in July 1963. His service medical records contained no record of any tests at Porton Down.

1. The tests in 1962 at Porton Down

13. The applicant alleged as follows. In the spring of 1962 he was invited to Porton Down; he was medically examined on arrival; he was asked on three or four occasions to enter a sealed and unventilated room, where he was seated and strapped to a chair; over a period of about six hours, drops of mustard gas were applied to patches of tissue which were then taped to his skin; he was told that, if he was unlucky, he might suffer temporary pain or discomfort but otherwise he was not given any, or any proper, warning about the possible consequences of the tests for his health; once the tests were finished he returned to his unit; there was no further

medical examination after he left Porton Down. He relied on a memorandum and file note of 13 November 1989 (see paragraph 24 below) and on the conclusions in this respect of 14 January 2004 of the Pensions Appeal Tribunal ("the PAT" – see paragraph 63 below) to substantiate his participation in tests in 1962.

14. While the Government did not deny that participation, they pointed to a number of matters that appeared to militate against such a conclusion: the summary and alphabetical record books did not refer to his attendance in 1962 but only to his attendance in 1963; there was no documentary evidence at all of the 1962 tests whereas certain records existed of his 1963 tests; and if the PAT had accepted his participation in the 1962 tests, this was based solely on his recollections.

2. The tests in 1963 at Porton Down

15. The nerve gas (known as "G-agent" or "GF") test is described in the relevant records as "exposure to single-breath GF". The applicant alleged that he was told before the test that the experiment "could not harm a mouse"; that he was placed in an air-tight, glass-partitioned cubicle containing a face mask, the mask was placed over his mouth and nose, the fitting was checked and the chamber was sealed; that a loudspeaker informed him that the test was about to begin and to inhale normally; that he felt an immediate tightening of the chest muscles and lungs which wore off after the end of the test; and that blood samples were taken at regular intervals during the following twenty-four hours. The Government submitted that diluted GF vapours were put into a gas chamber and, as the name of the test suggested, volunteers took a single breath of air with calculated doses of GF gas through a tube connected to that chamber, they held their breath for two seconds and then exhaled.

16. The other test involved mustard gas and was described in the records as "H sensitivity and penetration". According to the applicant, it followed the same format as that in 1962.

The Government added the following detail: the mustard gas test was designed to test the performance of protective clothing and was carried out in two parts. The first was a sensitivity test to determine an individual's sensitivity to mustard gas and it involved the placement of a dilute solution of the gas on the participant's upper arm. If after twenty-four hours the test subject had a small red mark, he or she was deemed too sensitive and did not participate any further in the tests. On the other hand, if the participant was not demonstrably sensitive, the second part consisted of putting a drop of dilute mustard gas solution on three samples of protective clothing left in place on the participant's body and the skin under the clothing was examined after six and then twenty-four hours. The participants were monitored before and after the tests. The rooms were properly ventilated,

the dosages were small and safe and the tests were carefully planned and controlled.

B. The applicant's search for relevant records

17. From 1981 the applicant was medically treated for breathlessness and high blood pressure and by 1987 these problems had significantly worsened. He began to search for his Porton Down records through what he described as "medical" and "political" channels.

1. The "medical" route

18. In response to his doctor's enquiry, in late 1987 the Ministry of Defence (MOD) supplied his doctor with his service medical records on a "medical in confidence" basis. Those records did not refer to the applicant's Porton Down tests.

19. In a letter of 14 November 1989, Porton Down responded to another enquiry from his doctor. The letter was sent on a "medical in confidence" basis and confirmed the applicant's participation in a GF gas test in July 1963. That GF test had been preceded and succeeded by a full medical examination which revealed no abnormality. The letter also referred (inaccurately, as it later emerged – see paragraph 36 below) to seven blood tests conducted after the GF test and to their results and confirmed that "peak flow meter measurements" had also been taken from the applicant and that "breath-holding tests", a clothing penetration study (apparently, although not expressly noted, the mustard gas tests) and a battery of personality tests were performed. The results of these tests were not included in the letter and no other records supporting the statements made in the letter were enclosed. His doctor's stamp on it indicates that he decided to tell the applicant that all was normal. The applicant persuaded his doctor to show him the letter in 1994.

20. By a letter dated 14 December 1989, a consultant informed the applicant's doctor that he doubted that the applicant's bronchial asthma was caused by his exposure to nerve gas. Further tests were to be carried out.

21. A letter from Dr H. (a professor of environmental toxicology at the University of Leeds and later the court-appointed expert witness in the PAT proceedings – see paragraphs 42-68 below) dated 5 December 1994 to the applicant stated that full and detailed records were required to judge the long-term effects of his participation in the tests and that a long-term epidemiological study would have been useful either to establish that there were long-term effects or to reassure test participants that there were none. His letter of 10 July 1996 repeated his view as to the need for such a study.

22. An internal Porton Down memorandum of 24 November 1997 noted that certain blood-test figures given in the letter to the applicant's doctor of 14 November 1989 were inaccurate. In addition, it was considered that the

applicant's description of the tests was roughly consistent with the procedures in the 1960s. While there were no obvious gaps in the 1960s records, it could not be said that the records were complete: the applicant could have attended in 1962 and his name could have been omitted or incorrectly recorded due to a clerical error.

2. The "political" route

23. *Inter alia*, the applicant carried out a sit-in hunger strike at Porton Down, held a press conference in the House of Commons and requested members of parliament to put parliamentary questions.

24. Between 11 and 14 November 1989, the applicant went on hunger strike outside Porton Down. On 13 November 1989 he spoke with the Secretary of Porton Down. The latter noted in a memorandum of that date that the applicant's description of the tests was strong enough to indicate that he had been there and he recommended a further search of the records. He also recorded in a file note (of the same date) that the applicant's description of his visits to Porton Down in 1962 and 1963 left him with a level of confidence that he had been a volunteer there on both occasions. This led to the letter of 14 November 1989 to the applicant's doctor (see paragraph 19 above).

25. In January 1994 the applicant formed the Porton Down Volunteers Association with the object of seeking recognition and redress for test participants. The association has over 300 members to date.

26. By a letter dated 26 January 1994, the Chief Executive of Porton Down answered, at the request of the Secretary of State for Defence, a series of questions raised by a member of parliament about chemical and biological warfare testing. The Chief Executive's letter described the test procedure, stating that participants were given a medical examination before and after the tests and recalled for check-ups "from time to time". It was pointed out that there was no evidence that the health of participants had deteriorated because of their test participation. On 22 June 1994 the Chief Executive confirmed the well-established policy of the MOD of releasing service medical records to a veteran's doctor on a "medical in confidence" basis. The Chief Executive's letter of 7 March 1995 (in response to a parliamentary question to the Minister of State for Defence) noted that the tests did not include any plan for long-term systematic monitoring of participants: any monitoring thereafter was purely *ad hoc* and sporadic.

27. On 2 February 1994 the applicant wrote to the MOD requesting copies of his medical records and of reports on the relevant tests. The reply of 9 March 1994 from Porton Down recalled the MOD policy of release on a "medical in confidence" basis. The applicant's doctor had been provided with information in 1989 on this basis. It was "entirely up to your own doctor how much or how little of this information he conveys to you".

Further queries from the applicant led to a similar response from Porton Down by letter dated 20 April 1994.

28. On 12 December 1994 Lord Henley stated in the House of Lords that the MOD would continue to send veterans to their doctors and would release medical records as appropriate. Information was provided to doctors to allow proper diagnosis and "would be released, if necessary". He repeated that there was no evidence over the previous forty years that test participants had suffered harm to their health.

29. In response to a series of parliamentary questions put to the Secretary of State for Defence as to the necessity for a public inquiry, the government's representative replied on 28 February 1995 that there was no evidence that any test participants had suffered any long-term damage to their health in the past four decades. Similar responses as to the lack of evidence of harm to the test participants were given by the Minister of State for Defence in Parliament on 4 April and 2 May 1995 in response to questions concerning the instigation of a study into the long-term health effects of exposure to chemical and biological substances.

30. On 25 April 1995 the applicant and the Labour Party defence spokesman took part in a press conference on the question of Porton Down volunteers and their requirements.

31. Following a meeting between them, on 2 December 1997 the Minister of State for Defence wrote to the applicant. He referred to the concerns of the applicant (and other test participants) that information about the tests was being withheld. He confirmed that this was not the case but rather reflected "less than thorough" record-keeping than would be currently expected. Henceforth all volunteers would be able to obtain access to all the information held on them at Porton Down and steps would be taken to declassify reports so as to make that information more accessible.

Certain copies of test documents were enclosed: (a) the alphabetical record book which recorded the applicant's attendance at Porton Down between 13 and 19 July 1963; (b) the summary record book which referred to the two tests carried out on the applicant involving GF and mustard gas and listed the monitoring procedures that were to be carried out on the applicant (chest X-rays, peak flow meter tests, "x 3 x alcohol" quiz, breath-holding tests and blood tests); and (c) a report entitled "Effects of Inhaled GF on Man" which described the single breath GF test and contained an analysis of the results of the tests carried out on fifty-six participants, believed to include the applicant's test. It was indicated that these documents were available to any test participant who requested them.

This was the first material obtained by the applicant about his participation in the tests.

The letter went on to note that much GF-related research work had already been published in open literature or was in the Public Record Office. The review of files to be disclosed would continue and the applicant

was given a list of all relevant research papers already published between 1957 and 1987. There was no evidence to date to suggest that any volunteer had suffered long-term adverse effects. A full independent and long-term study of the health impacts of test participation was not, however, considered feasible or practical so none had been or would be carried out.

32. In a letter dated 31 August 1999 to the PAT, Porton Down indicated that it was well acquainted with the applicant, having received numerous communications from him and from members of parliament.

33. By a letter dated 3 May 2001, Porton Down informed the applicant that it had discovered some old laboratory notebooks that included information about the 1963 tests: one book included some previously unavailable details of the mustard patch tests. A pre-exposure chest X-ray and the associated report card were also now available. The applicant was to contact Porton Down if he wanted to see this material or obtain copies.

C. Records submitted by the Government in the present application

34. As well as those disclosed with the Minister of State's letter of 2 December 1997, the following documents were also submitted to the Court.

1. With the Government's observations of 9 March 1998

35. The Government indicated that these were all the relevant records that could be traced: (a) an extract from a laboratory record of results of personality and intelligence tests; (b) extracts from laboratory records of GF blood tests – seven blood samples were taken from the applicant; and (c) an explanation of the GF blood-test results.

2. With the Government's observations of 5 April 2001

36. The Government corrected their previous explanations of the seven blood samples (see paragraph 19 above): one was taken on 13 July 1963, a second one prior to the applicant's exposure to GF and the remaining five were taken later. They also corrected other errors relating to information provided in their earlier observations about those tests including the following: “the reference to '25 milligrams of GF [vapour per kilogram of body weight]' appears to have been a typographical error. In fact, calculated doses of GF ranged from 0.16 to 2.84 microgrammes per kilogramme of body weight.” They also disclosed documents recently discovered following a further search: (a) the applicant's pre-exposure X-ray and its associated report card (see paragraph 33 above); (b) a report dated August 1942 which described the manner in which the sensitivity tests to mustard gas were performed and entitled “Technique of the Physiological Experiments Carried Out on the Human Subjects at [Porton Down]”; and (c) extracts

from a laboratory notebook entitled "Overgarment Tests. Mustard on Men", relating to mid-July 1963 and referring to the applicant.

D. The applicant's domestic proceedings

1. Application for a service pension

37. On 10 June 1991 the applicant claimed a service pension on the grounds of "hypertension/breathing problems" resulting from the Porton Down tests (and, in addition, from his radiation exposure on Christmas Island during the relevant nuclear tests there). The Department of Social Security (DSS) obtained copies of his service and civilian medical records together with a report from his doctor, which confirmed that he suffered from hypertension, COAD and late onset bronchial asthma. On 28 January 1992 the Secretary of State rejected his claim for a service pension as there was no causal link demonstrated between the tests and those medical conditions. The applicant did not pursue an appeal at that stage.

2. Certificate under section 10 of the Crown Proceedings Act 1947 ("the 1947 Act")

38. The applicant consulted solicitors in 1994 and obtained legal aid for proceedings. By a letter dated 14 November 1994 to the Secretary of State, his solicitors threatened proceedings, alleging, *inter alia*, negligence, assault and breach of statutory duty on the part of the MOD, and demanding the release of all medical and laboratory records in the possession of the Secretary of State or of Porton Down as regards the test periods in 1962 and 1963, failing which the applicant would apply to the High Court for pre-action discovery. The applicant's representatives met with MOD representatives in early January 1995 on a "without prejudice" basis and by a letter dated 5 June 1995 requested confirmation from the MOD as to whether a certificate would be issued under section 10 of the 1947 Act ("a section 10 certificate").

39. By a letter dated 4 July 1995 to the applicant's solicitors, the claims section of the MOD wrote as follows:

> "War Pensions Agency has informed me that a section 10 certificate in respect of acute bronchitis (1963), a bruised knee and loss of hearing will be regarded as attributable to service and a section 10 certificate will be issued. The other ailments for which [the applicant] claimed a war pension have not been regarded as attributable to service."

40. On 3 August 1995 a section 10 certificate was signed by the Secretary of State:

> "In so far as the personal injury of [the applicant] is due to anything suffered as a result of his service in the Army between 16 February 1954 and 2 April 1968, I hereby

> certify that his suffering that thing has been treated as attributable to service for the purpose of entitlement to an award under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983, which relates to disablement or death of members of the Army."

41. By a letter dated 8 August 1995, the Treasury Solicitor provided a copy of the section 10 certificate to the applicant's representatives.

3. The Pensions Appeal Tribunals ("the PAT")

42. Following the judgment of this Court in *McGinley and Egan v. the United Kingdom* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III) and the Government's disclosure of certain documents in their observations in the present case (on 9 March 1998), the applicant requested an adjournment of the present application in order to pursue an appeal to the PAT and, in particular, disclosure of documents under Rule 6 of the Pensions Appeal Tribunals (England and Wales) Rules 1980 ("the PAT Rules"). The present application was adjourned.

43. On 1 June 1998 he lodged his PAT appeal. Since the War Pensions Agency ("the WPA" – a specialised agency of the Department of Social Security) clarified that a further form was required, on 8 November 1998 the applicant re-lodged the appeal.

44. In February 1999 the applicant received his "Statement of Case". He obtained two extensions of the time-limit for the submission of his "answer" to the Statement of Case (to take advice from an expert chemical pathologist on the documents already disclosed and on those which were also to be requested during the PAT appeal and to consider the intervening observations of the Government in the present application) and he indicated that he would be making an application under Rule 6(1) of the PAT Rules.

45. On 30 July 1999 his answer was submitted to the WPA along with a letter which noted that the answer included an application for disclosure of documents under Rule 6(1) of the PAT Rules: paragraph 18 of the answer set out a list of seventeen categories of document required by him under that rule.

46. On 10 August 1999 the WPA responded by pointing out that enquiries were being made to obtain all the information requested under Rule 6(1) of the PAT Rules. Once received, the WPA would ask for the agreement of the President of the PAT to disclose it.

47. On the same day the WPA wrote to Porton Down enclosing a copy of the applicant's Rule 6 request and asking for the information as soon as possible so that the agreement of the President of the PAT could be obtained.

48. On 14 March and 13 April 2000 the WPA sent the supplementary Statement of Case (now incorporating the supplemental medical evidence) to the applicant and to the PAT, respectively.

49. On 3 August 2000 the President of the PAT responded to the applicant's enquiry, indicating that his case had not been listed as it awaited production of further documentary evidence and the Secretary of State's response. However, since the Rule 6 request should not have been made in the applicant's answer to the Statement of Case, that request had just come to light. The applicant was to confirm to the President if he intended paragraph 18 of his answer to constitute his Rule 6 request and, if so, the President would be grateful to receive any observations that would assist his consideration of the relevance of the documents to the appeal issues. The applicant was also to identify the State department to which a Rule 6 direction should be addressed.

50. On 9 November 2000 the applicant confirmed to the President of the PAT that paragraph 18 of his answer did indeed constitute his Rule 6 request and he made detailed submissions on the matters requested by the President.

51. By a letter dated 13 November 2000, the President of the PAT requested the applicant to submit a draft direction and attend a hearing on it since he was concerned that the wording of some parts of the Rule 6 request appeared to be ambiguous and lacking in clarity. The applicant submitted a draft direction (essentially listing those documents already included in paragraph 18 of his answer).

52. By an order dated 1 February 2001, the President of the PAT directed, pursuant to Rule 6(1) of the PAT Rules, disclosure of the scheduled documents by the Secretary of State since the documents "were likely to be relevant to the issues to be determined in the appeal".

53. On 6 July 2001 the Secretary of State responded to the direction of the President of the PAT. It was marked "medical in confidence". It referred to the documents already submitted by the Government to this Court (see paragraphs 34-36 above). The Secretary of State was unable to give a definitive response to the request for the fifth category of document required (namely, "any scientific or medical reports, whether published or prepared for internal use by Porton Down, the [MOD] or other government departments or agencies of the volunteer studies or experiments in Porton Down between 1957 and 1968 which were similar or related to the studies or experiments in which [the applicant] was involved"). A full and careful review had been undertaken and was a time-consuming process. Many of the documents identified as being possibly relevant to the request were classified. The Secretary of State had asked for an urgent review of the classification to be undertaken and, once the review was completed, he would let the PAT have his full response. Otherwise the Secretary of State provided various explanations of the documents already submitted by the Government to this Court and details of the precise dates on which the applicant would have participated in the tests, of the levels of exposure to gases and of various headings and abbreviations in the disclosed documents.

The only documents (additional to those already submitted to this Court) disclosed to the PAT were the applicant's service and payment records, the latter of which included a payment for attendance for a week at Porton Down in July 1963.

54. The MOD's letter was passed to the applicant on 25 July 2001. By a letter dated 19 July 2002, the applicant wrote to the PAT apologising for not having responded and explaining the reasons for the delay.

55. By a letter dated 23 August 2002, the MOD disclosed documents concerning the above-described fifth category: two reports entitled "The feasibility of performing follow-up studies of the health of volunteers attending [Porton Down]" and "The single-breath administration of Sarin", from which individual names had been blanked out. The feasibility report acknowledged that the records held at Porton Down prior to the late 1970s generally consisted of the name, service number and age of participants at the date of testing but were not "sufficient to allow either a comprehensive morbidity study or mortality study to proceed". While a study could be carried out on post-1976 test participants, "such a study would be of very limited value and may only serve to draw attention to [Porton Down's] interest in possible long-term health problems experienced by volunteers". The feasibility report concluded that a comprehensive follow-up study of all volunteers was "impractical". Porton Down's library catalogue had also mentioned a document entitled "Unique papers relating to early exposure of volunteers to GD [O-Pinacolyl methylphosphonoflouidate, commonly known as Soman] and GF and DM [diphenylaminearsine chloride, commonly known as Adamsite]". However, a copy of this document could not be located. A letter of 20 August 2002 was also enclosed which certified that nine of the requested documents were "in the nature of departmental minutes or records" and would not therefore be disclosed (Rule 6(1) of the PAT Rules).

56. A hearing was fixed for 3 October 2002. On 27 September 2002 the applicant was obliged to request an adjournment since his counsel had advised that further questions needed to be put to Dr H. On 30 September 2002 the PAT declined to adjourn, indicating that it was unlikely Dr H. could or would prepare a report.

57. On 2 October 2002 the MOD wrote to the PAT and the applicant. While nine documents had been previously certified as non-disclosable, (letter of 23 August 2002 – see paragraph 55 above), seven of those nine documents could now be disclosed. The MOD had "had the opportunity of re-examining the documents ... with a view to assessing whether [they] could be the subject of voluntary disclosure ... in an effort to ensure that everything that can be disclosed has been disclosed and so as to ensure the maximum openness and the maximum assistance to the [PAT]". Certain blocking out had been done on some disclosed documents to protect the identities of staff involved and to excise irrelevant material. Two documents

could still not be disclosed: the first did not appear "to contain anything of relevance" to the applicant's tests and, in any event, "contained information which remains security sensitive and is not properly subject to voluntary disclosure on security grounds"; and the second required permission from the United States before it could be disclosed.

58. The appeal was scheduled for 3 October 2002. The applicant applied for an adjournment supported by the Veterans Agency (the successor of the WPA – "the VA"). The PAT decision (delivered on 7 October 2002) recorded as follows:

> "The [PAT] are deeply disturbed that this application has proved necessary as a result of the [applicant's] advisers' failure to consider documents disclosed over a year ago, in a timely fashion.
>
> However, since the [VA] also appear to be without documentation and there is confusion by the [applicant] as to whether he also wishes to appeal for hypertension, we have reluctantly decided to allow the adjournment.
>
> It is highly unsatisfactory that Court resources have been wasted in this way. To prevent this happening in the future the Tribunal intend to exercise some control over the ongoing progress of the appeal."

The PAT was to clarify with the MOD the status of certain classified documents and the extent to which they could be released to the public, and directed the MOD to provide, by 21 October 2002, disclosure of further documents. The MOD, the VA and the applicant were to notify the PAT by 18 November 2002 of the questions and documents it wanted Dr H. to examine. It was intended that the PAT would add its own questions and submit a composite questionnaire to Dr H. who would report in response to the PAT. The applicant was also to confirm his position as regards the hypertension appeal by 28 October 2002.

59. On 21 October 2002, the MOD disclosed to the PAT three declassified documents. These were forwarded by the PAT to the applicant by a letter dated 8 November 2002, accompanied by a warning that the MOD had released the documents for the purpose of the appeal and that no information in them was to be used for any other purpose without the consent of the MOD. By a letter dated 25 October 2002, the applicant confirmed that his appeal had been intended to cover hypertension also, he explained the reasons for his confusion and he requested an extension of time to so appeal. A hypertension appeal form was lodged with the PAT on 5 December 2002.

60. By a letter dated 3 December 2002, the PAT wrote to Dr H. enclosing the documents disclosed by the MOD (at that point) with two sets of questions (prepared by the applicant and the medical member of the PAT). By a letter dated 19 February 2003, Dr H. provided the PAT with a report. The applicant having noted that Dr H. had omitted to respond to the

PAT questions, Dr H. did so in a supplemental report sent to the PAT under cover of a letter dated 14 May 2003.

61. In a document dated 14 October 2003, the MOD submitted its comments on Dr H.'s reports. On 16 October 2003 the VA submitted a supplementary Statement of Case.

62. The PAT appeal hearing took place on 23 October 2003. It allowed the hypertension appeal to be heard out of time but, once it became clear that the VA had not processed the appeal documentation filed by the applicant, the PAT reluctantly granted the MOD an adjournment to allow the VA time to "properly consider all the evidential material and prepare a reasoned medical opinion". The COAD appeal was, however, dismissed.

63. On 14 January 2004 the PAT delivered its written decision. As to the facts, the PAT accepted that the applicant had undergone tests for mustard gas "some time in 1962 as well as the documented tests in July 1963" despite the fact that there was no reference in his service records or in other research records to the 1962 test. The PAT also found "disquieting" the "difficulties" experienced by the applicant in obtaining the records which were produced to the PAT. The PAT also established the following facts:

> "1. We find that [the applicant] suffered no long-term respiratory effect from skin contact with mustard gas following both tests in 1962 and 1963.
>
> 2. We find that [the applicant] was administered only small doses of mustard gas and GF gas which would have resulted in minimal exposure to mustard gas by off-gassing and a limited and transitory reaction to the GF gas. Although no records relating to doses exist, the mustard gas tests were designed to test the suitability of military clothing to exposure and were not a gas test *per se*. Furthermore, after a fatality at Porton Down in 1953, safeguards were put in place to ensure that volunteers were only exposed to safe dosages.
>
> 3. The compelling weight of the evidence is that [the applicant] did not receive, in any of the tests, dosages likely to have long-term effects as described in the research papers. In particular, the [PAT expert], although accepting the *possibility* that given further research through a long-term follow-up study a link might be found, concludes that there is no evidence to link [the applicant's] exposure to either gases with his present condition. We accept [the PAT expert's] conclusion that, given the limited doses and [the applicant's] minimal immediate reactions, this would rule out a link between the tests and the claimed conditions.
>
> 4. We particularly rely on [Dr H.'s] expert report. He has analysed the specific data relevant to [the applicant's] case and considered the conditions for which he is claiming in relation to that specific data. The research papers relied on by the [applicant], although of some evidential value, are very general and speculative. We therefore prefer the evidence, and the conclusions reached by [Dr H.] in his reports."

The PAT also accepted, as a matter of law, that it was sufficient to show that the proved service event was only one of the causes of the condition even if there were other contributory factors. However, it stated:

"2. We do not accept that the lack of possible evidence of other follow-up tests is sufficient to constitute reliable evidence.

3. We find that there is some reliable evidence surrounding the Porton Down tests for which [the applicant] volunteered. However, this evidence tends, if anything, to support the view that there is in fact no link between those tests and [the applicant's] current conditions. The test of reasonable doubt is not therefore met.

4. There is no reliable evidence to suggest a causal link between the tests for either mustard gas or GF gas and the claimed condition.

5. [The PAT expert's] views that 'he cannot exclude the possibility' of a link between exposure to GF and/or mustard gas and the claimed condition, does not meet the 'reasonable doubt' test. Furthermore, he 'rules out' exposure to GF as a cause and deems it 'unlikely' that mustard gas is a cause.

6. Finally, [the applicant's counsel] invites us to allow the appeal for reasons which can be summarised as 'general fairness'. The [PAT] does not have legislative or discretionary power to do so. The decision of the [PAT] is to disallow the appeal for [COAD]."

64. On 4 February 2004 the applicant applied to the PAT for leave to appeal to the High Court (on the COAD matter) and for a stay of the hypertension appeal then pending before the PAT. On 26 April 2004 leave was refused, the PAT's reserved decision being delivered on 28 April 2004.

65. On 11 May 2004 the applicant applied for leave to appeal to the High Court. On 13 July 2004 leave was granted.

66. The applicant's appeal notice and supporting skeleton argument were submitted on 10 August 2004. The appeal was listed to be heard on 7 October 2004.

67. On 8 October 2004 the High Court allowed the appeal and referred the matter back to the PAT for a further hearing.

68. On 7 March 2005 a directions hearing was held before the PAT. It ordered the hypertension and COAD appeals to be heard together and mutual disclosure of any further documents relevant to the appeal by 18 April 2005. On the latter date the Treasury Solicitor produced a "schedule of disclosure" listing and disclosing eleven documents: apart from three items, the applicant had not seen them before. The Treasury Solicitor maintained that disclosure of most of the documents (including two sets of minutes of meetings which Rule 6 specifies can be withheld) was not obligatory as they were of marginal relevance, noted that all documents had been downgraded to "unclassified" and indicated that the MOD would endeavour to produce the annexes referred to in certain documents.

E. Information services and health studies

69. The armed forces have, since 1998, put in place a service to deal with enquiries from Porton Down test participants ("the 1998 Scheme"). The relevant information pamphlet noted that participants could request their test records, that a search would be carried out for references to that person and for additional evidence of actual procedures, that a summary would be provided and that, if the person wanted to go to Porton Down, he or she could obtain the actual records. While the pamphlet noted that reasonably comprehensive records had existed since 1942, individuals had to accept that old records in some cases were very sparse, that record keeping in years gone by was not up to current standards and that in certain cases a person's attendance might not even have been marked. The pamphlet claimed that no participant was worse off after the Porton Down tests.

70. In 2001 the Porton Down Volunteers Medical Assessment Programme was established by the MOD to investigate health concerns of Porton Down test participants. The study involved 111 participants but no control group. The report, published in April 2004, was entitled "Clinical Findings in 111 Ex-Porton Down Volunteers". It noted that over 20,000 had participated in the tests since Porton Down's establishment in 1916 and that 3,000 had participated in nerve gas tests and 6,000 in mustard gas tests, with some servicemen having been exposed to both. It concluded that:

> "On a clinical basis, no evidence was found to support the hypothesis that participation in Porton Down trials produced any long-term adverse health effects or unusual patterns of disease compared to those of the general population of the same age."

71. From July 2002 the MOD funded "an initial pilot research project" on mortality and cancer incidence among Porton Down test participants. It compared 500 participants with a control group of 500 other servicemen and the decision was taken that a full-scale epidemiological study should be undertaken. By mid-2003 this had begun and it was expected to take about two years to complete.

72. Further to the death of Aircraftsman Maddison in May 1953 after being exposed to Sarin gas (also referred to as GB gas, a nerve agent related to GF), a coroner's inquest was held and recorded "death by misadventure". An application was brought for a fresh inquest alleging, *inter alia*, that incomplete evidence had been brought before the coroner and in November 2002 the Court of Appeal ordered a fresh inquest. It concluded on 15 November 2004 with the jury finding that the cause of Mr Maddison's death was the "application of a nerve agent in a non-therapeutic experiment". Judicial review proceedings appear to be pending.

In or around 2004-05 a non-governmental organisation ("Porton Down Veterans") discovered during searches in the Public Record Office two

letters of May and August 1953 containing legal advice from the Treasury Solicitor to the MOD about Mr Maddison's case and about section 10 of the 1947 Act. That organisation sent this material to the Veterans Policy Unit – Legacy Health Issues of the MOD on 7 February 2005. The Treasury Solicitor's letter of August 1953 noted as follows:

> "When the case was referred to me previously I did consider the relevance of section 10 of the Crown Proceedings Act 1947 but I came to the conclusion that it had no application. On the information before me I am still of that opinion. Subsection (1) of that section, which deals with injuries caused by acts of members of the Armed Forces, can have no application since the administration of the GB gas to ... Maddison was (so I understand) carried out by [civilian] personnel and not by any member of the Armed Forces. Subsection (2) also seems inapplicable. [It] provides that no proceedings in tort are to lie against the Crown for death or personal injury due to anything suffered by a member of the Armed Forces if that thing is suffered by him 'in consequence of the nature or condition of any equipment or supplies used for the purposes of the Armed Forces of the Crown'. As I understand the facts of this case, GB gas cannot be said to be a 'supply used for the purposes of the Armed Forces' at all, it being purely an experimental substance and one which has never been used for the purposes of the Armed Forces. If this is correct, then section 10 of the 1947 Act cannot protect the Crown or the Minister from liability."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil actions by servicemen against the Crown

1. Prior to 1947

73. It was a well-established and unqualified common-law rule that the Crown was neither directly nor vicariously liable in tort.

74. The rule was counterbalanced in several ways. Actions against the errant serviceman would be permitted in which case the Crown would invariably (if the defendant was acting in the course of his duty) accept responsibility for any damages awarded. In cases where the individual author of the injury could not be identified, a nominee defendant would be appointed to enable the claim to proceed. In addition, from 1919 a serviceman injured in the course of war service was entitled to a disability pension and his spouse to a pension. The scope of these entitlements later widened to include disability or death caused by injury attributable to any service in the armed forces (war service or not). A feature of these successive schemes was that entitlement to a pension did not depend on proof of fault against the Crown.

75. Further to strong criticism of the Crown's position as litigant, in the 1920s legislation was envisaged that would make the Crown liable in tort. The 1924 terms of reference of the drafting committee were to prepare a bill

to provide, *inter alia*, that the Crown should become liable to be sued in tort. Clause 11 of the draft bill produced in 1927 (and never adopted) provided, under the heading "Substantive Rights", that: "Subject to the provisions of this Act, the Crown shall, notwithstanding any rule of law to the contrary, be liable in tort." This provision was made subject to clause 29(1)(g) which read:

> "Except as therein otherwise expressly provided, nothing in this Act shall–
>
> ...
>
> (g) entitle any member of the armed forces of the Crown to make a claim against the Crown in respect of any matter relating to or arising out of or in connection with the discipline or duties of those forces or the regulations relating thereto, or the performance or enforcement or purported performance or enforcement thereof by any member of those forces, or other matters connected with or ancillary to any of the matters aforesaid ..."

2. The Crown Proceedings Act 1947 ("the 1947 Act")

76. The 1947 Act made far-reaching changes, both substantive and procedural, to the Crown's liability to be sued.

77. The 1947 Act was divided into four parts: Part I "Substantive law" (sections 1-12 of the Act); Part II "Jurisdiction and procedure"; Part III "Judgments and execution"; and Part IV "Miscellaneous".

78. Section 1 provides for the Crown to be sued as of right rather than by a petition of right sanctioned by Royal fiat.

79. Section 2 of the 1947 Act provides:

> "Liability of the Crown in tort
>
> (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:–
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."

80. Members of the armed forces were to be treated differently. If they died or were injured in the course of their duties, the Crown could not be

sued in tort once the Secretary of State certified that the death or injury would be treated as attributable to service for the purposes of entitlement to a war pension. In particular, section 10 of the 1947 Act was entitled "Provisions relating to the armed forces" and provided as follows:

> "(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if–
>
> (a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and
>
> (b) the [Secretary of State] certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:
>
> Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.
>
> (2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if–
>
> (a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and
>
> (b) the [Secretary of State] certifies as mentioned in the preceding subsection;
>
> nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.
>
> (3) ... a Secretary of State, if satisfied that it is the fact:–
>
> (a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or
>
> (b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;
>
> may issue a certificate certifying that to be the fact; and any such certificate shall, for the purpose of this section, be conclusive as to the fact which it certifies."

The words in section 2 of the 1947 Act "subject to the provisions of this Act" rendered section 2 subject to the provisions of section 10 of the 1947 Act.

3. The Crown Proceedings (Armed Forces) Act 1987 ("the 1987 Act")

81. The exception contained in section 10 of the 1947 Act was removed by the 1987 Act. This removal was not retrospective. Accordingly, after 1987 claims in tort by members of the armed forces (or their estates) who had died or been injured as a result of conduct that took place prior to 1987 could not proceed if the Secretary of State issued the relevant certificate. The reasons the law was prospective only were explained by the member of parliament introducing the bill as follows (Hansard, HC, 13 February 1987, col. 572):

> "Successive Governments have resisted retrospective legislation as a basic concept, especially where such legislation imposes a retrospective liability on others. Secondly, it would be clearly wrong to impose retrospective liability on a serviceman for past actions, even if the Crown, his employer, were to stand behind him. That would involve individuals who are alleged to be guilty of negligence over the years being brought to book in a court of law for actions [for] which, at the time they were committed, they were not liable under the law. That is a strong argument against retrospective legislation. Thirdly, ... where should the line be drawn in dealing with past claims so as to be fair and just towards all claimants? How could there be a logical cut-off point for considering claims either by the [MOD] or the courts. How could those whose claims which fell on the wrong side of the arbitrary line be satisfied? How could the [MOD], and ultimately the courts, be expected to assess old cases where the necessary documentary evidence or witnesses are no longer available?
>
> Those are practical questions to which, sadly, there are no ready answers. For that reason, I believe that the only reasonable course of action is to legislate for the repeal of section 10 from the date of enactment."

4. The Limitation Act 1980

82. Section 11 of this Act provides that any action for damages for personal injury must be brought within three years of the cause of action arising.

B. The case of *Matthews v. Ministry of Defence*

83. Mr Matthews served in the Royal Navy between 1955 and 1968. In 2001 he brought proceedings in negligence against the MOD (alleging the MOD's negligence and breach of statutory duty and its vicarious liability for the negligence and breach of duty of his fellow servicemen) claiming that he had suffered personal injury as a result of his exposure to asbestos fibres and dust while performing his duties as a serviceman.

1. The High Court's judgment of 22 January 2002 ([2002] EWHC 13 (QB))

84. On the preliminary issue of whether the MOD could be sued under section 10 of the 1947 Act, the High Court found that provision to be incompatible with Article 6 § 1 of the Convention.

85. In deciding whether section 10 amounted to a procedural or substantive limitation on his rights, the High Court considered that the issue turned on whether a section 10 certificate extinguished not only Mr Matthews' right to sue for damages but also his primary right arising from the Crown's duty of care:

> "If, after the passing of the 1947 Act, he had the primary right not to be exposed to asbestos in circumstances amounting to negligence or breach of statutory duty, section 10 merely extinguished his secondary right to claim damages for its breach, and that would amount merely to a procedural bar on his secondary right to claim his preferred remedy for breach of his primary right."

In concluding that section 10 amounted to a procedural bar to an existing right of action in tort and in thus finding Article 6 applicable, the High Court relied, in particular, on *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (judgment of 10 July 1998, *Reports* 1998-IV) and *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI).

86. The limitation therefore had to be subjected to a proportionality test. In this respect, the High Court concluded that the disadvantages of a pension scheme were such that access to it was an "exceptionally, indeed an unacceptably" high price to pay for the advantage of not having to prove fault, an advantage that would only apply when the question of the fault of the other party was in doubt. Neither was the High Court convinced that the choice to repeal the 1947 Act prospectively was proportionate, considering, *inter alia*, that the finding of liability for conduct that was not a basis for liability when it took place was far less pernicious a solution than denying proper damages to persons injured as a result of negligence.

2. The Court of Appeal's judgment of 29 May 2002 ([2002] EWCA Civ 773)

87. The Court of Appeal allowed the MOD's appeal. Section 10 had a substantive and not procedural effect and the High Court's reliance on *Fogarty*, cited above, was mistaken. The Master of the Rolls stated that:

> "The requirement in section 10 for a certificate from the Secretary of State as a precondition to defeating a claimant's cause of action is an unusual one and not easily analysed, and it cannot be treated simply as an option to impose a procedural bar on the claim."

88. In so finding, the Court of Appeal rejected the MOD's objection, based on *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII) and,

more recently, *R. v. Belgium* (no. 33919/96, 27 February 2001), to the applicability of Article 6 § 1, the Court of Appeal finding that *Pellegrin* was concerned solely with "disputes raised by servants of the State over their conditions of service" whereas the proceedings before the Court of Appeal concerned the nature and effect of section 10 of the 1947 Act on a claim in tort against the MOD.

3. The House of Lords' judgment of 23 February 2003 ([2003] UKHL 4)

89. The applicant appealed, arguing that the Court of Appeal had ignored a clear principle established by *Fogarty*. The MOD did not pursue the *Pellegrin* argument.

90. The House of Lords (Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Millett and Lord Walker of Gestingthorpe) unanimously rejected the appeal. The House of Lords considered the maintenance of the distinction between procedural and substantive limitations on access to a court to be a necessary one since Article 6 was concerned with procedural fairness and the integrity of a State's judicial system rather than with the substantive content of its national law. However, the House of Lords acknowledged the difficulty in tracing the borderline between the substantive and procedural, considering the Convention jurisprudence to be indicative of some difficulty in this respect. Drawing on the text, historical context, legislative intent and the actual operation of section 10 of the 1947 Act and, further, on a comprehensive analysis of the Convention jurisprudence and applicable principles, the House of Lords concluded that section 10 of the 1947 Act maintained the existing lack of liability in tort of the Crown to service personnel for injury suffered that was attributable to service and served to ease servicemen towards the no-fault pension option by taking away the need to prove attributability. It amounted therefore to a substantive limitation on the liability of the Crown in tort to servicemen for service injury to which Article 6 § 1 did not apply.

91. Having reviewed the Convention jurisprudence, Lord Bingham noted that, whatever the difficulty in tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, an accurate analysis of a claimant's substantive rights in domestic law was, nonetheless, an essential first step towards deciding whether he had, for the purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as would engage Article 6.

Lord Bingham went on to outline the historical evolution of section 10, considering it clear that there was no parliamentary intention to confer any substantive right to claim damages. "Few common-law rules were better-established or more unqualified", he began, "than that which precluded any claim in tort against the Crown" and because "there was no wrong of which a claimant could complain (because the King could do no wrong) relief by

petition of right was not available". Claims referred to as "exempted claims" against the Crown for damages for, *inter alia*, injury sustained by armed forces personnel while on duty were "absolutely barred". When proposals for reform were put forward in the 1920s, "no cause of action was proposed in relation to the exempted claims". When the Crown Proceedings Bill was introduced into Parliament in 1947 it again provided that the exempted claims should be "absolutely barred", but those fulfilling the qualifying condition would be compensated by the award of a pension on a no-fault basis.

When what was to become section 10(1) was amended uncontentiously in the House of Commons, the intention was not to alter the "essential thrust of the provision as previously drafted". The object of the new certification procedure was to "ease the path of those denied any right to a common-law claim towards obtaining a pension, by obviating the need to prove attributability, an essential qualifying condition for the award of a pension". Whereas the issue of a certificate under section 10(3) of the 1947 Act was discretionary as shown by the permissive "may", no such permissive language applied to the issuance of a certificate under section 10(1)(b). "It was plainly intended that, where the conditions were met, the Secretary of State should issue a certificate as was the invariable practice of successive Secretaries of State over the next forty years." Although different language had been used over the years, "the English courts had consistently regarded section 10(1) as precluding any claim at common law". It was in fact the "absolute nature of the exclusion imposed by section 10(1)" (coupled with the discrepancy, by 1987, between the value of a pension and of a claim for common-law damages) which fuelled the demand for the revocation of section 10 and led to the 1987 Act. In deciding whether section 10(1) imposed a procedural bar or denied any substantive right, regard had to be had to the practical realities and, in that respect, the Secretary of State's practice had been "uniform and unvarying" so that any practitioner would have advised Mr Matthews that a section 10 certificate was "bound to be issued". Lord Bingham found *Fogarty* to be "categorically different" from *Matthews* and concluded, for reasons closely reflecting those of the Court of Appeal and of Lord Walker (see below), that the appeal was to be rejected.

92. As regards the distinction between substantive and procedural bars to a judicial remedy, Lord Walker conducted a comprehensive analysis of the Convention jurisprudence, highlighting what he considered to be inconsistencies and the difficulties in applying it:

> "127. The distinction between substantive and procedural bars to a judicial remedy has often been referred to in the Strasbourg jurisprudence on Article 6 § 1, but the cases do not speak with a single clear voice. That is hardly surprising. The distinction, although easy to grasp in extreme cases, becomes much more debatable close to the borderline, especially as different legal systems draw the line in different places ...
>
> ...

130. I have already referred to several of the most important Strasbourg cases, but it is useful to see how two contrasting themes have developed since the seminal *Golder* decision in 1975. Some cases emphasise the importance of avoiding any arbitrary or disproportionate restriction on a litigant's access to the court, whether or not the restriction should be classified as procedural in nature. Others attach importance to the distinction between substance and procedure.

131. The first case to note is *Ashingdane v. the United Kingdom* ... Section 141(1) [of the Mental Health Act 1959] imposed substantive restrictions on his rights of action (requiring bad faith or negligence) and subsection (2) imposed a procedural restriction (the need for the Court's permission for the commencement of proceedings). The Commission ... agreed with the parties that 'it is immaterial whether the measure is of a substantive or procedural character. It suffices to say that section 141 acted as an unwaivable bar, which effectively restricted the applicant's claim in tort'. But the Commission considered that the restrictions were not arbitrary or unreasonable, being intended to protect hospital staff from ill-founded or vexatious litigation. The Court ... took a similar view.

132. In *Pinder v. the United Kingdom* ... (from which *Ketterick* and *Dyer* are not significantly different) the Commission took the view ... that section 10 of the 1947 Act brought about the substitution of a no-fault system of pension entitlement for the right to sue for damages, and that that removed the claimant's civil right: 'It follows, therefore, that the State does not bear the burden of justifying an immunity from liability which forms part of its civil law with reference to "a pressing social need" as contended by the applicant.' However the Commission then ... referred to its report in *Ashingdane* and stated: 'These principles apply not only in respect of procedural limitations such as the removal of the jurisdiction of the court, as in the *Ashingdane* case, but also in respect of a substantive immunity from liability as in the present case. The question, therefore, arises in the present context, whether section 10 of the 1947 Act constitutes an arbitrary limitation of the applicant's substantive civil claims.'

133. The Commission held that section 10 was not arbitrary or disproportionate ...

134. *Powell and Rayner v. the United Kingdom* ... was concerned with the effect of section 76(1) of the Civil Aviation Act 1982 on persons complaining of noise from aircraft travelling to and from Heathrow Airport. Section 76(1) excludes liability for any action in trespass or nuisance so long as the height of the aircraft was reasonable in all the circumstances, and its flight was not in breach of the provisions of the Act or any order made under it. In unanimously rejecting the claimants' claim under Article 6 § 1 the European Court of Human Rights simply relied on the fact that the applicants had no substantive right to relief under English law. It rejected a subsidiary argument that the claimants' residuary entitlement to sue (in cases not excluded by section 6(1)) was illusory.

135. The Court's approach in *Fayed v. the United Kingdom* ... was much less straightforward. ... The Court's discussion of the relevant principles contained ... the following passage ...: 'Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it

would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.'

136. It is hard to tell how far the last sentence of this passage goes. The Court then referred ... to the distinction between substantive and procedural restrictions: 'It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.' The Court did not go any further in attempting to resolve this problem on the ground that it might in any case have had to consider issues of legitimate aim and proportionality for the purposes of Article 8 (respect for private life), even though there was in fact no complaint under Article 8.

137. In *Stubbings v. the United Kingdom* ... and *Tinnelly & Sons Ltd v. the United Kingdom* ..., the Court considered whether restrictions on access to the court (in section 2 of the Limitation Act 1980 and section 42 of the Fair Employment (Northern Ireland) Act 1976 respectively) were justifiable without adverting expressly to the distinction between substantive and procedural bars. In *Waite and Kennedy v. Germany* ..., the Commission ... described the immunity as merely a procedural bar, and as such requiring justification. The Court took the same view, regarding ... the claimants' access to some unspecified procedures for alternative dispute resolution as being a material factor.

138. The two most recent cases are of particular importance. In *Z* [*and Others*] *v. the United Kingdom* ..., the Court ... held that there had been no breach of Article 6 § 1 in your Lordships' decision in *X v. Bedfordshire County Council* [1995] 2 AC 633 as to the responsibility of a local authority for children who had suffered neglect and abuse over a period of five years while their suffering was known to the local authority (but they were not the subject of any care order). ... The whole of the Court's judgment on Article 6 § 1 ... merits careful study, but its essence appears from the following passages ...: ... 'The Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in the *Ashingdane* judgment.' In reaching these conclusions the majority of the Court stated in plain terms that its decision in *Osman* had been based on a misunderstanding of the English law of negligence.

139. Finally there is *Fogarty v. the United Kingdom* ... That case was decided about six months after *Z* and by a constitution of the Court several of whose members had sat (and some of whom had dissented) in *Z*. In *Fogarty* the Court repeated verbatim ... the passage from *Fayed* which I have already quoted. It rejected ... the United Kingdom's argument that because of the operation of State immunity the claimant did not have a substantive right under domestic law. The Court attached importance to the United States' ability to waive (in fact the judgment said 'not choose to claim') immunity as indicating that the bar was procedural. Nevertheless, the Court concluded ... that: 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as

embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.'

140. In trying to reconcile the inconsistencies in the Strasbourg jurisprudence it might be tempting to suppose that the Court's wide and rather speculative observations in *Fayed* (which were not its grounds for decision) marked a diversion which proved, in *Z*, to be a blind alley. But that explanation immediately runs into the difficulty that in *Fogarty*, six months after *Z*, the Court (constituted by many of the same judges) chose to repeat, word for word, the observations made in *Fayed*. The uncertain shadow of *Osman* still lies over this area of the law.

141. Nevertheless [Mr Matthews' counsel] conceded that in order to succeed on the appeal, he had to satisfy your Lordships that section 10 of the 1947 Act constituted a procedural bar. He equated this task with satisfying your Lordships that Mr Matthews had at the commencement of his proceedings a cause of action against the [MOD], and that that cause of action was cut off (or defeated) by the [MOD's] invocation of the section 10 procedure. He treated this event as indistinguishable from the United States government's invocation, in *Fogarty*, of the defence of State immunity (to be precise, its decision not to waive State immunity). In each case, [Mr Matthews' counsel] argued, the defendant was relying on a procedural bar to defeat a substantive claim which was valid when proceedings were commenced.

142. In my view, [Mr Matthews' counsel's] concession was rightly made. Although there are difficulties in defining the borderline between substance and procedure, the general nature of the distinction is clear in principle, and it is also clear that Article 6 is, in principle, concerned with the procedural fairness and integrity of a State's judicial system, not with the substantive content of its national law. The notion that a State should decide to substitute a no-fault system of compensation for some injuries which might otherwise lead to claims in tort is not inimical to Article 6 § 1, as the Commission said in *Dyer* ... (in a report, specifically dealing with section 10 of the 1947 Act, which has been referred to with approval by the Court in several later cases).

143. In the circumstances [Mr Matthews'] argument clings ever more closely to the bare fact that Mr Matthews had a cause of action when he issued his claim form, and that his claim could not be struck out as hopeless unless and until the Secretary of State issued a certificate under section 10. But European human rights law is concerned, not with superficial appearances or verbal formulae, but with the realities of the situation (*Van Droogenbroeck v. Belgium* ...). [Mr Matthews'] argument does, with respect, ignore the realities of the situation. It is common ground that the Secretary of State does in practice issue a certificate whenever it is (in legal and practical terms) appropriate to do so. He does not have a wide discretion comparable to that of a foreign government in deciding whether or not to waive State immunity (which may be by no means a foregone conclusion, especially in politically sensitive employment cases). The decision whether or not to waive immunity in *Fogarty* really was a decision about a procedural bar, but I am quite unpersuaded that it provides a parallel with this case. The fact is that section 10 of the 1947 Act did in very many cases before 1987, and still does in cases of latent injury sustained before 1987, substitute a no-fault system of compensation for a claim for damages. This was and is a matter of substantive law and the provision for an official certificate (in order to avoid or at least minimise the risk of inconsistent decisions on causation) does not

alter that. Section 10(1)(b), taken on its own, is a provision for the protection of persons with claims against the [MOD]. I respectfully agree with Lord Bingham's analysis of the legislative history of the 1947 Act and with the conclusions which he draws from it.

144. In these circumstances I do not consider it necessary or desirable to attempt to assess whether section 10, if tested as a procedural bar, would meet the test of proportionality. There would be serious arguments either way and as it is not necessary to express a view I prefer not to do so."

93. Lord Hoffmann agreed with Lord Walker's reasoning and conclusions and made certain additional observations. He noted that Mr Matthews' counsel (also counsel for the present applicant) had conceded that, if the 1947 Act simply said that servicemen had no right of action, it would not have infringed Article 6. Mr Matthews argued, however, that the structure of the 1947 Act was such that he had a civil right (a cause of action in tort) until a section 10 certificate was issued; if no certificate had been issued he would have been able to prosecute his action before the courts; and section 10 therefore gave the Secretary of State a power at his discretion to cut off the applicant's action and prevent him from bringing it before the courts. Lord Hoffmann pointed out that, if the purpose of section 10(1)(b) and (2)(b) had been to give the Secretary of State a discretionary power "to swoop down and prevent people with claims against the Crown from bringing them before the courts", he would have agreed since such executive interference would run counter to the rule of law and the principle of the separation of powers. However, referring to the historical analysis of Lord Bingham, he considered it clear that section 10 delimited the substantive cause of action and the section 10 certificate was no more than a binding acknowledgment by the Secretary of State of the "attributable to service" requirement for an award of a pension, the *quid pro quo* for the inability to sue in tort. He too considered distinguishable *Tinnelly & Sons Ltd and Others and McElduff and Others* (*Matthews* did not involve any encroachment by the executive upon the functions of the judicial branch) and *Fogarty* (having regard to the discretion available to the foreign government to submit or not to jurisdiction).

94. Lord Hope analysed in some detail the Convention jurisprudence and principles, the history of the 1947 Act, the text and operation of section 10 and the section 10 certification process. He noted:

"72. The overall context is provided by the fact that section 10 falls within the same Part [I] of the Act as section 2. Section 2, by which the basic rules for the Crown's liability in tort are laid down, is expressed to be 'subject to the provisions of this Act'. Section 10 is an integral part of the overall scheme of liability which is described in Part I of the Act. This was all new law. None of the provisions in this Part which preserved the Crown's immunity from suit in particular cases could be said, when the legislation was enacted, to be removing from anybody a right to claim which he previously enjoyed.

> 73. As for section 10 itself, ... [i]t proceeds on the assumption that if a claim is made under section 2 of the Act the Secretary of State will have to form a view, on the facts, as to whether or not the case is covered by the immunity. The Secretary of State is told that he cannot have it both ways. He is not allowed to assert the immunity without making a statement in the form of a certificate in the terms which the condition lays down. This has the effect of preventing him, as the minister responsible for the administration of the war pension scheme, from contesting the issue whether the suffering of the thing was attributable to service for the purposes of entitlement to an award under that scheme. This is a matter of substantive law. It is an essential part of the overall scheme for the reform of the law which the 1947 Act laid down. It does not take anything away from the claimant which he had before. On the contrary, it has been inserted into the scheme of the Act for his benefit."

Lord Hope concluded, in full agreement with the reasons expressed by Lord Walker, that section 10 amounted to a substantive limitation on the right to sue the Crown in tort.

95. Lord Millett's judgment also contained a comprehensive assessment of the Court's jurisprudence, the historical context and text of section 10 and the consequent purpose of the section 10 certificate. He noted:

> "If the serviceman brought proceedings against the Crown for damages, the question at once arose whether his injury was sustained in circumstances which qualified him for a pension, for if it was the Crown was not liable in damages. Sometimes the Secretary of State had already conceded, or the Tribunal had already found, that whatever the serviceman claimed to be the cause of his injury was attributable to service in the armed forces of the Crown. If so he would grant a certificate to that effect and the action would be struck out on the ground that it disclosed no cause of action.
>
> ... In such circumstances the Secretary of State had no discretion whether to grant or withhold a certificate. He was called on to certify an existing state of facts which prevented the proceedings from having any chance of success. It was his duty as a public servant to ascertain the facts and certify or not accordingly."

Lord Millett considered it plain that the section 10 certificate did not operate as a procedural bar to prevent the serviceman from having his civil right judicially determined. As regards *Fogarty*, and unlike the other Law Lords, he considered that immunities claimed by a State which conformed to generally accepted norms of international law fell outside Article 6 entirely. For the reasons outlined by each of their Lordships with which he agreed, he would also dismiss the appeal.

C. Service pensions

1. Entitlement to a service pension

96. The scheme currently in force for the payment of a service pension in respect of, *inter alia*, illnesses and injuries attributable to service is contained in the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 ("the Pensions Order").

97. The basic condition for the award of a pension is that "the disablement or death of a member of the armed forces is due to service" (Article 3 of the Pensions Order). "Disablement" is defined as "physical or mental injury or damage, or loss of physical or mental capacity" (Schedule 4 to the Pensions Order). Where claims are made more than seven years after the termination of service, Article 5(1)(a) provides that the disablement or death is to be treated as "due to service" if it is due to an injury which is either attributable to service after 2 September 1939 or existed before or arose during such service and was and continues to be aggravated by it.

98. The Pensions Order provides that where, upon reliable evidence, a reasonable doubt exists whether the above conditions are fulfilled, the benefit of that doubt must be given to the claimant (Article 5(4)).

2. The procedure for pension claims and appeals

99. The scheme for the payment of pensions is administered by a specialised agency of the DSS, formerly the War Pensions Agency ("WPA") and now the Veterans Agency ("VA"). On receipt of an application, the VA, *inter alia*, obtains the claimant's service records (including service medical records) from the MOD and, with the assistance of additional medical evidence if required, assesses whether the claimant is suffering from a disability attributable to service. The Secretary of State decides on the basis of this assessment whether to award a service pension.

100. A claimant who is refused a war pension by the Secretary of State may appeal to the PAT (see the Pensions Appeal Tribunals Act 1943) in accordance with the PAT Rules. This body is composed of a lawyer, a doctor and a serviceman or ex-serviceman of the same sex and rank as the claimant.

101. The VA provides the PAT with a Statement of Case, which includes, *inter alia*, a transcript of the claimant's service records including service medical records, civilian medical records and reports including those prepared at the request of the VA and a statement outlining the Secretary of State's reasons for refusing the application. The claimant may submit an answer to the Statement of Case and/or adduce further evidence. A hearing

then takes place. The PAT examination is *de novo* so that the appellant does not have to show that the Secretary of State's decision was wrong. A further appeal lies to the High Court on a point of law with leave from the PAT or the High Court.

3. Disclosure of documents before the PAT

102. Rule 6 of the PAT Rules ("the Rule 6 procedure") is entitled "Disclosure of official documents and information" and provides as follows:

> "(1) Where for the purposes of his appeal an appellant desires to have disclosed any document, or part of any document, which he has reason to believe is in the possession of a government department, he may, at any time not later than six weeks after the Statement of Case was sent to him, apply to the President for the disclosure of the document or part and, if the President considers that the document or part is likely to be relevant to any issue to be determined on the appeal, he may give a direction to the department concerned requiring its disclosure (if in the possession of the department) in such manner and upon such terms and conditions as the President may think fit:
>
> ...
>
> (2) On receipt of a direction given by the President under this rule, the Secretary of State or Minister in charge of the government department concerned, or any person authorised by him in that behalf, may certify to the President –
>
> (a) that it would be contrary to the public interest for the whole or part of the document to which the direction relates to be disclosed publicly; or
>
> (b) that the whole or part of the document ought not, for reasons of security, to be disclosed in any manner whatsoever;
>
> and where a certificate is given under sub-paragraph (a), the President shall give such directions to the tribunal as may be requisite for prohibiting or restricting the disclosure in public of the document, or part thereof, as the case may be, and where a certificate is given under sub-paragraph (b) the President shall direct the tribunal to consider whether the appellant's case will be prejudiced if the appeal proceeds without such disclosure, and, where the tribunal are of the opinion that the appellant would be prejudiced if the appeal were to proceed without such disclosure, they shall adjourn the hearing of the appeal until such time as the necessity for non-disclosure on the ground of security no longer exists."

D. The Access to Health Records Act 1990 ("the 1990 Act")

103. Prior to 1991 all medical records (civilian or service) were only disclosed on a "medical in confidence" basis. It was a matter for the doctor to decide if it was in the patient's best interests to see his or her records. The 1990 Act came into force on 1 November 1991 and it sets down the rights of persons to access, *inter alia*, their service and civilian medical records. It applies only to records compiled after the date of its entry into force and to records compiled "in connection with the care of the applicant".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

104. The applicant complained that section 10 of the Crown Proceedings Act 1947 ("the 1947 Act") violated his right of access to a court guaranteed by Article 6 § 1 of the Convention, the relevant parts of which provide as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

A. The applicant's submissions

105. The applicant maintained that the essential point, emphasised by the earlier jurisprudence (see, notably, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, and *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93), was the constitutional protection of the domestic courts against executive control and the assumption of arbitrary power by the State. The Commission's decisions in *Ketterick v. the United Kingdom* (no. 9803/82, Commission decision of 15 October 1982, unreported), *Pinder v. the United Kingdom* (no. 10096/82, Commission decision of 9 October 1984, unreported), and *Dyer v. the United Kingdom* (no. 10475/83, Commission decision of 9 October 1984, Decisions and Reports 39, p. 246), and the Court's judgment in *Fayed v. the United Kingdom* (judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65) accepted this core constitutional safeguard.

Accordingly, whether section 10 of the 1947 Act could be described as a substantive limitation on his right of access to a court or a procedural one, paragraph 65 of *Fayed* (as cited in *Fogarty*, cited above) meant that it should be subjected to a proportionality test. Lord Walker of the House of Lords had recognised in *Matthews* the difficulty in suggesting that the principle laid down in *Fayed* had been qualified by the judgment in *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V) and the applicant considered that there was nothing inconsistent in the latter case with the decision in *Dyer* or judgment in *Fayed*.

106. Alternatively, section 10 was a procedural limitation on his right of access to a court for a determination of his civil rights.

He had a "civil right" (a cause of action recognised by national law) within the meaning of Article 6 § 1 which was extinguished by the issuance of a section 10 certificate. The concept of civil rights was, and rightly so in

the applicant's view, an autonomous Convention notion not solely dependent on domestic classifications. This ensured that a State could not legislate to divest itself of its Article 6 responsibilities and implied that a "civil right" could have a meaning or content different to domestic law. However, the House of Lords in *Matthews* analysed the existence of a "civil right" solely by reference to domestic law. It was true that there was an unresolved tension between, on the one hand, the principle that the expression "civil rights" had an autonomous meaning and, on the other, the principle that Article 6 applied only to disputes about civil rights which could be said at least on arguable grounds to be recognised under domestic law. The answer was to view domestic law as regulating whether a right had "some legal basis" in domestic law but not as determining whether there was, in fact, a civil right. Accordingly, the fact that the applicant had, until the issuance of the section 10 certificate, a civil cause of action recognised by domestic law was sufficient to conclude that he had a "civil right" for the purposes of Article 6 of the Convention.

While the applicant did not contest the historical analysis of Lord Bingham in *Matthews*, he maintained that the actual operation of section 10 was also pertinent. He had a cause of action until the Secretary of State had, in the exercise of his discretion, issued the section 10 certificate, thereby extinguishing it. It was the existence of this discretion that distinguished his case from *Z and Others* and rendered it indistinguishable from *Fogarty*. Section 10 may not have accorded a wide discretion, but it existed and, if not exercised, the cause of action subsisted. Indeed, it took nine months after the issuance of proceedings for the certificate to be issued.

107. Having regard to the material sent by the Porton Down Veterans to the MOD on 7 February 2005 (see paragraph 72 above) and the Government submissions thereon (paragraph 115 below), the applicant considered that the only relevant point was that, as the Government had recognised, the MOD's change of policy as regards his civil action had no impact on the issues or submissions before the Court except to undermine the Government's assertion that section 10 certificates were invariably granted.

108. The applicant further rejected the contention, based on *Pellegrin*, that Article 6 did not apply. Noting that the MOD had not pursued this argument before the House of Lords, he pointed out that the principles laid down in *Pellegrin* were relevant only to disputes "raised by employees in the public sector over their conditions of service" as was later confirmed in *Fogarty*. In so far as it was suggested that *R. v. Belgium* laid down a rule that any dispute between a serviceman and the services fell outside the scope of Article 6, that would be both inconsistent with *Pellegrin* and wrong in principle. If it was to be maintained that *Pellegrin* had laid down such a broad rule, that judgment was incorrect.

109. According to the applicant, the restriction on his right of access to a court was also disproportionate. The legitimate aim pursued by restricting

access was identified by the High Court (operational efficiency and discipline during training). However, in 1987 Parliament had clearly considered that any such aim was no longer worth pursuing, it had little to do with someone volunteering for tests and there was no rational connection between section 10 and the aim it purported to pursue, since a section 10 certificate was so broad as to potentially cover situations having no connection with that legitimate aim.

Even with the pension alternative, the restriction was disproportionate to any such legitimate aim. The breadth of the restriction was greater than necessary to achieve its objective. The pension scheme was manifestly inadequate and this was an exceptionally high price to pay for the advantage of not having to prove fault. The fundamental injustice of section 10 of the 1947 Act was recognised by its repeal in 1987 and, further, service personnel who now discover an injury that was sustained prior to 1987 will be treated less favourably than those with a similar injury sustained after 1987.

B. The Government's submissions

110. The Government relied on the judgments of the Court of Appeal and the House of Lords in *Matthews*, cited above. Both courts had considered in some detail the Convention case-law and decided (the House of Lords unanimously) that Article 6 was inapplicable because section 10 of the 1947 Act was a substantive element of national tort law delimiting the extent of the civil right in question.

111. Even if difficult, the distinction between substantive and procedural provisions remained necessary. The oft-quoted paragraph 65 of the judgment in *Fayed*, cited above, provided no basis for ignoring this distinction and the Court of Appeal and the House of Lords convincingly explained why it should be maintained.

Any creation of a sort of hybrid category would expand the applicability of Article 6 beyond its proper boundaries, turning it from a provision guaranteeing procedural rights to one creating substantive ones, which would, in turn, go against the well-established principle that Article 6 applied only to civil rights which could be said on arguable grounds to be recognised under domestic law. In addition, the Government considered it vital to bear in mind the rationale underlying Article 6: the protection of the rule of law and the proper separation of powers from any threat (see *Golder*, cited above, and Lord Hoffmann in *Matthews*). A provision entitling the executive to exercise arbitrary discretion to prevent otherwise valid claims from being decided by the courts would threaten the rule of law, whereas section 10 brought with it no such threat as it simply defined the circumstances in which a no-fault pension scheme would replace a claim in tort for damages. Moreover, it was essential to analyse accurately an

individual's substantive rights in domestic law taking into account the history and legislative context of the provision and its purpose (as did Lord Bingham). The purpose of the provision could then be measured against the underlying rationale of Article 6 of the Convention.

112. The core question was therefore the actual characterisation to be given (procedural or substantive) to the relevant limitation. The essential starting-point was an accurate analysis of domestic law and considerable respect had to be shown to the analysis of the restriction by the higher domestic courts. The Government suggested caution as regards the terminology used so that, for example, the use of the word "immunity" was not determinative of the question: indeed, domestic law recognised an immunity from liability (substantive) and immunity from suit (procedural).

The Government further considered, for the reasons outlined in the judgments in *Matthews*, that section 10 was a substantive limitation. The uncontroversial starting-point was that, prior to the 1947 Act, there was no common-law right to claim damages in tort from the Crown: section 10 could not therefore have removed or taken away any pre-existing right. The 1947 Act created such a right in section 2 but did so expressly subject to section 10 which preserved the preclusion from claiming damages in cases concerning servicemen. In short, the parliamentary intention behind the 1947 Act was to maintain the pre-existing preclusion in so far as servicemen were concerned. Both sections 2 and 10 were contained in Part I of the Act entitled "Substantive Law", a title which accurately reflected the nature of Part I which was a composite of provisions laying down the basic rules for the Crown's liability in tort. Both the prior common law and the 1947 Act were rules of general application marking the limits of tortious liability in domestic law: they were expressed in the language of rules of substantive law and the circumstances in which there was no right to claim (the section 10 exception to the section 2 right to claim) were of general application and clearly set out in the statute.

The certification provisions, properly understood in context, did not indicate the existence of a right to claim removed by some broad discretion of the executive. There was no such right in the first place and the discretion was a narrow one: in this latter respect, the circumstances in which Parliament intended that no action could be brought were fully defined (sections 10(1)(a) and (2)(b)), the narrow discretion therein can be contrasted with the broad discretion in section 10(3) of the 1947 Act, and the discretion was uniformly and invariably exercised. The purpose of the certification provisions was not to confer a broad discretion to take away an existing cause of action but rather to ease the path of servicemen towards an alternative pension by taking away the need to prove a causal link between the injury and service. If a certificate was not issued, a cause of action continued but under section 2 of the 1947 Act. Accordingly, the certification

process did not have any purpose or effect that threatened the rule of law or the separation of powers or was inimical to the rationale behind Article 6.

For these reasons, the Government maintained that the Court of Appeal and the House of Lords correctly concluded in *Matthews* that section 10 was a substantive provision limiting the scope of the civil right.

113. Alternatively, the Government submitted that Article 6 was not applicable given the "functional" principles outlined in *Pellegrin* (§ 66) as applied in *R. v. Belgium*.

114. In the further alternative, the Government argued that, even if Article 6 applied, any interference with the applicant's access to a court was proportionate having regard, on the one hand, to the vagaries, costs and other difficulties of an uncertain fault-based action (where the task of determining whether it was just and reasonable to impose a duty of care would be especially difficult) and, on the other, to the certainty and relative efficiency of a no-fault needs-based system. The Commission (in *Ketterick*, *Dyer* and *Pinder*, all cited above) concluded (as recently as 1984) that the creation of the no-fault pension entitlement was an adequate alternative to the right to sue in negligence. The fact that the State decided in 1987 that the bar on service personnel suing in tort was no longer necessary for claims thereafter did not mean that the prior restriction was inappropriate or disproportionate.

115. Following receipt of the letter of the Porton Down Veterans of 7 February 2005 (see paragraph 72 above), the Government Agent caused urgent inquiries to be made. In submitting this correspondence to this Court, the Government pointed out that neither they nor the Secretary of State in 1995 (in issuing the section 10 certificate) were aware of these Treasury Solicitor letters until the above-noted letter of 7 February 2005. A policy decision had been taken by the MOD not to "take a section 10(1) point" as regards certain civil claims mounted by some Porton Down volunteers because at least some of the tests (including those conducted on Mr Maddison to which the Treasury Solicitor's letters related) had been conducted by or under the direction and control of civilian personnel and not solely by members of the armed forces. While it was not clear precisely which type of personnel were involved in tests on the applicant, "there appear to have been some armed forces personnel and some civilians involved" in the applicant's tests. The MOD stated that it would be prepared to treat the applicant as falling within the above-noted policy decision. The applicant could now sue for damages in tort given this decision of the MOD. He retained, in addition, the separate right to continue with his claim for a pension in the PAT since the section 10 certificate remained valid for the purpose of those proceedings. When the section 10 certificate was issued in 1995, the Minister believed section 10 to be applicable and, until the Treasury Solicitor's letters of advice were recently produced, that was the belief of the Government Agent. They concluded that it was "at least

arguable" that, if the applicant had commenced a civil negligence action following his section 10 certificate (of August 1995), the action would have been barred. According to the Government, therefore, the Article 6 issues he raised before the Court remained live.

C. The Court's assessment

1. General principles

116. The right of access to a court guaranteed by Article 6 in issue in the present case was established in *Golder* (cited above, pp. 13-18, §§ 28-36). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see, more recently, *Z and Others*, cited above, § 91).

117. Article 6 § 1 does not, however, guarantee any particular content for those (civil) "rights" in the substantive law of the Contracting States: the Court may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Fayed*, cited above, pp. 49-50, § 65). Its guarantees extend only to rights which can be said, at least on arguable grounds, to be recognised under domestic law (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, and *Z and Others*, § 81, and the authorities cited therein, together with *McElhinney v. Ireland* [GC], no. 31253/96, § 23, 21 November 2001).

118. The applicant maintained that there was a certain tension between this aforementioned principle, on the one hand, and, on the other, the established autonomous meaning accorded by the Court to the notion of "civil rights and obligations". Connected to this, he questioned the distinction between a restriction which delimits the substantive content properly speaking of the relevant civil right, to which the guarantees of Article 6 § 1 do not apply (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, pp. 16-17, § 36, and *Z and Others*, cited above, § 100), and a restriction which amounts to a procedural bar preventing the bringing of potential claims to court, to which Article 6 could have some application (see *Tinnelly & Sons Ltd and Others and McElduff and Others*, p. 1657, § 62; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 48-49, ECHR 2001-XI; *Fogarty*, § 26; and *McElhinney*, § 25). The applicant argued that it was not necessary to maintain that distinction (relying on the Commission decisions in *Ketterick*, *Pinder* and *Dyer*, cited above, together with paragraph 65 (p. 49) of *Fayed*, as cited in *Fogarty*, § 25): any restriction should be subjected to a proportionality test

because the important point was to protect the courts from the assumption of arbitrary power and control on the part of the executive.

119. The Court cannot agree with these submissions of the applicant. It does not find any inconsistency between the autonomous notion of "civil" (see *König v. Germany*, judgment of 28 June 1987, Series A no. 27, p. 30, § 89, and, more recently, *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII) and the requirement that domestic law recognises, at least on arguable grounds, the existence of a "right" (see *James and Others*, cited above, pp. 46-47, § 81; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 70, § 192; and *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, pp. 36-37, § 80). In addition, the Commission decisions in *Ketterick*, *Pinder* and *Dyer* must be read in the light, *inter alia*, of the judgment in *Z and Others* (cited above) and, in particular, in the light of the Court's affirmation therein as to the necessity to maintain that procedural/substantive distinction: fine as it may be in a particular case, this distinction remains determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention. In both these respects, the Court would reiterate the fundamental principle that Article 6 does not itself guarantee any particular content of substantive law of the Contracting Parties (see, amongst other authorities, *Z and Others*, cited above, § 87).

No implication to the contrary can be drawn, in the Court's view, from paragraph 67 of *Fayed*. The fact that the particular circumstances of, and complaints made in, a case may render it unnecessary to draw the distinction between substantive limitations and procedural bars (see, for example, *A. v. the United Kingdom*, no. 35373/97, § 65, ECHR 2002-X) does not affect the scope of Article 6 of the Convention which can, in principle, have no application to substantive limitations on the right existing under domestic law.

120. In assessing therefore whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 19, § 49). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.

121. Finally, in carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, pp. 20-21, § 38). The Court must not be unduly influenced by, for example, the legislative techniques used (see *Fayed*, pp. 50-51, § 67) or by the labels put on the relevant restriction in domestic law: as the Government noted, the oft-used word "immunity" can mean an "immunity from liability" (in principle, a substantive limitation) or an "immunity from suit" (suggestive of a procedural limitation).

2. Application to the present case

122. The Court has therefore taken as a starting-point the assessment of, and conclusions concerning, section 10 of the 1947 Act by the House of Lords in *Matthews*, cited above.

Drawing on the historical context, the text and purpose of, in particular, sections 2 and 10 of the 1947 Act, the House of Lords concluded that section 10 was not intended to confer on servicemen any substantive right to claim damages against the Crown but rather had maintained the existing (and undisputed) absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. The Lords made it clear that prior to 1947 no right of action in tort lay against the Crown on the part of anyone. The doctrine that "the King could do no wrong" meant that the Crown was under no liability in tort at common law. Section 2 of the 1947 Act granted a right of action in tort for the first time against the Crown but the section was made expressly subject to the provisions of section 10 of the Act. Section 10 (which fell within the same part of the 1947 Act as section 2 entitled "Substantive law" – see Lord Hope in *Matthews*, paragraph 94 above) provided that no act or omission of a member of the armed forces of the Crown while on duty should subject either that person or the Crown to liability in tort for causing personal injury to another member of the armed forces while on duty. Section 10 did not therefore remove a class of claim from the domestic courts' jurisdiction or confer an immunity from liability which had been previously recognised: such a class of claim had never existed and was not created by the 1947 Act. Section 10 was found therefore to be a provision of substantive law which delimited the rights of servicemen as regards damages claims against the Crown and which provided instead as a matter of substantive law a no-fault pension scheme for injuries sustained in the course of service.

123. As to whether there exist strong reasons to depart from this conclusion, the applicant mainly argued that the section 10 certificate issued by the Secretary of State operated as a procedural restriction to prevent him from pursuing a right of action which he enjoyed under the 1947 Act from the moment he suffered significant injury. The Court is unable to accept this argument. It finds that section 10 must be interpreted in its context and with

the legislative intent and purpose in mind. As explained in detail in the judgments of Lord Bingham and Lord Hope in *Matthews*, the object of the certification procedure introduced by section 10(1)(b) was not to alter the essential thrust of section 10 as originally drafted – namely, to exclude the Crown's liability altogether – but was rather to facilitate the grant of a pension to injured service personnel by obviating the need to prove that the injury was attributable to service.

Moreover, Lord Bingham pointed out that the "realities of the situation" were that it was "plainly intended" that the section 10 certificate would be issued where the relevant conditions had been fulfilled and he noted that that had indeed been the uniform and unvarying practice of successive Secretaries of State for forty years, to the extent that any practitioner would have advised Mr Matthews that a section 10 certificate was bound to be issued (see also Lord Walker in *Matthews*, paragraph 92 above). This narrow discretion conferred by section 10(1)(b) was to be contrasted with the broader discretion for which section 10(3) of the 1947 Act provided. For the reasons set out in paragraph 126 below, this finding as to the narrow discretion of the Secretary of State is not altered by the fact that the latter has now decided not to maintain "a section 10(1) point" against the applicant.

The Court finds this discretion conferred on the Secretary of State by section 10 to be fundamentally different in character from the unfettered discretion enjoyed by a foreign government, which was the subject of the Court's examination in *Fogarty*, not to waive State immunity and thereby to prevent a claim otherwise well-founded in domestic law from being entertained by a domestic court.

The certification procedure provided for by section 10 is similarly to be distinguished from that considered by the Court in *Tinnelly & Sons Ltd and Others and McElduff and Others*. In that case, the Fair Employment (Northern Ireland) Act 1976 clearly granted a right in national law to claim damages for religious discrimination when tendering for public contracts. Section 42 of the 1976 Act was not aimed at creating an exception for cases in which Parliament (when adopting the 1976 Act) considered discrimination justified but rather allowed the Secretary of State by a conclusive certificate, based on an assertion that the impugned act was done to protect national security, to stop court proceedings that would otherwise have been justified. As observed by Lord Hoffmann, section 10 did not involve such encroachment by the executive into the judicial realm but rather concerned a decision by Parliament in 1947 that, in a case where injuries were sustained by service personnel which were attributable to service, no right of action would be created but rather a no-fault pension scheme was to be put in place, the certificate of the Secretary of State serving only to confirm that the injuries were attributable to service and thereby to facilitate access to that scheme.

124. Accordingly, this Court finds no reason to differ from the unanimous conclusion of the Court of Appeal and the House of Lords as to the effect of section 10 in domestic law. It considers that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law (see *Z and Others*, § 100). In such circumstances, the applicant had no (civil) "right" recognised under domestic law which would attract the application of Article 6 § 1 of the Convention (see *Powell and Rayner*, cited above, pp. 16-17, § 36).

It is not therefore also necessary to examine the parties' submissions as to the proportionality of that restriction. It is further unnecessary to examine the Government's argument that Article 6 was inapplicable on the basis of the above-cited judgments in *Pellegrin* and *R. v. Belgium*.

125. The Court concludes that Article 6 of the Convention is not applicable and that there has not therefore been a violation of that provision.

126. Finally, the Court has noted the submissions of the parties concerning the recent discovery of the Treasury Solicitor's letters of advice from 1953 concerning another test participant (see paragraphs 72, 107 and 115 above). The fact that the Secretary of State has now decided to no longer "take a section 10(1) point" in any civil action of the applicant, does not alter or otherwise affect the above conclusion in respect of section 10 in the applicant's case. That decision merely serves to resolve in the applicant's favour a doubt which has recently emerged (not commented upon by the applicant and remaining unclarified) as to whether the applicant in fact belonged to a category of persons to which the provisions of section 10 applied. Further, it is a decision which concerns the future, the Government having confirmed that the section 10 certificate remains valid for the purposes of the ongoing PAT appeal.

The Court has, however, returned to these submissions in the context of Article 8 of the Convention below.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

127. The applicant further complained that section 10 of the 1947 Act had also violated his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1, the relevant part of which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> ..."

128. For the reasons outlined in the context of Article 6, the applicant maintained that he had a "possession" (a claim in negligence against the

MOD) until deprived of it, in an unjustified manner, when the Secretary of State issued the section 10 certificate (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, § 31). The Government pointed out that, while Article 1 of Protocol No. 1 recognised a vested cause of action as a possession, any claim the applicant might otherwise have had in tort was always subject to section 10 of the 1947 Act and was defeasible. There had been, therefore, no interference with the applicant's rights under that provision. Indeed, Mr Matthews (see *Matthews*, cited above) did not pursue this argument before the House of Lords.

129. The Court reiterates that a proprietary interest in the nature of a claim can only be regarded as a possession where it has a sufficient basis in national law, including settled case-law of the domestic courts confirming it (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX). The applicant argued that he had a "possession" on the same grounds as he maintained that he had a "civil right" within the meaning of Article 6 § 1. For the reasons outlined under Article 6 § 1 above (see paragraphs 122-24), the Court considers that there was no basis in domestic law for any such claim. The applicant had no "possession" within the meaning of Article 1 of Protocol No. 1 and the guarantees of that provision do not therefore apply.

130. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1

131. The applicant further argued under Article 14 of the Convention (taken in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1) that section 10 of the 1947 Act was discriminatory. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

132. He maintained, for the reasons set out above in the context of Article 6 of the Convention and Article 1 of Protocol No. 1, that the impugned facts fell within the ambit of those Convention provisions. He further argued that he had been treated less favourably than other persons in an analogous position: he referred to other employees who had suffered injury as a result of the negligence or lack of foresight of their employers or, alternatively, to other servicemen injured as a result of activities after 1987. He also considered that difference in treatment to be disproportionate on the

same grounds as he maintained the interference with his right of access to a court was unjustified. The Government disagreed.

133. In the light of its findings (see paragraphs 124 and 129 above) that the applicant had no "civil right" or "possession" within the meaning of Article 6 § 1 and Article 1 of Protocol No. 1 so that neither Article was applicable, the Court considers that Article 14 is equally therefore inapplicable (see, amongst many other authorities, *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, p. 585, § 22).

134. There has therefore been no violation of Article 14 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 OF THE CONVENTION AND/OR ARTICLE 1 OF PROTOCOL No. 1

135. The applicant also complained under Article 13 of the Convention taken in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1 that he was left without an effective remedy for the unlawful barring of his claim or, alternatively, the unlawful deprivation of his possessions.

136. The Government contended that there was no arguable claim of a violation of Article 1 of Protocol No. 1 or, consequently, of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

137. The Court notes that the applicant's complaints under Article 6 and Article 1 of Protocol No. 1 are clearly directed against the provisions of section 10 of the 1947 Act. In this respect, the Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on the ground that it is contrary to the Convention (see *James and Others*, cited above, p. 47, § 85).

138. Accordingly, there has been no violation of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

139. The applicant complained about inadequate access to information about the tests performed on him in Porton Down. He considered that his access to information to allay his fears about the tests was sufficiently linked to his private and family life to raise an issue under Article 8 of the Convention, the relevant parts of which read as follows:

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The applicant's submissions

140. The applicant's primary submission was that the State failed to provide him with information about his test participation in breach of its positive obligation to respect his private and family life.

141. Relying mainly on the Court's judgments in *Gaskin v. the United Kingdom* (judgment of 7 July 1989, Series A no. 160), *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports* 1998-I) and *McGinley and Egan* (cited above), he maintained that he had a right to information under Article 8 to allow him to understand and react to the risks and dangers to which he had been exposed. This was a free-standing obligation (unattached to any judicial or other process) to provide an "effective" and "accessible" means for an individual to "seek all relevant and appropriate information". His particular need for information, and for the means of obtaining it, first arose in 1987 when he initially began to seek his records, well before and separate from any PAT appeal. In any event, attaching the positive obligation to the PAT process was absurd as it would effectively require someone (whether or not he or she was entitled to, or was interested in, a pension): to engage in a litigious process and, in particular, to apply for a pension and/or threaten litigation under section 2 of the 1947 Act; to hope that any pension application would be unsuccessful at first instance so that he/she could appeal to the PAT; and, before the PAT, to discharge a burden of proof and demonstrate the relevance of the documents to the litigation issues before he/she could obtain an order for disclosure under Rule 6 of the PAT Rules. Rule 6 is designed for the contentious litigation process and not to assuage fear by providing information: the applicants in *McGinley and Egan* had not relied on the general right to information and their case was therefore distinguishable on the facts.

142. The applicant maintained that the State did not secure his right to an effective and accessible procedure to obtain the necessary information.

143. Prior to the 1998 Scheme (see paragraph 69 above) and his PAT appeal, he had made significant attempts, apart from any litigation, to obtain information. The first information disclosed was to his doctor on a "medical in confidence" basis so he did not see it until 1994. It was not, in any event, useful as it contained errors and gaps (it did not mention the mustard gas tests) and was unsubstantiated by underlying records. He obtained some meaningful disclosure in December 1997 and March 1998 but this too was

inadequate and it came via extraordinary channels (a meeting with a Minister of State and in the context of his application to this Court). It did not amount to "all relevant and appropriate information": there was no mention of the 1962 tests and no information about the 1963 mustard gas test; the standards of record generation (at the time) and maintenance (thereafter) were recognised to be lacking; while it was stated that all documents had been disclosed, this was obviously not the case given later disclosure; and the letter of December 1997 contained assertions unsubstantiated by any records.

144. The subsequent 1998 Scheme could not remedy this and was itself an inadequate means of obtaining information. The 1998 Scheme began more than ten years after he had begun to seek information and subsequent to his introduction of the present application. The reassurances in the information pamphlet were unconvincing as they were not backed up by an epidemiological study and the pamphlet promised only a summary of records and the possibility of going to Porton Down to inspect records. Indeed, the applicant considered that the 1998 Scheme confirmed the lack of adequate and effective means of obtaining information.

145. Similarly, the subsequent Rule 6 procedure did not cure this earlier lack of information and it was, in any event, neither effective nor accessible since it was a cumbersome, unwieldy and long procedure allowing incomplete and drip-feed disclosure (the latest being in April 2005).

The procedure could be conditioned and limited as the President of the PAT wished, Rule 6 providing that the President "may" order disclosure *only* if the information "is likely to be relevant to any issue to be determined on appeal". In addition, the applicant considered the Rule 6 procedure to lack effective control: there were no time-limits on disclosure and disclosure was allowed on a piecemeal basis. There were also significant delays in the procedure. The applicant accepted that some delay was attributable to him and he explained the reasons for his delay in responding to the PAT's letter of 25 July 2001 and for applying to adjourn the October 2002 hearing. However, he argued that those delays did not, in any event, lead to the overall delay in the procedure: the MOD continued to make disclosure thereafter and the hearing adjournment was attributable also to the VA which was not ready, to the reasonable confusion as to the scope of the appeal and to the need to put further questions to Dr H. The uncontrolled certification by the MOD of records as undisclosable "departmental minutes or records" also undermined the ability of the Rule 6 procedure to fulfil the positive obligation under Article 8, as did the power to withhold documents on "national security" grounds. The whole Rule 6 procedure was, in the applicant's view, marked by errors, contradictory statements and admissions that certain documents could no longer be found with the consequence that the information at the end of the disclosure process was incomplete. Had Mr McGinley and Mr Egan used the Rule 6 procedure, the Court would

have inevitably concluded in its judgment as to the inability, both in principle and in practice, of that procedure to satisfy the positive obligation to provide an accessible and effective means of obtaining information.

146. Moreover, the applicant maintained that all "relevant and appropriate information" had not been disclosed to him. Apart from the conclusion that could be drawn from the piecemeal disclosure to date, accompanied by unsubstantiated assurances (later contradicted) that all disclosure had been made, the applicant considered that two other factors demonstrated that all relevant and appropriate documents had not been disclosed.

In the first place, there was, in the applicant's view, an unacceptable failure to create and maintain records which rendered compliance with the Article 8 positive obligation impossible from the outset. Secondly, the Government had, until recently, refused to carry out a long-term follow-up study which was the only effective way to provide information. He considered unconvincing the reasoning and conclusion of the feasibility study report (see paragraph 55 above), while the recently commissioned study (see paragraph 70 above) had still not been completed and, further, begged the question as to why it was not done earlier.

147. As to the proportionality of the State's position, the applicant noted that the Government did not plead a national security justification but rather one based on quite narrow "medical in confidence" grounds. While withholding information on "medical in confidence" grounds could serve a legitimate aim (the interests of health professionals compiling medical records and, consequently, the interests of patients), the applicant was not convinced of this in the present case since the only persons who stood to gain by the Porton Down scientists expressing themselves freely were the scientists themselves. In any event, the "medical in confidence" approach was abandoned generally (in 1991 with the entry into force of the Access to Health Records Act 1990) and specifically as regards Porton Down participants (with the introduction of the 1998 Scheme). This defence to full disclosure was clearly not proportionate having regard to the enormous importance of the information for the applicant; the paucity of the information disclosed and the piecemeal manner in which that had been done; the need for actual and original records to make a proper risk assessment; the anxiety and stress caused by the absence of such a risk assessment; the facts that the tests were in secret, that the participants were forbidden to speak of them and that there were no safeguards against abuse put in place; the toxic and hazardous material to which the participants were exposed; and the lack of an adequate follow-up study which might have generated conclusions to clarify the issue for test participants one way or the other.

148. Relying on the detailed legal submissions made, and shortcomings highlighted, in the context of his primary Article 8 submission, the applicant advanced two alternative and secondary arguments.

In the first place, he maintained that the procedures and systems surrounding the tests did not fulfil the procedural requirements inherent in respect for private life, so that the Government had failed adequately to secure and respect his Article 8 interests (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, and *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B).

Secondly, he argued that the Government had failed to secure his Article 8 rights in that they had failed to adequately investigate and research (or, alternatively, to put in place an adequate system to investigate and research) the potential risks to which they had chosen to expose him. Just as Articles 2 and 3 implied an investigatory requirement (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324; *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99 ECHR 2002-II; and *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V), so a similar obligation arose under Article 8 of the Convention.

B. The Government's submissions

149. While the Government considered that there was no evidence that the tests had had a negative impact on his health, the key answer to the applicant's complaint was, as found in *McGinley and Egan*, cited above, that the positive obligation under Article 8 to provide an effective and accessible procedure giving access to all relevant and appropriate information had been fulfilled by the Rule 6 procedure. This was a conclusion of principle not altered by, and indeed confirmed by, the facts of the present case.

150. The procedure was demonstrably accessible to the applicant and he had successfully relied on and used it. It had been available to him at all relevant times since the illnesses in respect of which he claimed a pension manifested themselves in the late 1980s. He had not appealed to the PAT until November 1998 or made the Rule 6 request until July 1999. Accordingly, the period prior to July 1999 could not be relied upon to assess the accessibility (or indeed the effectiveness) of the Rule 6 procedure. In addition, should the current State epidemiological study provide evidence to support the applicant's case, he could begin his pension claim again.

151. The Rule 6 procedure was also capable of being effective and, on the facts of the present case, was effective in producing the relevant documents for the applicant in a reasonable period of time.

152. It was in principle effective since it allowed disclosure of documents directly corresponding to the positive obligation under Article 8. The retention of certain documents on national security or public interest

grounds did not undermine its effectiveness and was compatible with the Convention, as it enabled a balance to be struck between the competing interests involved and was not without statutory safeguards (the text of Rule 6 itself). There was no systematic delay or "lack of control" over the Rule 6 procedure.

It was also effective in the present case. Pursuant to the applicant's request, a Rule 6 order was made setting out in broad terms the simple categories of document to be disclosed. The Secretary of State approached compliance in a timely manner, thoroughly and with an evident disposition to conduct an extensive and wide-ranging search in order to disclose the maximum documents possible. A wide range of test documentation was disclosed: nothing of significance was withheld on national security grounds. The applicant made no further request under Rule 6 for disclosure to the PAT.

153. If there was some delay attributable to the State after July 1999, it did not undermine the effectiveness of the process and there was no tangible evidence of prejudice to the applicant's case. The applicant had the "responsive documents" well in advance of the PAT hearing and was able to make use of them as he considered appropriate. The delay in furnishing the fifth category of documents (see paragraphs 53 and 55 above) was not surprising given the width of that category, the need to ensure completeness, the time that had elapsed since the tests and the "need to consider serious classification issues". Moreover, any delay by those authorities was to be measured against the applicant's own delays: Rule 6 was only relied on in July 1999 although it had been available since the late 1980s when the applicant began to look for documents; he caused confusion, and consequently delay, as regards the breadth of the PAT appeal; and, indeed, the Government attributed to the applicant any delay after the Secretary of State's letter of 6 July 2001. Furthermore, and other than the timely disposal of the PAT proceedings, there were no time-sensitive issues as in, for example, the preventative measures in issue in *Guerra and Others*, cited above.

Disclosure in stages was not unexpected (given the broad category of documents requested, their age and the numerous checks required) and it was a better option than holding all documents until all had been located. As to the suggestion that the documentation was not complete, the Government pointed out that, as in *McGinley and Egan*, the State could not be held responsible for any allegation concerning the failure to make or maintain records prior to the State's acceptance of the right of individual petition in 1966. As to the complaint about a refusal to carry out a follow-up study, the Government argued that there was no positive obligation to do so, that on no view could such an obligation arise without compelling evidence that there was a material problem and that, in any event, there was at the time an ongoing epidemiological study to assuage the fears of the servicemen.

154. Finally, the Government also referred to the medical responses in 1987 and 1989, to meetings and correspondence with the Secretary of State in 1997, to the 1998 Scheme and to the ongoing epidemiological study, to conclude that the applicant had had access to all relevant information.

C. The Court's assessment

1. Applicability of Article 8

155. The Government were not definitive about the applicant's participation in tests in 1962 despite the findings of the PAT. The Court considers that it is not necessary for current purposes to resolve this dispute since, in any event, it is accepted that the applicant attended the Chemical and Biological Defence Establishment at Porton Down in 1963 to participate in testing on armed forces personnel of mustard and nerve gas.

The tests are described in paragraphs 15 and 16 above and involved the applicant's exposure to small doses of both of these agents for research purposes. In the case of mustard gas, the PAT expressly found that the aim was to test the suitability of military clothing to exposure (the PAT finding of fact – see paragraph 63 above) and it would appear from the inhalation of nerve gas, that the aim was to test the reaction of service personnel to it. Even accepting the Government's clarifications about the manner in which those tests were conducted, the Court considers that the issue of access to information, which could either have allayed the applicant's fears or enabled him to assess the danger to which he had been exposed, was sufficiently closely linked to his private life within the meaning of Article 8 as to raise an issue under that provision (see *McGinley and Egan*, cited above, pp. 1362-63, § 97). It is not necessary to examine whether the case also gives rise to a separate issue under the family life aspect of this Article.

156. It follows that Article 8 of the Convention is applicable.

2. Compliance with Article 8

157. The applicant considered that the State had failed to provide him with access to information in violation of his rights under Article 8. The Court observes that, in addition to the primarily negative undertakings in Article 8 of the Convention, there may be positive obligations inherent in effective respect for private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck

between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of Article 8 being of a certain relevance (see *Gaskin*, cited above, p. 17, § 42).

158. In *Gaskin*, a file existed containing details of the applicant's childhood history that he had no opportunity of examining in its entirety. The Court found (p. 20, § 49) that the United Kingdom, in handling his requests for access to those records, was in breach of a positive obligation flowing from Article 8 of the Convention:

> "... persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case."

159. In the later judgment in *Guerra and Others* (cited above, p. 228, § 60), the Court ascertained whether the national authorities had taken the necessary steps to provide the applicants with information concerning risks to their health and well-being:

> "The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, *mutatis mutandis*, the *López Ostra* judgment cited above, p. 54, § 51). In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.
>
> The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention."

160. Subsequently, in *McGinley and Egan*, cited above, the Court also examined whether the State had fulfilled a positive obligation to provide information to the applicant servicemen who had participated in armed forces atmospheric tests of nuclear weapons. It distinguished the judgment in *Guerra and Others* since, in that case, it was not disputed that the applicants were at risk from the neighbouring factory or that the State had in its possession information which would have enabled them to assess this risk and take steps to avert it, whereas Mr McGinley and Mr Egan had only demonstrated that one set of relevant records remained in the hands of the authorities (radiation level records). It went on (pp. 1363-64):

"100. ... the Government have asserted that there was no pressing national security reason for retaining information relating to radiation levels ... following the tests.

101. In these circumstances, given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose. Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

102. As regards compliance with the above positive obligation, the Court recalls its findings in relation to the complaint under Article 6 § 1, that Rule 6 of the Tribunal Rules provided a procedure which would have enabled the applicants to have requested documents relating to the MOD's assertion that they had not been dangerously exposed to radiation, and that there was no evidence before it to suggest that this procedure would not have been effective in securing disclosure of the documents sought ... However, neither of the applicants chose to avail themselves of this procedure or, according to the evidence presented to the Court, to request from the competent authorities at any other time the production of the documents in question.

For these reasons the present case is different from that of *Gaskin* ..., where the applicant had made an application to the High Court for discovery of the records to which he sought access.

103. The Court considers that, in providing the above Rule 6 procedure, the State has fulfilled its positive obligation under Article 8 in relation to these applicants. It follows that there has been no violation of this provision."

161. The present applicant's uncertainty, as to whether or not he had been put at risk through his participation in the tests carried out at Porton Down, could reasonably be accepted to have caused him substantial anxiety and stress (see *McGinley and Egan*, p. 1363, § 99). Indeed, the clear evidence is that it did. From the onset of his medical problems in 1987, he single-mindedly pursued through various means (detailed in paragraphs 17-33 above) any relevant information that could inform him about his test participation and assuage his anxiety as to the consequences. While the PAT found, relying on its expert's report, that there was no reliable evidence to suggest a causal link between the tests and the applicant's claimed medical conditions, that was not until 2004 and, in any event, the High Court has since allowed his appeal and sent the matter back to the PAT, before which the matter is pending. Moreover, as is now clear, a significant number of "relevant records" of the 1963 tests were still in existence in 1966, the date of the respondent State's declarations under Article 25 and 46 of the Convention (see *McGinley and Egan*, p. 1360, § 88): the documents included with the letter of 2 December 1997 from the Minister of State for Defence; those documents referred to in the letter of 3 May 2001 from Porton Down; the records submitted with the Government's observations in

the present case (on 9 March 1998 and 5 April 2001); and the additional documents disclosed to the PAT on 6 July 2001, 23 August 2002, 2 and 21 October 2002 and on 18 April 2005.

On the other hand, the Government have not asserted that there was any pressing reason for withholding the above-noted information although they commented on the vagaries of locating old records that had inevitably become dispersed. Reasons of "medical confidence" were not pleaded by the Government and such reasons would, in any event, be inconsistent with the dilution of the notion in the 1990 Act and the apparent decision not to raise it in the context of the 1998 Scheme and Porton Down records. Following certain revisions of their position and declassification of documents (see paragraphs 53, 55, 57, 59 and 68 above), the Government submitted that, "nothing of significance" had been withheld on national security grounds (see paragraph 152 above).

162. In such circumstances, the Court considers that a positive obligation arose to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information" (see *McGinley and Egan*, cited above, pp. 1363-64, § 101) which would allow him to assess any risk to which he had been exposed during his participation in the tests (see *Guerra and Others*, p. 228, § 60).

163. As to compliance with this positive obligation, the Government mainly relied on the Court's conclusion in *McGinley and Egan* that the Rule 6 procedure before the PAT fulfilled this obligation.

164. The Court considers that that conclusion does not apply in the present case since the essential complaints of Mr McGinley and Mr Egan and the present applicant are not comparable. The search for documents by the former was inextricably bound up with their domestic applications for pensions in respect of illnesses they maintained were caused by their participation in nuclear tests. In contrast, the present applicant had made numerous attempts to obtain the relevant records (outlined in paragraphs 17-33 above) independently of any litigation and, in particular, of a pension application. Indeed, even when he applied for a pension in 1991, he continued to seek documents in parallel with that application since the Rule 6 procedure was not, in any event, available at first instance. If the present applicant appealed to the PAT it was because he felt constrained to do so in order to make his Rule 6 request for documents following the judgment of this Court in *McGinley and Egan* in June 1998.

165. The Court's judgment in *McGinley and Egan* did not imply that a disclosure procedure linked to litigation could, as a matter of principle, fulfil the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation. Consistently with judgments in *Guerra and Others* and *Gaskin* and as the applicant argued, it is an obligation of disclosure (of the

nature summarised in paragraph 162 above) not requiring the individual to litigate to obtain it.

166. The Government also relied more generally upon the disclosure that had been made through the "medical" and "political" channels and upon the other information services and health studies (see paragraphs 17-33 and 69-71 above). However, the Court does not consider that, either individually or collectively, these could constitute the kind of structured disclosure process envisaged by Article 8. In any event, it is evident that those processes resulted in partial disclosure only given the later disclosure of relevant records, notably during the present application and the PAT appeal.

In particular, the applicant's doctor was given information in 1987 and 1989. However, the applicant did not see it until 1994 given the "medical in confidence" basis of disclosure, the information did not refer to the mustard gas tests, it was not accompanied by the underlying records and it was, in any event, incorrect as regards certain matters (see paragraphs 19 and 36 above). Having been refused disclosure of further information, the applicant was given access for the first time to original records in 1997: this was an *ad hoc* procedure adopted in response to his tenacious pursuit of the information (see paragraphs 19-33 above) and it constituted but the first of many instalments.

Moreover, none of the processes described as "information services and health studies" (see paragraphs 69-71 above) began until almost ten years after the applicant had commenced his search for records and, further, after he had introduced his application to the Court.

As to the 1998 Scheme, the Court notes the difficulties experienced by the authorities, even in a judicial context before the PAT, in providing records pursuant to the Rule 6 order of the President of the PAT. Even taking into account only the period following the making of the Rule 6 order by the President in February 2001, the disclosure has been piecemeal (over five occasions listed in paragraph 161 above, the most recent being in April 2005), the State reviewed its position on the classification of certain material on several occasions during that period (see paragraphs 53, 55, 57, 59 and 68 above) and, over four years after the Rule 6 order, disclosure remains incomplete (see the letter of 18 April 2005, paragraph 68 above). Indeed, the PAT described as "disquieting" the difficulties experienced by the applicant in obtaining the records produced to the PAT. In the same vein, it is also illustrative that none of the authorities dealing with the Rule 6 procedure or the present application was aware until recently of the Treasury Solicitor's letters from 1953 (see paragraph 72 above). These demonstrated difficulties in making comprehensive and structured disclosure to date undermines, in the Court's view, any suggestion that an individual going to Porton Down to review records retained there (the 1998 Scheme) could lead to the provision of all relevant and appropriate

information to that person. It is undoubtedly the case that certain records (existing after 1996) were, given their age and nature, somewhat dispersed so that the location of all relevant records was, and could still be, difficult. However, it is equally the case that the absence of any obligation to disclose and inform facilitates this dispersal of records and undermines an individual's right to obtain the relevant and appropriate disclosure.

Finally, the Porton Down Volunteers Medical Assessment Programme involved only 111 participants and no control group whereas 3,000 service personnel had participated in nerve gas tests and 6,000 in mustard gas tests, with some having been involved in both types of test. The full-scale epidemiological study did not begin until 2003 and has not yet been completed.

167. In such circumstances, the Court considers that the State has not fulfilled the positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information that would allow him to assess any risk to which he had been exposed during his participation in the tests.

168. It is not therefore necessary to examine the applicant's additional submission that the positive obligation required the completion of a "long-term follow-up study" (see paragraph 146 above) or the applicant's alternative and secondary arguments outlined in paragraph 148 above.

169. In conclusion, there has been a violation of Article 8 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

170. The applicant also complained about the inadequate provision of information under Article 10 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... for preventing the disclosure of information received in confidence ..."

171. While the applicant acknowledged that the Court had preferred to examine such questions under Article 8 to date, he maintained that as a matter of principle the right to seek access to information was an important and inherent part of the protection of Article 10 of the Convention. The Government did not agree.

172. The Court reiterates its conclusion in *Leander v. Sweden* (judgment of 26 March 1987, Series A no. 116, p. 29, § 74) and in *Gaskin* (cited above, p. 21, § 52) and, more recently, confirmed in *Guerra and Others* (cited above, p. 226, § 53), that the freedom to receive information "prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" and that that freedom "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to ... disseminate information of its own motion". It sees no reason not to apply this established jurisprudence.

173. There has thus been no interference with the applicant's right to receive information as protected by Article 10 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

174. 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

175. As regards pecuniary loss, the applicant considered that the failure to disclose information and the application to him of the section 10 certificate denied him the opportunity to bring proceedings in tort against the MOD armed with the necessary evidence to establish the relevant causal link. Access to the PAT did not assist since the pension system was not an adequate substitute for a civil claim and since the PAT was constrained by the limited evidence available to it which resulted, in turn, from the State's failure to create and properly retain records, to carry out proper short and long-term monitoring of participants and to commission follow-up work and epidemiological studies. While he did not specify the level of damages sought for this loss of opportunity, he indicated that it represented his loss of earnings due to ill-health resulting from his test participation.

As to his alleged non-pecuniary loss, he claimed to have been denied access to the relevant information for a very long time. This coupled with unsubstantiated assertions by the authorities that no harm was done by the tests only served to cause him substantial anxiety, stress and uncertainty. He made considerable efforts (medical, political and judicial) to obtain the information over almost twenty years. He did not believe that the Rule 6 procedure was the answer and, in any event, he maintained that he still had not had access to all information. The finding of a violation would not

adequately compensate him and he considered that it warranted a substantial award, although he did not specify a sum.

176. The Government observed, as regards both the pecuniary and non-pecuniary loss alleged, that the applicant had access, at all material times, to a pension scheme (in substitution for a civil action), the PAT and the Rule 6 procedure. He had obtained information under Rule 6, his entitlement to a pension remained open and he would obtain a pension if he were to meet the threshold for an award.

177. The Court notes that it has not found a violation of Article 6 as regards the impugned section 10 certificate. In addition, the Court's finding of a violation was based on the applicant's right *per se* to information about his test participation independently of any litigation. In any event, it is not possible to speculate as to the applicant's prospects of establishing a causal link between his test participation and ill-health had he been provided with an "effective and accessible procedure" giving access to "all relevant and appropriate information".

178. Nonetheless, the Court considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety: the tests concerned substances which, in theory, were military weapons; he had been ill with chronic respiratory problems since 1987 when he began his search for information; he made substantial and determined efforts to obtain this information through various channels (medical, political and judicial) over a long period of time; disclosure has been gradual and is apparently not complete (see paragraphs 161 and 166 above). The Court considers that this non-pecuniary loss cannot be compensated solely by the finding of violation.

179. Having regard to awards made in similar cases, the Court awards, on an equitable basis, 8,000 euros (EUR), which sum is to be converted into pounds sterling at the date of settlement.

B. Costs and expenses

180. The applicant claimed a total sum (inclusive of value-added tax – VAT) of 100,109.67 pounds sterling (GBP) in legal costs and expenses for the PAT proceedings and the present application, including the anticipated costs of the hearing before this Court in October 2004.

In particular, he claimed GBP 86,663.84 as regards the present application, including the fees of a solicitor and a trainee solicitor (almost 100 hours work) and of three counsel (including one Queen's Counsel). The legal costs and expenses of the domestic PAT proceedings amounted to GBP 13,445.83, including the fees of a solicitor and trainee (for approximately 40 hours work) and of two counsel (one of whom had not been involved in the present application). The relevant fee notes and vouchers were submitted detailing the costs. The applicant did not claim the

costs and expenses of his appeal to the High Court from the PAT since Rule 28 of the PAT Rules provided that he was entitled to his costs once leave to appeal was granted.

181. The Government considered the claims concerning the proceedings before this Court to be excessive. They considered unnecessary the appointment of three counsel (for the present proceedings) and contended that the solicitors' fees should, in any event, have been lower. Certain items of work were vaguely described and counsels' fee rates had not been included. They challenged the necessity for the applicant's lengthy submissions before the Grand Chamber. They maintained that GBP 29,000 would be a reasonable sum in legal costs and expenses for the Convention proceedings. The Government did not comment on the costs and expenses claimed for the PAT proceedings.

182. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred (in the case of domestic proceedings, in seeking redress for the violations of the Convention found or preventing a violation occurring) and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, for example, *Stašaitis v. Lithuania*, no. 47679/99, §§ 102-03, 21 March 2002).

183. On the one hand, the present application was of some complexity. It required an examination in a Chamber and in the Grand Chamber including several rounds of observations and an oral hearing. It was adjourned for a number of years pending the applicant's PAT appeal. During the adjournment, the applicant kept the Court informed of progress and thereafter continued the PAT proceedings at the same time as the present application. It is reasonable to accept as necessarily incurred the PAT costs to date (excluding the High Court appeal costs which are not claimed), despite the finding under Article 8 above, given not least that those proceedings have led to disclosure of much documentation as recently as April 2005. Further costs, both in terms of the present application and the PAT proceedings, have been incurred since the date of the oral hearing, the date to which the applicant had estimated his costs and expenses.

184. On the other hand, the Court considers excessive the appointment of three counsel as well as a solicitor (and a trainee solicitor) to the present application and two counsel (together with a solicitor and trainee) to the PAT proceedings. It is not explained why one of the counsel working on the PAT appeal was not involved in the application to this Court: this would have led to some duplication of work. In addition, and as the Government pointed out, certain items of work in counsels' fee notes are not clearly explained and they have not noted their rates. Moreover, the estimated fees for the hearing before this Court (approximately GBP 37,000 including the travel, accommodation and legal fees of three counsel as well as of a solicitor) are unreasonably high. Furthermore, the applicant's claim under Article 6, which was a significant part of the application, was unsuccessful

so that the costs and expenses allowed should be reduced (see *Z and Others*, cited above, § 134).

185. Making its assessment on an equitable basis, the Court awards the sum of EUR 47,000 in respect of the costs and expenses of the PAT proceedings and the present application (which sum is to be converted into pounds sterling at the rate applicable on the date of settlement and is inclusive of any VAT which may be chargeable) less EUR 3,228.72 in legal aid already paid by the Council of Europe.

C. Default interest

186. 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 nine votes to eight that there has been no violation of Article 6 § 1 of the Convention;

2. *Holds* by sixteen votes to one that there has been no violation of Article 1 of Protocol No. 1;

3. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1;

4. *Holds* by sixteen votes to one that there has been no violation of Article13 of the Convention taken in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

6. *Holds* unanimously that there has been no violation of Article 10 of the Convention;

7. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts to be converted into pounds sterling on the date of settlement:

(i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;

(ii) EUR 47,000 (forty seven thousand euros) in respect of costs and expenses (inclusive of any VAT which may be chargeable) less EUR 3,228.72 (three thousand two hundred and twenty-eight euros seventy-two cents) in legal aid already paid by the Council of Europe;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 October 2005.

Luzius WILDHABER
President

Lawrence EARLY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Caflisch and Mr Ress;

(b) dissenting opinion of Mr Loucaides joined by Mr Rozakis, Mr Zupančič, Mrs Strážnická, Mr Casadevall, Mrs Thomassen, Mr Maruste and Mr Traja;

(c) dissenting opinion of Mr Zupančič.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGES CAFLISCH AND RESS

We agree with the present judgment. We agree in particular, regarding the scope of Article 6 § 1 of the Convention, that the restriction contained in section 10 of the Crown Proceedings Act 1947 barred the applicant from suing the Crown and that it derived from the applicable principles governing the substantive right of action in domestic law (see paragraph 124 of the judgment).

Having reached the above conclusion, the Court has found it unnecessary to dwell on the alternative argument submitted by the Government (see paragraph 113 of the judgment) to the effect that Article 6 § 1 was not applicable on account of the Court's judgments in *Pellegrin v. France* ([GC], no. 28541/95, § 66, ECHR 1999-VIII) and *R. v. Belgium* (no. 33919/96, 27 February 2001), which exclude from the scope of that provision cases pertaining to the relationship between the State and State officials engaged in the exercise of public functions. As the Court pointed out in *Pellegrin*:

> "... the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided *by the armed forces* and the police." (§ 66; emphasis added)

The present case squarely fits into the above category, which is why we find that the applicant's complaint under Article 6 § 1 of the Convention must also fail on the basis of the alternative argument put forward by the Government but not examined by the Court.

DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGES ROZAKIS, ZUPANČIČ, STRÁŽNICKÁ, CASADEVALL, THOMASSEN, MARUSTE AND TRAJA

I am unable to agree with the majority that the applicant had no civil "right" recognised under domestic law which could attract the application of Article 6 § 1 of the Convention and that as a consequence there has been no violation of that provision. I believe that the applicant in this case had a civil *right* in respect of the tort of negligence, subject to a procedural limitation. I therefore find that Article 6 § 1 of the Convention is applicable and that, in so far as the applicant was denied access to a court, there has been a violation of the provisions of that Article. I shall set out in detail the reasons for my approach.

The basic issue in this case is whether the limitations imposed by section 10 of the Crown Proceedings Act 1947 amount to procedural or other non-substantive restrictions on bringing an action before the British courts in cases such as that of the applicant, or whether they limit the extent of the substantive cause of action with the result that the applicant cannot rely on Article 6 of the Convention because he is not entitled to any civil right. In deciding this issue we have to take into account the domestic law and at the same time bear in mind the autonomous Convention concept of a civil right. In other words, the question is whether the applicant had a cause of action in respect of which he was denied access to a court because of procedural restrictions or whether he did not have a cause of action at all and consequently no question of access to a court arises in any event under Article 6 of the Convention.

Until 1947 no cause of action in tort lay against the State ("the Crown"). Political and social developments appear to have led to a radical change in the situation. Section 2 of the 1947 Act introduced a provision by which the Crown would be subject to liability in tort. However, section 2 was subject to section 10, which provided for different treatment for the armed forces. If members of the armed forces were injured in the course of their duties, the Crown could not be sued in tort *if* the Secretary of State certified that the death or injury could be treated as attributable to service for the purposes of entitlement to a war pension, the idea being to substitute a no-fault pension system for an action in tort. While the placement of sections 2 and 10 in Part I of the 1947 Act, entitled "Substantive law", is relevant, it is also pertinent to observe that a cause of action in tort against the Crown could be pursued by a serviceman against the Crown if the Secretary of State did not issue a section 10 certificate. It must be underlined that section 10 of the 1947 Act was repealed in 1987, allowing armed forces personnel to sue the Crown in tort without any restrictions, but the repeal concerned events post-dating the entry into force of the 1987 Act and clearly does not apply to the applicant's case

Prior to the decision on admissibility in the present case, the High Court (in *Matthews v. Ministry of Defence*) found section 10 of the 1947 Act to be incompatible with Article 6 on the ground that it amounted to a procedural bar that was disproportionate (see paragraphs 84-86 of the present judgment). Since the admissibility stage, the Court of Appeal and the House of Lords have overturned the High Court's ruling, finding that section 10 delimited the substantive cause of action so that Article 6 was inapplicable (see paragraphs 87-95 of the judgment)

Consequently, I believe that in deciding whether the fact that the applicant was unable to bring an action against the State for negligence, a possibility afforded to every private individual under the same law, is a procedural or substantive issue, it is useful to bear in mind the approach of the High Court and the House of Lords on this very issue in *Matthews*.

According to the High Court, the relevant provisions of the 1947 Act did not affect the applicant's right of action but simply prevented him from suing the State for damages on account of a breach of that right. In other words there was a right of action but the remedy was unavailable. In this connection, it took into account the fact that the applicant was prevented from suing under the provisions in question as a consequence of a decision by the Secretary of State to issue a certificate entitling him to a no-fault pension. The High Court stressed the following on this point:

(a) Even working on the assumption that the certificate required by section 10 of the Act as a condition for preventing an action in tort against the State was generally issued as a matter of policy in every case in which the Secretary of State was satisfied that there was a connection between the serviceman's injuries and his service in the armed forces, that did not mean that the Secretary of State responsible for issuing such a certificate could not depart from this policy if he wished to.

(b) If the legislature had intended to exclude claims by members of the armed forces, such as the applicant, from the scope of the State's liability in tort and not simply make such liability dependent on certain procedural conditions, it could simply have specified that the provisions regarding tortious liability were not to apply to claims by such persons.

The approach of the House of Lords was that the legislation complained of by the applicant provided for the first time for the State's liability in tort. The legislation in question defined the extent of the cause of action in respect of such acts. Section 10, which prevented the applicant from suing in the circumstances of his case, set a limit on the cause of action, leaving cases such as his outside the scope of such action.

Regarding the fact that non-liability for tort in cases such as that of the applicant depended on the issuing of a certificate by the Secretary of State leading to the payment of a pension, a fact on which the High Court relied

in finding that the limitation of access to a court in such cases was a procedural bar and not a substantive one, the House of Lords took the view that according to

> "... the realities of the situation ... the Secretary of State does in practice issue a certificate whenever it is (in legal and practical terms) appropriate to do so. He does not have a wide discretion comparable to that of a foreign government in deciding whether or not to waive State immunity". (see paragraph 92 of the judgment)

I take it that the House of Lords meant that certification by the Secretary of State in practice was more of a formality rather than a procedure involving the exercise of a substantial discretion.

Having considered carefully the legal position before 1947, the 1947 Act and the case-law, I am inclined to support the conclusion that we are not dealing here with the exclusion of the right of access to a court on account of the delimitation of the scope of the particular civil tort, but with restrictions on access to a court in respect of a civil right on account of certain conditions of a procedural nature. More specifically, I believe that the tort of negligence for which the applicant seeks judicial redress has a well-established legal basis in the domestic law of the respondent State. Until 1947 it was not actionable against the State. One could argue that until then the State did not have any legal liability because according to the British legal system prevailing at the time, "the King could do no wrong". I do not find this traditional legal fiction sufficiently convincing to have neutralised in terms of the Convention the civil wrong of negligence as far as claims against the State were concerned. It did, however, prevent any action against the State. It should be recalled that whether there is a civil right in any country is not decided exclusively by reference to the domestic law. The courts may examine whether there is a sufficient legal basis for a civil right in the State in question regardless of the domestic conditions or limitations.

But even assuming that the State had no liability at all for any tort because "the King could do no wrong", the fact remains that after the 1947 Act the State became liable for torts committed by its public servants. The substantive provisions of this Act do not exclude cases such as that of the applicant from the scope of the State's tortious liability. And here I must say that I agree with the statement in the judgment of the High Court that if the 1947 Act was intended to exclude members of the armed forces from the reforms introduced by sections 1 and 2, then one would have expected a clear provision to the effect that these reforms were not to apply to claims by such persons. In such cases the question whether any particular claim fell within this category or not would have had to have been decided by the courts on the basis of the relevant facts (see *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172) concerning the substantive limitation under section 76(1) of the Civil Aviation Act 1982).

It is correct that section 10 of the 1947 Act provides that the Crown is not subject to liability in tort in respect of acts causing death or personal injury to members of the armed forces *if* certain conditions are satisfied, one of them being that the Secretary of State certifies that the suffering of the relevant injury has been or will be treated as attributable to service for the purposes of entitlement to a pension. The question then arises whether this provision is part of the definition of the relevant civil right, or whether it simply regulates an already existing civil liability through procedural restrictions. I favour the second alternative and in this respect I again subscribe to the approach of the High Court, to which I have already referred.

Providing for a condition such as certification by the Secretary of State, rather than defining a series of exceptions and leaving the question of their existence in any particular case to be decided by the courts, lends support to the view that the relevant restriction on the right of access to a court is procedural in nature. In this connection, I believe that it is also pertinent to point out that certification by the Secretary of State also amounts to intervention by the executive, in fact a member of the government, in the determination of the question whether an individual is qualified to bring an action in the courts for negligence. Given the political status of the Secretary of State, his intervention points to a procedural rather than a substantive limitation on the right to bring an action. This is because holders of political posts are responsible for the formulation of policies and their application and this involves the exercise of substantial discretion. And, as was rightly pointed out by the High Court, the fact that the certificate was generally issued as a matter of policy in every case in which the Secretary of State was satisfied that there was a connection between the serviceman's injuries and his service in the armed forces did not mean that the Secretary of State could not depart from this policy if he wished to. Such a change of policy is illustrated by what was discovered, after the hearing in this case before our Court, in connection with a case similar to that of the applicant (see paragraph 72 of the judgment; reference is made to this point below).

The Secretary of State may issue the certificate in question or he may not. If he is not satisfied that the relevant situation requires such a certificate or, to use the words of the House of Lords, if he finds that it is not appropriate to issue the certificate, people in the applicant's position can sue for the civil wrong of negligence, which already exists. The Secretary of State may not have wide discretion compared to that of a foreign government in deciding whether or not to waive State immunity, but he certainly does have the possibility or the power to decide each case in one way or another. If he issues the certificate there can be no judicial action. If he does not, people in the applicant's position can bring an action on a legal basis that already exists. Indeed, it is important to stress that in such cases the existing legal basis is the general right to sue the State in tort under

section 2 of the Act. No new legal basis is provided for in the absence of the relevant certification and therefore no new legal basis is required. This supports the conclusion that the restrictions regarding members of the armed forces do not fall within the definition or delimitation of the general liability of the Crown in tort as introduced by the substantive provisions of the 1947 Act. Furthermore, taking into account the wording of the Act, the distinction made by the High Court between the existence of a right and a remedy is, I believe, correct. The legal basis of the right is there. The remedy is conditional.

The certificate by the Secretary of State may in general be issued as a matter of course. Nevertheless, it may not be issued and the assumed nature of certification does not strengthen the respondent Government's case any further. Admittedly, the judgment in *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI) regarding immunities differs from the present case. But even a claim for immunity is in practice generally a formal claim before the courts. Embassies issue certificates claiming diplomatic or State immunities even for non-payment of their diplomats' debts, and such certificates are issued as a matter of course.

What is also important in this respect is the fact that after the hearing before the Court in the present case it was discovered that according to legal advice given by the Treasury Solicitor to the Ministry of Defence in 1953 concerning another test participant in the same position as the applicant, section 10 of the Crown Proceedings Act 1947 was not applicable and its provisions could not therefore protect the Crown or the Minister from liability. As a consequence of that, the Secretary of State has decided that he will no longer "take a section 10(1) point" in any civil action brought by the applicant. So it appears that in the present case there were two contradictory approaches regarding the exclusion of Crown liability by virtue of section 10 of the 1947 Act. This is an additional strong argument in support of the position that section 10 certificates were not granted as a matter of course. The Secretary of State may exercise his or her discretion in one way or another through an assessment of the situation on the basis of the same facts. This is strongly indicative of a procedural limitation on the right of access to a court in respect of the claim. It certainly seems to undermine the view expressed by the House of Lords and the Government that the exercise of discretion in issuing section 10 certificates is not substantial. On the contrary, it appears from these new facts that the Secretary of State in issuing a certificate is making an assessment or appraisal of the situation that goes beyond the mere finding of fact or the verification of the fulfilment of certain legal conditions. It has been demonstrated that the same situation may be assessed in two different, contradictory ways. The political status of the Secretary of State and the nature of the conditions that he has to consider when deciding whether or not to issue a certificate ("... if [the]

suffering ... has been or will be treated as attributable to service ...") do play a role in such an assessment.

But, being concerned with human rights, we must not lose sight of the demands of the rule of law which formed a basis for the acceptance of a right of access to a court. The rule of law requires that individuals should be allowed to have their civil rights examined by independent judicial institutions. This applies *a fortiori* to claims against the State. In such cases we must adopt a more liberal approach or interpretation of the legal situation so as to allow room for the right of access to a court rather than lean towards the extinction of, or the creation of absolute bars to, such a right – if, of course, there is a reasonable opportunity to do so. And in this case I believe that there is such an opportunity.

The *raison d'être* of the restrictions on the relevant right of the members of the armed forces in the present case has ceased to exist since 1987. This is a factor to be taken into consideration, both in support of my position that the restrictions in question did not limit that right and in support of the conclusion that, as such restrictions were procedural, they could not be considered proportionate to the aim pursued. On this subject I again fully subscribe to the reasoning of the High Court (see paragraph 86 of our judgment).

Finally, I must state that I do not agree with the argument made by the Government (see paragraph 113 of the judgment) to the effect that Article 6 § 1 is inapplicable on account of the Court's judgments in *Pellegrin v. France* ([GC], no. 28541/95, § 66, ECHR 1999-VIII) and *R. v. Belgium* (no. 33919/96, 27 February 2001). My disagreement is based on precisely the same reasons as those set out by the Court of Appeal in *Matthews* (see paragraph 88 of our judgment). Furthermore, I note that the Ministry of Defence did not raise this argument before the House of Lords in that case.

In view of my finding regarding the violation of Article 6 of the Convention, I do not think that it is necessary to deal with the complaint concerning Article 1 of Protocol No. 1.

DISSENTING OPINION OF JUDGE ZUPANČIČ

In decisional terms I follow the nuanced approach of Judge Loucaides's dissenting opinion in which he, on balance, opts for the *procedural* perspective.

In conceptual terms, however, I find it difficult to accept that the issue should depend on the somewhat fictional distinction between what is "procedural" and what is "substantive". However, this artificial separation of "procedural" and "substantive" has been maintained and further built upon by our own case-law. Article 6 and its precedential progeny such as "access to a court" derive from an unconscious, or at any rate unstated, underlying premise.

The premise is that the procedure is a mere ancillary and adjective means, a transmission belt, to bring about the substantive rights.

At its inception it perhaps made political sense that an international instrument such as the European Convention on Human Rights should attempt to limit its effect to what was seen as a mere procedural means. The establishment of a substantive right would then, at least seemingly, remain in the sovereign domain of the domestic law. With time, however, this imagined tectonic boundary between what is substantive and what is "merely" procedural has developed into a seismic fault line. It generates hard cases, as the split in the vote demonstrates, which make bad law. In a case, moreover, where the executive is given the discretion to interfere with access to a court, we face a checks and balances (separation of powers) issue typically to be resolved by a domestic constitutional judicial body.

It is ironic that we should, particularly in British cases, build on the distinction between what is procedural and what is substantive. While the Continental legal systems have, for historical reasons, traditionally maintained the strictness of the distinction, it is precisely the common-law system which has always considered the right and the remedy to be interdependent[1]. Is the remedy something "substantive"? Or is it "procedural"? Is the legal fiction "the Crown can do no wrong" – and the consequent blocking of action (immunity) – merely procedural? Or has the substantive right of the plaintiff simply been denied? As we move from one British case to another the dilemma appears *in cameo*.

It is becoming clear that we need to resort back to common sense. Despite the slender majority's vote to the contrary, it is easy to maintain that any immunity from any suit is a *procedural* block. On the other hand, we are aware that both the intent and the effect of such an immunity is to deny one of the most logically compelling *substantive* claims in law.

1. See, for a more extensive explanation, B. Zupančič, "Adjudication and the Rule of Law", European Journal of Law Reform, vol. 5 (2003), pp. 23-125.

What then is a right? Is it not true that a "right" – including a "human right" – becomes something legally relevant, paradoxically, only when it is alleged to have been denied? Philosophers and politicians may have the luxury of being able to speak of rights deontologically and *in abstracto*. In law, however, it is the adversary procedural context which makes the substantive rights come out in the open, that is to say, exist. The right appears on the legal horizon when an infringed interest of a legal subject is procedurally asserted and the remedy actively pursued. A non-vindicated right is mere hypothetical abstraction.

Human relations in society may be saturated with all kinds of potential rights. Nevertheless, in most cases they remain unasserted either because they are not violated in the first place or because the aggrieved person omits to pursue them procedurally. Moreover, a right without a remedy is a simple recommendation ("natural obligation"). It follows that a right is doubly dependent on its concomitant remedy. If the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. The right and its remedy are not only interdependent. They are consubstantial.

To speak of rights as if they existed apart from their procedural context is to separate artificially – say for pedagogical, theoretical or nomotechnical reasons –what in practical terms is inseparable. A substantive right is not a mirror image of its procedural remedy.

A substantive right *is* its remedy.

It is ironic that so often common sense and common law should come into direct collision. It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities (see paragraph 121 of the present judgment) when the distinction the judgment is built upon is pure legal fiction. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back.

The way to address this dilemma is, obviously, to cease subscribing to the false premise. It is difficult to address this in the abstract. However, at least in cases in which the fault line is potentially decisive, where it collides with justice and common sense, since we are a court of human rights, we should opt for an autonomous meaning of "substantive due process". Intellectual honesty demands no less.