﻿

AS TO THE ADMISSIBILITY OF

Application No. 11603/85

by the Council of Civil Service Unions,

Christopher BRAUNHOLTZ, Jack HART, Ann DOWNEY,

Jeremy WINDUST, Dennis MITCHELL and David McCAFFREY

against the United Kingdom

The European Commission of Human Rights sitting in private on

20 January 1987, the following members being present:

MM. C.A. NØRGAARD, President

G. SPERDUTI

J.A. FROWEIN

F. ERMACORA

E. BUSUTTIL

G. JÖRUNDSSON

G. TENEKIDES

B. KIERNAN

A. WEITZEL

J.C. SOYER

H.G. SCHERMERS

H. DANELIUS

G. BATLINER

H. VANDENBERGHE

Mrs G.H. THUNE

Mr. F. MARTINEZ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the

Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 9 May 1985 by

the Council of Civil Service Unions, Christopher BRAUNHOLTZ, Jack HART,

Ann DOWNEY, Jeremy WINDUST, Dennis MITCHELL and David McCAFFREY against

the United Kingdom and registered on 27 June 1985 under file No.

11603/85;

Having regard to:

- the first report of August 1985 provided for in Rule 40 of the

Rules of Procedure of the Commission;

- the Commission's decision of 9 October 1985 to bring the

application to the notice of the respondent Government and

invite them to submit written observations on the admissibility

and merits of the application;

- the observations submitted by the respondent Government on

22 January 1986 and the reply thereto submitted by the applicants

on 7 May 1986;

- the second report of June 1986 provided for by Rule 40 of the

Rules of Procedure;

- the Commission's decision of 17 July 1986 to invite the

parties to a hearing on the admissibility and merits of the

application;

- the submissions of the parties at the hearing on

20 January 1987;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case as they have been submitted by the

parties may be summarised as follows.

The first applicant is a trade union registered in the United

Kingdom. The other applicants are all British citizens. The second

applicant, born in 1929, resides in Cheltenham, Gloucestershire, and

the third applicant, born in 1926, resides in Taunton, Somerset. Both

are former civil servants. The fourth and fifth applicants, born in

1957 and 1952, respectively, reside in Cheltenham and are civil

servants employed at Government Communications Headquarters. The

sixth applicant, born in 1937 and resident in Cheltenham, is a former

civil servant. The seventh applicant, born in 1944, is a civil

servant resident in Gunnislake, Cornwall. Before the Commission all

applicants are represented by Messrs. Lawford and Co., solicitors

practising in London, who are instructing Messrs. A. Lester QC, R.

Drabble and D. Pannick.

I.

Government Communications Headquarters (GCHQ) is a civilian-

manned branch of Government established in its present form in 1947.

It has the function of ensuring the security of the United Kingdom's

military and official communications and to provide signals

intelligence for the Government. The main establishment is at

Cheltenham, where there are approximately 4,000 employees. Smaller

branches of the organisation exist in the United Kingdom and

elsewhere. The total number of employees who are all civil servants

is approximately 7,000. The fact that GCHQ was concerned with

national security was disclosed publicly in a newspaper article in

1978 and first acknowledged by the Government on 12 May 1983 in

connection with offences against the 1911 Official Secrets Act by a

person not relating to the present application.

From 1947 until 1984 staff at GCHQ were permitted to become

members of a trade union. On 31 December 1982, there were 4,454 paid

up trade union members at GCHQ.

The first applicant was formed as a trade union in May 1980.

It represented its members, inter alia, in pay negotiations and in

discussions over conditions of service. It is a coordinating body of

nine trade unions, six of which had members at GCHQ, and is the trade

union side of the Civil Service National Whitley Council, which is

responsible for determining the pay and conditions of service of all

non-industrial civil servants, including GCHQ employees.

II.

The terms and conditions upon which civil servants, in theory

members of the Sovereign's staff, are employed and continue in office

are governed by royal prerogative. Since 1963, by Order in Council,

these prerogative powers have been vested in the Minister for the

Civil Service. In this respect, Article 4 of the 1982 Civil Service

Order in Council states:

"a) The Minister for the Civil Service may from time to

time make regulations or give instructions ... ii) for

controlling the conduct of the Service and providing for the

classification of all persons employed therein and, so far as

they relate to matters other than remuneration, expenses and

allowances, the conditions of service of all such persons ... "

The exercise of this prerogative power is restricted in

particular by the Employment Protection Act 1975, insofar as it is

still in force, and the Employment Protection (Consolidation) Act

1978. Section 138(1), (2) and (4) of the 1978 Act state:

"Application of Act to Crown employment:

138(1) Subject to the following provisions of this section,

Parts I (so far as it relates to itemised pay statement),

II, III (except Section 44), V, VIII and this Part and

Section 58 shall have effect in relation to Crown employment

and to persons in Crown employment as they have effect in

relation to other employment and to other employees.

(2) In this section, subject to sub-sections (3) to (5),

'Crown employment' means employment under or for the

purposes of a government department or any officer or body

exercising on behalf of the Crown functions conferred by any

enactment. ...

(4) For the purposes of this section, Crown employment does

not include any employment in respect of which there is in

force a certificate issued by or on behalf of a Minister of

the Crown certifying that employment of a description

specified in the certificate, or the employment of a particular

person so specified, is (or, at a time specified in the

certificate, was) required to be excepted from this section

for the purpose of safeguarding national security; and any

document purporting to be a certificate so issued shall be

received in evidence and shall, unless the contrary is

proved, be deemed to be such a certificate ... "

Section 121(4) of the 1975 Act states:

"For the purposes of this section, Crown employment does not

include any employment in respect of which there is in force

a certificate issued by or on behalf of a Minister of the

Crown certifying that employment of a description specified

in the certificate, or the employment of a particular person

so specified, is (or, at a time specified in the

certificate, was) required to be excepted from this section

for the purpose of safeguarding national security; and any

document purporting to be a certificate so issued shall be

received in evidence and shall, unless the contrary is

proved, be deemed to be such a certificate."

III.

On seven occasions between 13 February 1979 and 14 April 1981

various forms of industrial action were taken at GCHQ, such as one-

day strikes; work to rule; and overtime bans. This action generally

arose from disputes between the Government and national trade unions

over the pay and conditions of service applicable to civil servants.

Altogether over 10,000 working days were lost by virtue of this

action. At a one-day strike on 9 March 1981, 25% of the staff were

involved in such action.

On 22 December 1983 the Prime Minister as Minister for the

Civil Service directed orally, by virtue of the 1982 Civil Service

Order, that the Conditions of Service applicable to civil servants

serving GCHQ should be revised so as to exclude membership of any

trade union other than a Departmental Staff Association approved by

the director of GCHQ.

On 25 January 1984 the Secretary of State for Foreign and

Commonwealth Affairs signed and issued two certificates under Section

138(4) of the 1978 Act and the corresponding Section 121(4) of the

1975 Act, in order to remove the rights granted by those Acts to all

GCHQ staff. In a ministerial statement in the House of Commons of the

same day he stated inter alia:

"The Government fully respects the right of civil servants

to be members of a trade union, and it is only the special

nature of the work of the GCHQ which has led us to take

these measures. I can assure the House therefore that it

is not our intention to introduce similar measures outside

the field of security and intelligence."

On 25 January 1984 GCHQ staff were informed by a General

Notice and an accompanying letter that, as a condition of service,

they were no longer permitted to be members of any existing trade

union other than a Departmental Staff Association. Disciplinary

action might be undertaken against anyone involved in industrial

action. Staff not wishing to remain at GCHQ were to be given the

opportunity to seek a transfer elsewhere in the civil service. If

such a transfer was not possible, the respective person would be

eligible for premature retirement on redundancy terms. Staff

remaining at GCHQ would receive an ex gratia payment of £1,000 in

recognition of the loss of rights previously enjoyed.

Subsequent representations by the first applicant to the

Government were without success.

On 14 February 1984, the all-Party House of Commons Employment

Committee unsuccessfully proposed in a report to the House of Commons

that the Government and the civil service unions hold discussions with

a view to an agreement which would preserve union membership for GCHQ

staff while meeting the Government's objectives.

At present, all staff at GCHQ have accepted the new conditions

of service, except 35 persons, including the fourth and fifth

applicants, who declined to express an option, and six persons who

opted to move but for whom a transfer has not yet been arranged. On

1 May 1985 a departmental staff association was formed at GCHQ by

members of staff under the name "Government Communications Staff

Federation" (GCSF). Its membership is over 49% of the GCHQ staff.

IV.

On 14 February 1984 the General Council of the Trades Union

Congress (TUC), through its General Secretary, acting on its own

behalf, complained to the Director General of the International Labour

Organisation (ILO) that the United Kingdom Government was in breach of

Articles 2-5 and 11 of the 1948 ILO Convention No. 87 on Freedom of

Association. Article 2 states in particular:

"Workers and employers, without distinction whatsoever,

shall have the right to establish and, subject only to the

rules of the organisation concerned, to join organisations

of their own choosing without previous authorisation."

The Committee of Freedom of Association which was set up to

examine complaints from organisations of workers and employees

reported on 1 June 1984 that the action of the Government was not in

conformity with Convention No. 87. The Report was adopted by the

Governing Body of the ILO on 1 June 1984. The Committee again

considered the complaint of the TUC in February 1985, whereupon it

recommended that the Committee of Experts on the Application of

Conventions and Recommendations (the Experts) should examine the legal

arguments put forward. The Experts met in March 1985 and published a

Report of their proceedings which indicated that the Government's

reply did indeed raise complex legal questions on which the

International Court of Justice might more appropriately be requested

to provide an opinion. The Report of the Experts was considered by

the International Labour Conference Committee on the Application of

Conventions and Recommendations, and the report of the Conference

Committee was put forward for adoption by the Plenary Session of

Conference, and concludes with the Conference Committee's hope that

"the Government would be able to find appropriate solutions to the

problems raised by the application of the Convention".

V.

In January 1984 all individual applicants were employed at

GCHQ. The third applicant was then Chairman of the Trade Union Side

of the Departmental Whitley Council at GCHQ.

Following the prohibition to join a trade union, the

individual applicants applied to the High Court for judicial review,

seeking declarations that the General Notice of 25 January 1984 and

the accompanying letter were ineffective to vary the conditions of

service, and that the two certificates of the same day were invalid.

This application was heard by a single judge of the Divisional

Court of the Queen's Bench Division. On 16 July 1984 the judge

declared invalid the instructions issued by the Minister for the Civil

Service on 22 December 1983.

In its reasoning the judge set out by assuming that the Court

had jurisdiction to control the exercise by the Minister for the Civil

Service of her power under Article 4 of the 1982 Civil Service Order.

The judge also found that the Crown was competent to dismiss a civil

servant at will, unless some statutory provision prevented this. It

was unnecessary in the present case to resort to ILO Convention No. 87

in view of the fact that there was no doubt about the relevant English

law. Moreover, the Prime Minister's instruction on 22 December 1983,

although of a general nature and given orally, was a proper

instruction under Article 4 of the 1982 Civil Service Order.

However, the judge accepted the applicants' submissions that

the Prime Minister's direction of 22 December 1983 and the statutory

certificates issued on 25 January 1984 were invalid, as there had been

no previous consultation by the Government of the trade unions. The

Government had, by means of various regulations, in effect promised to

consult about any changes in the conditions of service at GCHQ, and

the GCHQ staff had, therefore, a legitimate expectation in this

respect. When a decision by Ministers to withdraw the trade union

rights was in contemplation, fairness, i.e. natural justice, required

that the decision should not finally be made until the staff or their

representatives had been consulted.

On 6 August 1984 the Court of Appeal allowed the appeal of the

Minister for the Civil Service and set aside the High Court's

declaration.

The Court of Appeal first examined its entitlement to

supervise the exercise of royal prerogative powers. In this respect

the Lord Chief Justice, Lord Lane, found that the actions taken by the

Government with regard to trades union membership at GCHQ were actions

taken on the grounds of national security. The Ministers were the

sole judges of what the national security required and consequently

the instruction and certificates were not susceptible to judicial

review.

Lord Lane agreed with the previous court that on

22 December 1983 the Prime Minister had in fact been giving

instructions "for controlling the conduct of service" and for

"providing for ... the conditions of service" within the meaning of

Article 4 of the 1982 Civil Service Order, and that the Government's

actions had been in accordance with its international obligations

under the ILO Conventions. Insofar as the GCHQ staff had held

expectations as to prior consultation, there existed in the various

staff regulations restrictions on this requirement. He could

understand the Government's anxiety lest by premature disclosure of

their plans they might precipitate the very troubles which, by their

decision, they were seeking to avoid. Where there existed a conflict

between the interests of national security and the freedom of the

individual, the balance between the two was for the Home Secretary,

rather than for a court of law. On rare occasions, the rights of an

individual had to be subordinated to the protection of the realm.

The Court of Appeal then granted the applicants leave to

appeal to the House of Lords.

In its judgment of 22 November 1984 the House of Lords

unanimously dismissed the appeal.

The five Lords sitting concluded in their respective opinions

that the applicants had had a legitimate expectation that the Minister

would consult them before issuing the instructions of 22 December 1983.

However, the work at GCHQ was a matter of national security, and that

security would have been seriously compromised, had industrial action

taken place similar to that encountered between 1979 and 1981.

Consultation prior to the oral instructions of the Prime Minister

would have served further to reveal the vulnerability of GCHQ to such

action. For instance, a former director at GCHQ, when giving evidence on

8 February 1984 to the House of Commons Employment Committee, recalled

that one of his subordinates had sought to explain to the general

secretary of one of the trade unions the serious consequences of

industrial action. In reply he had been thanked for telling where the

Government could be hurt most. The Government had accordingly been

justified in the interests of national security in avoiding industrial

action and in issuing the instructions without prior consultation with

the applicants.

COMPLAINTS

1. The applicants complain under Article 11 of the Convention

that the United Kingdom Government have removed the right of

individual employees at GCHQ to belong to a trade union, and have

deprived these unions of any role in industrial relations at GCHQ.

The applicants submit that the Government's action was not

"prescribed by law" within the meaning of Article 11 para. 2. While

the 1975 and 1978 Acts set out the circumstances in which the

respective certificates may be issued, the latter alone would still

have left the GCHQ employees with the contractual freedom to belong to

a trade union. It was for this reason that the conditions of service

had to be changed. Article 4 of the Civil Service Order does no more

than confer a discretion on the Minister with no guidelines as to how

this discretion should be exercised.

The Government's action was also not "necessary in a

democratic society in the interests of national security" within the

meaning of Article 11 para. 2. No industrial action occurred between

1981 and 1984, and it is difficult to see a "pressing social need" for

the action. In any event, the blanket removal of all rights was

disproportionate to the end to be achieved. Thus, some of the other

45,000 civil servants are also in highly sensitive positions. Yet

only the GCHQ employees have been deprived of their trade union

rights.

The applicants submit that their application is not

substantially the same as that presented by the TUC to the ILO within

the meaning of Article 27 para. 1 (b) of the Convention.

2. The applicants complain under Article 13 of the Convention

that there was no effective remedy under domestic law for the alleged

breach of Article 11 para. 2, by which a municipal court can judge the

validity of a particular administrative action. No remedy was

available to them which was amenable, sufficient, and likely to be

effective, for instance in respect of their complaint concerning the

oral instruction of 22 December 1983, which changed their conditions

of service.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 May 1985 and registered on

27 June 1985.

On 9 October 1985 the Commission decided to bring the

application to the notice of the respondent Government and to invite

them to submit written observations on its admissibility and merits

pursuant to Rule 42, para. 2, sub-para. b of the Rules of Procedure.

The Government's observations were submitted on

22 January 1986 and the applicants' reply thereto on 7 May 1986.

On 17 July 1986 the Commission decided to invite the parties

to a hearing on the admissibility and merits of the application.

At the hearing which was held on 20 January 1987 the parties

were represented as follows:

For the respondent Government

Mr. M.C. Wood Agent, Foreign and

Commonwealth Office

Mr. Robert Alexander QC Barrister, Counsel

Mr. Nicholas Bratza Barrister, Counsel

and four advisers

For the Applicants

Mr. Anthony Lester QC Barrister, Counsel

Mr. David Pannick Barrister, Counsel

Mr. B. Hooberman Solicitor, Lawford & Co.,

Adviser

The applicants Mrs. Downey and Messrs. Braunholtz, Hart,

Windust, Mitchell and McCaffrey were also present.

The applicant Council of Civil Service Unions were represented

as follows:

Mr. P. Jones Secretary

Mr. A. Christopher Chairman of the Major

Policy Committee

SUBMISSIONS OF THE PARTIES

The parties have presented extensive written and oral

submissions which may be summarised as follows:

A. The respondent Government

I. The Facts (see THE FACTS above)

GCHQ is one of the security and intelligence agencies on which

the national security of the United Kingdom and to some degree of the

allies depends. The present case has direct effects on the national

security interests of the country.

Between February 1979 and April 1981 industrial action was

taken at GCHQ on the following seven occasions: first, a one-day

strike on 23 February 1979 followed by selective action continuing

until 2 April 1979; second, a one-day strike on 22 June 1979 followed

by selective action until 25 July; third, in September 1979, a work to

rule and overtime ban by industrial staff; fourth, between

20 December 1979 and 13 February 1980 industrial action in support of

a pay dispute by station radio officers; fifth, on 14 May 1980,

involvement by GCHQ staff in a TUC day of action; sixth, a protest

meeting on 27 November 1980 against the suspension of the existing pay

arrangements; and seventh, a one-day strike on 9 March 1981, which

resulted in the virtual closure of part of GCHQ, followed by various

forms of industrial action until 14 April 1981.

In the circumstances of the industrial disputes which took

place between 1979 and 1981 Ministers were satisfied that national

unions were pressing GCHQ staff to place their loyalty to their union

above their loyalty to the service to the detriment of national

security and that industrial disruption of the kind which took place

could do very real damage to national security.

As a result the Government considered in 1982 the measures

which could be taken to prevent such action recurring in the future.

Only in 1983, following the conviction of a former member of GCHQ of

offences under the 1911 Official Secrets Act, was the intelligence

role of GCHQ for the first time officially acknowledged. In December

1983, the Ministers concerned decided that the conditions of service

of GCHQ staff should be brought into line with the arrangements

prevailing in the other security and intelligence agencies, which had

not been available as a target for trade union disruption by ensuring

that national unions ceased to play any part in its affairs. It was

also decided for security reasons that GCHQ staff should cease to have

access to industrial tribunals under the 1978 Act.

The Ministers concerned did not consider that there was any

legal obligation on them to consult the national unions or the staff

involved before reaching the decision to take the steps mentioned

above. To have entered into such consultations would have served to

bring out the vulnerability of areas of operations to those who had

shown themselves ready to organise disruption, and consultation with

individual members of staff at GCHQ would have been impossible without

involving the national unions. Finally, the importance of the

decision was such as to warrant its first being announced in

Parliament.

During the subsequent meetings between the first applicant and

other unions with the Government, the unions accepted that the

certificates signed by the Secretary of State should stand but urged

that a no-disruption agreement would provide adequate safeguards. The

Ministers nevertheless rejected the proposals as not providing

sufficient guarantee that conflicting pressures would not produce

difficulties in the future. Support for this conclusion is taken from

the fact that the draft no-disruption agreement, which had been tabled

by the first applicant, was subsequently repudiated by two of the

national unions at their 1984 annual conferences.

II. Domestic Law and Practice (see THE FACTS above)

Civil servants are servants of the Crown. The civil service

is regulated primarily under the Royal Prerogative, subject, however,

to a number of qualifications. In 1920 the present pattern emerged

under which a central department, now in part the Minister for the

Civil Service, has been given power by the Sovereign through

successive Orders in Council to give instructions or make regulations

for providing for terms of conditions of service of the Home Civil

Service.

Pursuant to the powers conferred by Article 4 of the 1982

Civil Service Order in Council, regulations and instructions have been

made in relation to the Home Civil Service as a whole and are

consolidated in the Civil Service Pay and Conditions of Service Code

(the Code). The Code permits civil servants as a whole to belong to

a trade union or a staff association and applies to all Home Civil

Servants. Consistently with the Code and subject to particular

instructions under the Civil Service Order in Council, Government

Departments may make rules or give instructions for controlling the

conduct of their establishment and defining the condition of the

service of their staff. Departmental regulations or rules are

generally contained within a Department's own Handbook. The

conditions there set out may be supplemented from time to time by

General Notices. Pursuant to these provisions, Staff Regulations have

been in force at GCHQ. Under Section P provision was made for

membership of the appropriate staff association or trade union and for

consultation between management and staff in all matters of common

interest.

The generality of the powers contained in the Order in Council

is limited by the 1975 Employment Protection Act, insofar as it is

still in force, and the 1978 Employment Protection (Consolidation)

Act, which contain provisions relating to trade unions and membership

of trade unions.

III. As to the conditions of Article 27 para. 1 (b) of the Convention

The Government are content to leave the issue under Article 27

para. 1 (b) to the Commission in respect of the complaint under

Article 11 of the Convention and do not request it to reach any

particular conclusion thereon.

There is a clear similarity of scope and purpose between the

relevant provisions of the European Convention and the ILO Convention,

and the complaints made to the ILO and to the Commission arise out of

the same facts. Moreover, the substance of the complaint made under

the two Conventions is identical, namely that the Government have

removed the right of civil servants engaged at GCHQ to belong to a

trade union of their choice in contravention of the United Kingdom's

international obligations under each Convention. Finally, the

particular provisions of Article 11 para. 2 do not provide the

applicants with any new grounds for complaint before the Commission

which are not available to the applicants in the proceedings before

the ILO. There is no requirement in the provision that the particular

procedure involved should inevitably lead, or be pursued, to an

enforceable decision of a court.

The fact that the TUC application and the present application

are not identical is not a conclusive factor for the purposes of

Article 27 para. 1 (b). In the present case, not only is the first

applicant a member of the TUC, but it is plain on the face of the

TUC's application that it is made with the full concurrence of the

first applicant. There is nothing to have prevented the first

applicant, as "an industrial association of workers" within the terms

of Article 24 of the Constitution of the ILO, itself bringing a

complaint to the ILO. That the TUC instead lodged the complaint was no

doubt for the purpose of demonstrating that this was an issue of

national concern.

IV. As to Article 11 of the Convention

a. "Prescribed by law"

The Government refer to the Court's cases regarding the Sunday

Times (judgment of 26 April 1979, Series A no. 30), Silver and Others

(judgment of 25 March 1983, Series A no. 61) and Malone (judgment

of 2 August 1984, Series A no. 82, para. 66 et seq.). The requirement

"prescribed by law" in Article 11 para. 2 as explained by the Court

is amply satisfied in respect of the restrictions imposed on the

applicants' right to freedom of association.

It is clear that the giving of instructions by the Minister

for the Civil Service and the issue of certificates under the 1975 and

1978 Acts were both lawful and had a statutory legal basis in domestic

law. As to the former, Article 4 of the Civil Service Order in

Council 1982 expressly confers powers upon the Minister for the Civil

Service. The lawfulness of the exercise of the powers was upheld by

all the respective courts. As to the latter, the power of the

Secretary of State to issue certificates is expressly conferred by

Section 121(4) of the 1975 Act and Section 138(4) of the 1978 Act. The

present application contains no suggestion that the certificates had

no statutory legal basis or were other than lawfully and validly

issued.

The present case likewise satisfies the requirements of

foreseeability and accessibility. The 1982 Order in Council and the

1975 and 1978 Acts are unquestionably accessible, being contained in

published legislation. There is also no doubt that the relevant

provisions of the 1975 and 1978 Acts are sufficiently clear and

precise in their terms to give those affected an adequate indication

as to the circumstances in which and the conditions on which the

Secretary of State is empowered to issue certificates.

The Government accept that the 1982 Order in Council confers a

discretion on the Minister for the Civil Service. It is not, however,

accepted that in respect of conditions of service relating to union

membership that discretion is unfettered or that the scope of the

discretion or the manner of its exercise is so imprecisely defined

that those affected by its exercise are given inadequate protection

against arbitrary interference. The proceedings before the domestic

courts made clear not only that the exercise of the discretion under

Article 4 was subject to the supervisory jurisdiction of the courts

but that the exercise of the prerogative power was now restricted by

statute in certain respects. In particular, by virtue of the

provisions of the 1975 and 1978 Act a civil servant is normally

entitled in law to be a member of a trade union, may not be legally

dismissed because of such membership, and is entitled to make a

complaint of unfair dismissal to an Industrial Tribunal if he is

dismissed for this reason. Accordingly, the power of the Minister in

the exercise of her discretion is specifically constrained by the

provisions of the 1975 and 1978 Acts except in the limited and

clearly defined circumstances in which a certificate may be issued

under the Acts, namely where the exception of the civil servant from

the protection of the Acts is required for the purpose of safeguarding

national security. Of course, GCHQ is a vital part of the security of

the United Kingdom.

The measures were not arbitrary, being based on considerations

of national security. In this connection, it is relevant to observe

that in the domestic proceedings the applicants did not allege that

the action of the Minister for the Civil Service or of the Secretary

of State was liable to judicial review on the grounds that it was

arbitrary or on grounds of "irrationality". Moreover, the measures

taken were both in line with the Convention as a whole and with one of

the particular purposes of restrictions on the right to freedom of

association permitted by para. 2 of Article 11 of the Convention.

Substantially the same considerations apply to the requirement

in the second sentence of Article 11 para. 2. For the reasons given

above the "restrictions" imposed were "lawful" in that there was a

statutory legal basis for the restrictions under domestic law and the

lawfulness of the restrictions was specifically upheld in the domestic

courts; the provisions under which the restrictions were imposed

satisfied the requirements of accessibility and foreseeability; the

restrictions, being founded on considerations of national security,

were not arbitrary and were consistent with the particular purpose of

the restrictions in Article 11 para. 2.

b. "Necessary in a democratic society"

The restrictions imposed on the applicants' rights were

justified under Article 11 para. 2 as being "necessary in a democratic

society in the interests of national security". The purpose of the

restrictions is consistent with the legitimate purpose set out in

para. 2 of protecting the interests of national security of which GCHQ

forms a vital part. The provisions of Sections 121(4) and 138(4) of

the 1975 and 1978 Acts reflected the acknowledged need for

particularly sensitive functions of Government to be protected so far

as possible from the risk of interference or disruption.

In making their assessment, the national authorities enjoy a

margin of appreciation as regards the nature and extent of the

restrictions required. The scope of the margin of appreciation varies

depending on the nature of the aim which is being pursued in

restricting an individual's rights under the Convention. In the field

of national security, the margin of appreciation afforded to the State

authorities is necessarily a wide one (see the cases of Klass and

Others, judgment of 6 September 1978, Series A no. 28, para. 48 p.

23; Leander v. Sweden, Comm. Report 17.5.85, para. 68).

Although wide, the discretion afforded to the national

authorities is not unlimited and is subject to the supervision of the

Convention organs. The Commission's approach in Leander

(ibid. para. 69) is entirely consistent with that adopted by the

courts in the domestic proceedings. Members in the House of Lords made

clear that, although the precise requirements of national security

were matters on which the Government, rather than the courts, had

access to the information necessary to make a judgment, it was for the

Government to produce evidence that their decisions were based on

considerations of national security: a mere assertion that questions

of national security were involved would not be sufficient to exclude

review by the domestic courts.

In the present case, it is perfectly plain from the statements

of the unions that their industrial action was designed to disrupt

operations at GCHQ and hurt the Government. A moral pressure exists

for the trade union members to follow the call to strike, even if, as

in the present case, the strike did not concern GCHQ at all. There is

undisputed evidence that over 10,000 working days were lost at GCHQ as

a result of the industrial action and that, at its worst, on

9 March 1981, 25% of the staff at GCHQ were involved and parts of the

organisation were virtually shut down as a result. The Government

alone is in a position to appreciate the effects of the industrial

action.

Moreover, the lapse of time which occurred between the events

in question and the measures taken in January 1984 in no sense

suggests that the measures were other than a genuine response to a

pressing social need. Until the public acknowledgement of GCHQ's

functions in May 1983, the Government concluded that the disadvantages

associated with the public disclosure of GCHQ's role outweighed the

undoubted need to take measures to prevent a recurrence of the

disruption of GCHQ's operations by industrial action. When the role

of GCHQ was for the first time officially acknowledged, a full

reappraisal could be made of the measures required to prevent a

recurrence of the serious threat to national security proposed by any

disruption of the operations at GCHQ.

The measures taken were not disproportionate to the

legitimate aim sought to be achieved. The House of Lords found that

the Government had legitimately concluded that the interests of

national security demanded that no prior notice or consultation should

take place. In the domestic proceedings the applicants did not

contest that there was evidence on which a reasonable Minister might

have taken the view that advance consultation with the unions would

have involved the real risk of industrial disruption at GCHQ or,

indeed, that the respondent as a reasonable Minister might have taken

that view. For the reasons given in the House of Lords the interests

of national security justified not only the action taken by the

Government but the decision of the Government not to consult with the

unions prior to the introduction of the measures in question.

Before January 1984, there was no offer from the trade unions

for a no-strike. Thereafter, while giving careful consideration to

possible alternative courses of action, the Government concluded that

such an agreement would not provide an adequate guarantee that the

conflicting pressures on union members employed at GCHQ would not give

rise to serious difficulties in the future. This conclusion was

reinforced by the unsuccessful attempts in 1981 to persuade the

national unions not to involve key areas in their industrial action

and their response that they were glad to be told where they could

hurt the Government most. Subsequently, the principle of

no-disruption agreements was repudiated by two national unions at

their 1984 annual conference.

Still stronger objections applied to the suggested alternative

course of issuing ad hoc certificates under paragraph 2 of Schedule 9

to the 1978 Act. Paragraph 2 of Schedule 9 provides that, if, on a

complaint to an industrial tribunal under Section 24 or 67 of the Act,

it is shown that the action complained of was taken for the purpose of

national security, the industrial tribunal shall dismiss the

complaint. In the Government's view such ad hoc action would only

have operated after the event and would not have prevented the

interruption in the performance of GCHQ's functions as a result of

union-organised action.

It is not accepted that the Government's action was

disproportionate in that it placed civil servants at GCHQ in a unique

position in comparison with civil servants working in similar fields

elsewhere. On the contrary, the arrangements introduced at GCHQ were

those which had always existed in other agencies whose operations and

activities are primarily concerned with security and intelligence and

had the effect of bringing GCHQ into line with those other agencies as

regards membership of national trade unions. Indeed, national

security required that GCHQ be treated as a whole and industrial

action avoided throughout.

It can also not be said that only the work of a small part of

the GCHQ staff is essential to the continuous operation of GCHQ, since

the latter can only operate as an integral whole.

Steps were taken to secure, so far as possible, a fair balance

between the interests of national security and the individual rights

and freedoms guaranteed by Article 11 of the Convention. Those

serving at GCHQ were given the choice between continuing to remain

there under the revised conditions (including receiving payment of

£1,000) and requesting a transfer to a similar alternative post

elsewhere in the Civil Service with a continuing right of membership

of a national trade union. A staff association - the GCSF - has now

been formed by members of the staff at GCHQ. It has been statutorily

listed as a trade union and has been granted recognition by GCHQ and

by the Treasury to represent the staff and negotiate on their behalf.

Moreover, many of the rights affected by the measures are paralleled

in the Code, the Staff Regulations in force at GCHQ and the Principal

Civil Service Pension Scheme.

Insofar as a very small number of staff have rejoined a

national trade union, they have been treated compassionately and have

not been dismissed, though they have been disciplined. They no longer

pose a threat to national security.

c. "Members ... of the administration of the State"

The second sentence of Article 11 para. 2 justifies the

imposition of restrictions on the freedoms enjoyed by persons in the

three specified categories which could not be justified under the

first sentence. The justification provided for in the second sentence

is entirely independent of that contained in the first sentence.

Otherwise, the provision would be superfluous. The sentence also does

more than just highlight the fact that persons in the three categories

have special duties and responsibilities which must be taken into

account under the first sentence. In a number of European countries

persons in the three categories are made subject to special

restrictions in relation to union membership and union activities.

Indeed, the word "restrictions" is sufficiently wide to introduce a

prohibition on membership of a trade union.

The words "members ... of the administration of the State" are

wide in scope. Although the phrase would appear to be limited to

civil servants employed in central government, it is not limited to

high-ranking civil servants such as the Cabinet Secretary and heads of

Government Departments. This would be inconsistent with the practice

in a number of States of imposing restrictions on persons in the

public service by reference not only to their level of responsibility

but also to the nature of the services they perform. The function of

GCHQ can be defeated just as effectively if the radio officer, or the

data processor, or those operating the teleprinters, are on strike.

The phrase thus covers also employees whose duties are of a

particularly confidential nature or who are in highly sensitive areas

of Government.

In the present case the restrictions imposed on the staff of

GCHQ were unquestionably lawful restrictions. They were imposed on

persons who were employed in central government in work of a highly

confidential nature. The second sentence of Article 11 para. 2 is

particularly apt to include civil servants at GCHQ, being directly

concerned as they are with the security of the State.

Of course, the second sentence does not exclude all

supervision by the Convention organs. In relation to the three

specified categories the State enjoys wider powers to impose

restrictions and the supervisory role of the Convention institutions

is correspondingly reduced. Moreover, the right to form or join

unions of one's choice is an important aspect of the rights guaranteed

by Article 11, but it is in no sense the only aspect of the Article.

The Article guarantees both the right to freedom of peaceful assembly

and to freedom of association with others. Even the substance of the

right to join a trade union was not entirely destroyed. GCHQ staff

are free to join the departmental staff association, which serves to

protect the interests of all GCHQ.

Finally, the word "lawful" in the second sentence cannot be

interpreted in a more extensive manner than "prescribed by law" in the

first sentence as requiring that any restrictions should be both

prescribed by law and necessary in a democratic society.

V. As to Article 13 of the Convention

It is clear from the Court's case-law that Contracting States

are not obliged to ensure within their internal law the effective

implementation of any of the provisions of the Convention (see

Swedish Engine Drivers' Union judgment of 6 February 1976, Series

A no. 20 para. 50 p. 18; Silver and Others, ibid. para. 113 p. 42).

Article 13 does not require the incorporation of the Convention rights

into domestic law or that domestic courts apply the same standards or

criteria, or enjoy the same scope of examination, as provided for in

the Convention.

The rights of those in Crown employment to join a trade union

as guaranteed under Article 11 are as fully protected as the rights in

employment outside the Civil Service. The only power to restrict the

rights secured by the 1978 Act in relation to those in Crown

employment is the power conferred on the Secretary of State to issue

certificates under Section 121(4) of the 1975 Act and Section 138(4)

of the 1978 Act.

As is apparent from the domestic proceedings, both the issue

of the certificates and the giving of instructions under the Order in

Council are subject to judicial review by the English courts. The

decision of the House of Lords clearly demonstrates the effectiveness

of the remedy of judicial review, establishing as it does the

following propositions. First, the exercise of the power under the

1982 Order in Council is subject to judicial review and is to be

treated in identically the same way as the exercise of a statutory

power. Second, the exercise of the power may be challenged on any of

the usual grounds of judicial review, notwithstanding that the field

of law to which the decision relates is national security. Third,

although the Government is in a better position than the courts to

determine the requirements of national security, if a decision is

challenged by way of judicial review, it is for the Government to

adduce evidence to satisfy the court that the decision under challenge

was in fact properly founded on grounds of national security.

Thus the English courts were applying their minds to

substantially the same considerations as confront the Commission. The

material and evidence before the Commission are also identical to that

placed before the domestic courts, including the Report of the

Employment Committee on which the applicants heavily rely.

B. The Applicants

I. The facts (see THE FACTS above)

The applicants point out further detriments suffered by trade

union members employed within GCHQ. For instance, in April 1986 a

payment of £500 or 5% of an individual's salary was made to non trade

union staff at GCHQ on account of a proposed re-structuring of grades

within GCHQ. Moreover, GCHQ management have declared that trade

unionists will not be included in the new grading structure currently

being negotiated. This exclusion is expected to result in a financial

loss for union members.

General Notice GN100/84 provided that trade union members

within GCHQ "will not be promoted while (they) remain at

GCHQ". On at least two occasions members have been specifically

told that they were being refused promotion because of their union

membership. GCHQ trade unionists are also barred from training

courses which relate only to GCHQ work.

II. As to the conditions of Article 27 para. 1 (b) of the Convention

ILO Convention No. 87 contains no provisions comparable to

Article 11 para. 2. Therefore, the ILO has not already determined the

issues under Article 11. Nor would the Commission's consideration of

the present application give the appearance of an "appeal". One of

the central issues of the present application - whether the conditions

specified in Article 11 para. 2 are satisfied - does not arise under

the ILO Convention. It was because of the very narrow scope of the

issues under ILO Convention No. 87 that the Committee on Freedom of

Associatiion stated that the facts were not in dispute. Under Article

11, the facts - e.g., as to whether the decisions complained of were

necessary in a democratic society - are very much in dispute between

the parties.

The ILO does not provide "another procedure of international

investigation or settlement" within the terms of Article 27 para. 1

(b). The word "another" suggests that that provision is concerned

with a procedure similar to that provided by the Commission. There is

no investigation or settlement of the issues leading to a decision

binding on the State.

III. As to Article 11 para. 2 of the Convention

a. "Prescribed by law"

With reference to the Malone case (Eur. Court H.R.,

judgment of 2 August 1984, Series A no. 82 paras. 66-68), the

applicants submit that the powers conferred by Section 121(4) of the

1975 Act and Section 138(4) of the 1978 Act are not "prescribed by

law" in that they grant to the State discretionary powers without

providing any adequate indication as to the conditions on which such

powers relating to trade union rights should be exercised.

The Order in Council which was used to remove the right to

belong to a trade union, is part of the very broad and uncertain

prerogative powers of the Crown and contains no indication of the

purpose for which the powers are to be used. The powers conferred by

Article 4 of the Order in Council of 1982 are not "prescribed by law"

in that they are unjustifiably broad. They do not provide any

adequate indication as to the conditions on which such powers to

regulate contractual terms and conditions may be exercised. They

contain no provisions for judicial control of the State assertion that

national security is at stake. The exercise of such powers in

relation to GCHQ staff was also not reasonably foreseeable.

The powers referred to above were further not "prescribed by

law" in that they contravened the ILO Convention No. 87, i.e. an

international law obligation imposed on the State.

The Government refer to the fact that in the domestic courts

the applicants did not pursue an allegation that judicial review

should lie on the ground of "irrationality". The applicants emphasise

that the requirement that a law be adequately precise in order to

avoid arbitrary use, looks to the content of the law and its potential

for abuse. It does not primarily look to whether, in the instant

case, the law has been abused. In any event, judicial review for

"irrationality" is an extremely narrow remedy which does not provide

an effective means of ensuring that the power is "prescribed by law"

or that the power is exercised fairly or proportionately or for a

pressing social need. For that reason, in the domestic legal

proceedings such a claim was not pursued.

b. "Necessary in a democratic society"

The applicants first refer to the Court's case-law inter alia in

Handyside (judgment of 7 December 1976, Series A no. 24 paras. 48-50

p. 22 et seq.), Tyrer (judgment of 25 April 1978, Series A no. 26

para. 31 p. 15), Sunday Times (judgment of 26 April 1979, Series A no. 30

paras. 59 et seq., p. 35 et seq.; paras. 62 et seq., p. 38 et seq.),

Young, James and Webster (judgment of 13 August 1981, Series A no.

44 paras. 63-65), Sporrong and Lönnroth (judgment of 23 September

1982, Series A no. 52 para. 69 p. 25 et seq.) as well as to the

Commission's Reports in de Becker v. Belgium (8.1.60, para. 263) and

Leander v. Sweden (17.5.85, para. 69).

The case is about a blanket ban on trade union membership and

not about industrial action. Conversely, assertions of national

security do not create a blanket exception to the Convention

guarantees. The Government's interpretation of Article 11 para. 2

would make the latter valueless as a protection of the rights of civil

servants throughout Europe. The exception clause in Article 11 para. 2

must be strictly interpreted and other international Human Rights

Conventions and the relevant ILO Conventions must thereby be

considered. Regard must also be had to the laws and practices of

other Convention States, the overwhelming number of which do not as a

general practice prevent or prohibit civil servants from belonging to

an independent trade union.

The House of Lords was applying a very much weaker test than

that of "necessary in a democratic society" which is not recognised in

English law. Therefore the conclusions reached in the English

domestic courts under domestic law do not provide any guidance on the

application of Article 11 para. 2 in this respect.

The traditional British approach has been to encourage trade

union membership since it promotes the settlement of industrial

disputes. Trade union rights at GCHQ have been encouraged by

successive Governments since the inception of GCHQ in 1947. This, and

the Government's conduct between the industrial action in 1981 and

January 1984 clearly demonstrate that there was no "pressing social

need" to deny trade union rights, and that the steps taken were, in

any event, not proportionate to any such need for the following

reasons.

Thus, the latest industrial action relied on by the Government

occurred on 14 April 1981. Yet the Government did not decide to

remove trade union rights at GCHQ until December 1983, over 2 1/2

years later. If the Government suggest that it was only in May 1983

that the intelligence role of GCHQ was for the first time officially

and explicitly acknowledged, the applicants point out that, as a

result of widespread publicity, members of the public well knew of the

functions of GCHQ by 1978. The Secretary of State for Foreign and

Commonwealth Affairs stated in an affidavit to the English courts that

"the activities at GCHQ were made known to the public as early as

1978...". Even after the official acknowledgement of GCHQ's function

in May 1983, the Government took no steps to ban trade union

membership until January 1984.

The true reason of the delay between April 1981 and January

1984 is that the industrial action now complained of by the Government

was not at the time perceived by the Government as constituting any

threat which justified the removal of trade union rights. Indeed, the

then Secretary of State for Defence stated in April 1981 in Parliament

that "up to now industrial actions have not in any way affected the

operational capability in any area". Only a small proportion of GCHQ

staff - probably less than one fifth - work in areas requiring

continuous operations. The examples of industrial action cited by the

Government could not affect the continuous nature of operations at

GCHQ. Thus:

- The one day strike on 23 February 1979 and the "selective

action" thereafter was a minor dispute involving junior grades.

- The one day strike on 22 June 1979 followed by some selective

action up to and including 25 July 1979 was part of a national

dispute. The participants were technicians involved in work on future

projects.

- The work to rule and overtime ban called by industrial staff

in September 1979 was called by the TGWU and AUEW, not the first

applicant. The participants were "non-craft" industrials (e.g.

cleaners).

- The TUC day of action of 14 May 1980 had no impact at all upon

the continuous nature of operations at GCHQ.

- The protest meeting on 27 November 1980 was a lunchtime

meeting with no conceivable impact on the day to day running of GCHQ.

- The two other incidents were the industrial action by station

radio officers between 20 December 1979 and 13 February 1980 and the

industrial action in March and April 1981. Advance warning was given

to the Government in order to enable alternative arrangements to

ensure the continuity of operations. The Government wrongly imply

that the industrial action had relevant adverse effects.

The Foreign Secretary himself said before the Parliamentary

Select Committee that he did not doubt the loyalty and professional

dedication of GCHQ staff. The loss of 10,000 working days is O.1% of

total working time over the relevant period. During the same period

(February 1979 - February 1984) sick leave accounted for the loss of

over 340 days work. No substantive approaches were ever made by

management to the trade unions involved stating that such action had

in any way threatened the operational efficiency of GCHQ.

The Government failed to consult the trade unions prior to the

removal of trade union rights and it failed to act on the February

1984 recommendations of the House of Commons Employment Committee. As

the Committee's Report of 14 February 1984 explains, it held an

inquiry into the Government's policy on trade union rights at GCHQ

immediately following the announcement on 25 January 1984 of the

removal of trade union rights. The Committee stated inter alia as

follows:

"15. One point which has concerned us is the timing of

the action ... We do not consider that the explanation given

by the Government justifies the delay ... Does this mean that

but for the exposure of a spy, which led to the avowal, the

Government would have continued indefinitely to be seriously

disturbed about possible threats to national security at

GCHQ, and yet be prepared to take no action? They could

surely have approached the unions to impress upon them the

seriousness of the position and to discuss other ways of

avoiding disruption ...

20. ... The Prime Minister stressed the need to treat

GCHQ like other security services. But there are important

differences. The staff of services like MI5 have never

enjoyed trade union rights, whereas GCHQ employees always

have. To remove those rights, which are also enjoyed by

many other civil servants in highly secret posts, from GCHQ

is a most serious step, which had provoked strong opposition

from the staff and the trade union movement, and caused

major political controversy. It is necessary to consider

whether the Government could achieve their objectives in

some other way."

The Committee noted, at paras. 21-24, the trade unions'

willingness to offer guarantees and a legally binding agreement to

meet the Government's objectives, including ensuring continuity of

operations at GCHQ, without denying trade union rights at GCHQ.

The Government had no pressing social need to remove trade

union rights without any consultation or negotiation. The

"unproductive informal discussions held earlier at GCHQ" were

insignificant. It is denied that any national union other than the

first applicant was approached or that the reaction of the first

applicant in 1981 justified the absence of negotiations or

consultation in 1984. No mention was made in 1981 of any specific

operation which should not be disrupted because of potential damage to

the effective operation of GCHQ. Had such mention been made, the

trade unions would immediately have stopped such action. There is

every reason to believe that the trade unions would have behaved in a

constructive manner, had such consultations taken place. In this

respect it is noted that the Employment Committee referred to above

rejected the Government's explanation for non-consultation. The ILO

Committee was especially critical of this aspect of the case.

No pressing social need existed in that the Government could

have accepted the recommendations of the Employment Committee in

relation to this matter and the trade unions' proposals. In the form

of an agreement these provisions would have become legally binding for

the trade unions. If the proposals did not meet the Government's

concerns, then it was for the Government to present further proposals,

short of a ban on trade union membership at GCHQ.

In fact the trade unions were willing to offer guarantees,

including a binding guarantee of continuity of operations at GCHQ. If

the national unions did indeed later vote against the trade union

proposals on account of the Government's own conduct, this in no way

justifies the Government's previous rejection of those proposals.

The measures were disproportionate to any danger to ban trade

union membership. Why prevent staff from exercising the right to

freedom of association when the alleged concern was not about trade

union membership but about trade union activities? As GCHQ employees

who are trade union members will continue to work at GCHQ, and as this

is now accepted by the Government, it is clear that there is no

pressing social need for the removal of trade union rights.

The creation of a staff association (which has not applied

for, and would not be granted, a certificate of independence by the

Certification Officer) is not relevant to the question of whether

there was a pressing social need or whether the Government acted

proportionately to any such need. Rather, Article 11 contains a right

to associate in a trade union of one's choice, particularly when the

trade unions chosen have been recognised by the employers for this

purpose since 1947.

c. "Members ... of the administration of the State"

The second sentence of Article 11 para. 2 should be narrowly

construed, providing as it does an exception clause to a basic right

under the Convention. It does not exclude persons from protection of

their basic rights under Article 11 para. 1 even when the conditions

specified in the first sentence of para. 2 are not satisfied. It

would be contrary to the objects and purposes of Article 11 to empower

States to exercise unlimited powers to regulate trade union rights

without supervision by the organs established under the Convention.

This would require the clearest language in the Convention.

"Lawful" in the second sentence of Article 11 para. 2 means

more than merely authorised by domestic law. It means lawful under

the Convention, that is having regard to the aim and object of the

Convention to prevent fundamental rights being interfered with other

than by means which are prescribed by law and which are necessary in a

democratic society (reference to Comm. Reports of 11.5.84 in G. v.

Federal Republic of Germany, paras. 94 et seq., and K. v.

Federal Republic of Germany, paras. 87 et seq.).

The second sentence ensures that the nature of the work done

by those employees may validly be considered in applying the first

sentence of Article 11 para. 2. Moreover, it authorises restrictions

on trade union activities, but not the denial or prohibition of trade

union membership. The second sentence refers to restrictions on the

exercise of the right, but not to its destruction. As an exception

clause, it should be narrowly construed, particularly as a broad

interpretation would remove hundreds of thousands of public sector

employees in the United Kingdom and millions throughout Europe from

the protection of Article 11 and would be entirely inconsistent with

the "fair balance" which is at the heart of the Convention as a whole.

If the second sentence of Article 11 para. 2 does exclude

certain persons from the protection of Article 11 para. 1, it is

submitted that the present case does not concern "members ... of the

administration of the State". Article 11 para. 2 should be narrowly

interpreted only to cover persons expressly mentioned - that is police

and army personnel - and those who are included by necessary

implication from the overwhelming demands of the context. All GCHQ

employees are not so included. However, the trade union rights of all

GCHQ employees were removed. The applicants refer in this context to

Article 55 of the Treaty of Rome, Article 22 of the International

Covenant on Civil and Political Rights, Article 5 of the Social

Charter as well as to the Court's case-law in National Union of Belgian

Police (judgment of 27 October 1975, Series A no. 19 para. 38 p. 17

et seq.), Swedish Engine Drivers' Union (judgment of 6 February 1976,

Series A no. 20 para. 32 p. 14), and Schmidt and Dahlström

(judgment of 6 February 1976, Series A no. 21 para. 36 p. 16).

In this light, the phrase "members ... of the administration of

the State" should not be construed to cover all public employees or

all employees of central government. Nor can it be appropriate to

include within the second sentence of Article 11 para. 2 all persons

working at GCHQ simply because their work is (directly or indirectly)

associated with national security. Indeed, if the second sentence

were to be so interpreted, there would be no need for the phrase "in

the interests of national security" in the first sentence of Article

11 para. 2. The phrase "members ... of the administration of the

State" means, in this context, persons who have a specific and direct

connection with the exercise of official authority or who administer

the basic functions of the State, that is high-ranking civil servants

such as the Cabinet Secretary and Heads of Government Departments. It

therefore does not cover all employees at GCHQ.

The second sentence of Article 11 para. 2 is not unique.

Thus, the second paragraph of Article 1 of Protocol No. 1 and the

third sentence of Article 10 para. 1 are subject to the principle of

proportionality. The phrase "administration of the State" should

therefore be construed to apply only to those employees covered by the

overwhelming demands of the language and context.

The approach adopted by the Government in the present case

would conflict with the general practice throughout Contracting States

of allowing civil servants to join a trade union. The general

practice fully recognises the right to belong to a union as distinct

from the right to strike or to take other forms of industrial action

which are, of course, restricted and sometimes even forbidden for

certain sectors of the labour force in Convention States. Even in the

United Kingdom, armed forces may belong to a trade union, though they

may not be active in it.

The Government's approach also conflicts with the obligations

undertaken by the United Kingdom under international Human Rights

Covenants and Conventions. Article 11 para. 2 can only properly be

understood against the background of the ILO Conventions of 1948 and

1949, against which background the 1950 Convention was drafted.

In this respect the ILO carefully distinguished two distinct

rights. First, the ILO distinguished the right to belong to a trade

union. Under Convention No. 87 of 1948, this right to belong is

enjoyed by members of the administration of the State as well as by

other employees. Secondly, there is the right to collective

bargaining guaranteed by ILO Convention No. 98 of 1949. Public

servants engaged in the administration of the State are not covered by

Convention No. 98 dealing with collective bargaining though they are

covered by the right to belong to a trade union in Convention No. 87.

The consistent case-law of the ILO has always recognised this vital

distinction.

Article 5 of the European Social Charter, Article 22 of the

International Covenant on Civil and Political Rights and Article 8 of

the International Covenant on Economic, Social and Cultural Rights, by

all of which the United Kingdom is bound, also recognise the rights of

members of the administration of the State to belong to a trade union.

Those instruments expressly prevent measures which would derogate from

the ILO Conventions.

IV. As to Article 13 of the Convention

It is important to understand that the applicants complain of

the issue of certificates under Section 121(4) of the 1975 Employment

Protection Act and Section 138(4) of the 1978 Employment Protection

(Consolidation) Act removing trade union rights "for the purpose of

safeguarding national security". They also complain of the exercise

of powers under the 1982 Order in Council withdrawing the right to

trade union membership for the same purpose. The domestic remedy open

to the applicants, which they have exhausted, did not allow an

assessment of whether, in taking those steps, the Government acted in

response to a pressing social need or proportionately to any such

need, or whether the powers exercised were prescribed by law. For

that reason, the applicants did not argue before the domestic courts

that the Government's action was not required by a pressing social

need or that it was disproportionate to any such need or that it was

not prescribed by law.

The decision of the House of Lords in the present case

stated inter alia that judicial review does not exist to determine

whether the decision complained of "was proper or fair or justifiable

on its merits. These matters are not for the courts to determine"

(per Lord Fraser). The scope of judicial review can be conveniently

summarised under three main heads: illegality, irrationality and

procedural impropriety (per Lord Diplock).

By "illegality" is meant that the decision-maker must

understand correctly the law that regulates his decision-making power

and must give effect to it. The House of Lords were not concerned

with any such challenge in the present case.

By "irrationality" is meant, inter alia, that the

decision-maker must not have regard to irrelevances, or ignore

relevances, or act for an improper purpose. It was not suggested in

the present case that the House of Lords should conclude that the

decision complained of was irrational in that very narrow and extreme

sense.

By "procedural impropriety" is meant the failure to observe

the rules of natural justice or a failure to act with procedural

fairness towards the person who will be affected by the decision.

That was the complaint raised in the House of Lords: namely, that the

complainants had a reasonable expectation of consultation prior to the

decision to remove trade union rights, but that no such consultation

had taken place.

In the present case, the House of Lords held that the

complainants did have a legitimate expectation of consultation.

However, in the present case "there was evidence upon which a

reasonable Minister might have taken (the) view" that the Government

"needed to act, to preserve national security" (per Lord Roskill).

Once such evidence was produced, the court would not assess its

weight, unless reliance on national security was irrational, which was

not here suggested. So national security excused what would otherwise

have been an unlawful procedural impropriety in failing to consult

prior to the decision of which complaint was made.

It can therefore be seen that it was not open to the

applicants to seek judicial review of the decisions complained of on

the grounds that the powers exercised were not prescribed by law or

the decisions made were not required by a pressing social need or were

disproportionate to any such need.

Neither judicial review nor any other domestic legal

procedure entitles the applicants to complain before a national

authority with the power to grant an effective remedy if their rights

guaranteed under Article 11, or the substance of those rights, have

been breached. It is well known that the Convention is not

incorporated into English law and that English courts have no power to

determine whether the Convention has been breached. Judicial review

applies criteria much less onerous for the State to satisfy (reference

to Weeks v. United Kingdom, Comm. Report 7.12.84, para. 100;

X v. United Kingdom, Eur. Court H.R., judgment of 5 November 1981,

Series A no. 46 para. 56 et seq., p. 24 et seq.).

THE LAW

1. The applicants complain under Article 11 (Art. 11) of the Convention

that the respondent Government have removed the right of individual

employees at GCHQ to belong to a trade union.

a) In respect of the conditions set out in Article 27 para. 1 (b)

(Art. 27-1-b) of the Convention, the applicants submit that the

present application cannot be regarded as being substantially the same as that

presented by the Trades Union Congress (TUC) to the International Labour

Organisation (ILO). In particular, ILO Convention No. 87 contains no

provisions comparable to Article 11 para. 2 (Art. 11-2). The issue whether the

conditions specified in Article 11 para. 2 (Art. 11-2) are satisfied does not

arise under the ILO Convention. Moreover, there was in the present case no

investigation or settlement of the issues leading to a decision binding on the

respondent Government.

The respondent Government do not request the Commission to

reach any particular conclusion on the issue under Article 27 para. 1 (b)

(Art. 27-1-b) of the Convention. Nevertheless, it is pointed out

that there is a clear similarity of scope and purpose between the relevant

provisions of the two Conventions, and the complaints arise out of the same

facts. The substance of the complaints is also identical. Moreover, the first

applicant is a member of the TUC, and the TUC's application was made with the

full concurrence of the first applicant.

The Commission has examined whether the present application is

substantially the same as the complaints raised before the ILO within the

meaning of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention which states:

"1. The Commission shall not deal with any petition

submitted under Article 25 (Art. 25 ) which ...

(b) is substantially the same as a matter which ...

has already been submitted to another procedure of

international investigation or settlement ... "

It is true that the rights mentioned in Article 2 of the ILO

Convention No. 87 of 1947 resemble to an extent the rights guaranteed

in Article 11 para. 1 (Art. 11-1) of the Convention. However, the Commission

finds that the present applicants, namely the Council of Civil Service

Unions and six individual applicants, are not identical with the

complainant before the ILO organs concerned. Rather the complaints

before the ILO were brought by the Trades Union Congress, through its

General Secretary, on its own behalf. Indeed, the six individual

applicants before the Commission would not have been able to bring

such complaints since the Committee on Freedom of Association was set

up to examine complaints from organisations of workers and employees,

as opposed to individual complainants.

Accordingly, the present application cannot be regarded as

being substantially the same as the complaints brought before the ILO within

the meaning of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention. The

Commission is therefore called upon to deal with the complaints raised by the

applicants.

b) The applicants complain that individual employees at GCHQ no

longer have the right to belong to a trade union. They rely on

Article 11 (Art. 11) of the Convention which states:

"1. Everyone has the right to freedom of peaceful

assembly and to freedom of association with others,

including the right to form and to join trade unions for the

protection of his interests.

2. No restrictions shall be placed on the exercise of

these rights other than such as are prescribed by law and

are necessary in a democratic society in the interests of

national security or public safety, 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.

This Article shall not prevent the imposition of lawful

restrictions on the exercise of these rights by members of

the armed forces, of the police or of the administration of

the State."

The Commissions finds - in agreement with the parties - that

there has been an interference by a public authority with the exercise

of the applicants' right, under Article 11 para. 1 (Art. 11-1), to

form and to join trade unions, namely in that on 25 January 1984, upon

instructions of the Prime Minister as Minister for the Civil Service,

the Secretary of State for Foreign and Commonwealth Affairs issued two

certificates with the result that GCHQ staff were henceforth no longer

permitted to be members of any existing trade union.

The Commission's next task is to examine whether such

interference was justified under Article 11 para. 2 (Art. 11-2) of the

Convention. First it must consider whether the interference falls to

be considered under the first or the second sentence of Article 11

para. 2 (Art. 11-2).

The applicants have submitted that the restrictions at issue

were not justified either by the conditions stated in the first or in

the second sentence of Article 11 para. 2 (Art. 11-2). They have

pointed out that the second sentence did not exclude persons from

protection of their basic rights under Article 11 para. 1 (Art. 11-1)

even when the conditions specified in the first sentence of paragraph

2 (Art. 11-2) were not satisfied. In any event, they consider that

the present case does not concern "members ... of the administration

of the State", since this concept must be given a narrow

interpretation.

The Government have filed submissions justifying the

interference both under the first and the second sentence of Article

11 para. 2 (Art. 11-2). However, in the Government's submissions the

justification provided for in the second sentence is entirely

independent of that contained in the first sentence. Otherwise the

second sentence would be superfluous.

The Commission observes that the first sentence of Article 11

para. 2 (Art. 11-2) provides criteria for justifying an interference

with the rights under Article 11 para. 1 (Art. 11-1). The second

sentence specifically envisages restrictions on the exercise of these

rights by various categories of persons employed by the State. The

Commission finds that the restrictions at issue fall to be examined

primarily under the second sentence, if the staff serving at GCHQ can

be considered as "members ... of the administration of the State".

The Commission must therefore turn its attention to the meaning and

scope of these terms.

In this respect, the Commission notes that the applicants have

placed much reliance on various other international instruments as a

background to their interpretation in particular in the second

sentence of Article 11 para. 2 (Art. 11-2) of the terms "members ...

of the administration of the State".

It is true that the Commission has occasionally had recourse

to other international instruments under international law (see

Swedish Engine Drivers Union, Comm. Report 27.5.74, paras. 65 ff). In

the present case, it notes that for instance Article 22 para. 1 of the

International Covenant on Civil and Political Rights of 1966 ensures

the right to form and join trade unions. The second sentence of

Article 22 para. 2 is similar to the second sentence of Article 11 para. 2

(Art. 11-2) of the Convention, while only mentioning "the armed forces and ...

the police" but not the administration of the State. Again, Article 8 para. 1

(a) of the International Covenant on Economic, Social and Cultural Rights of

1966 also guarantees the right to form and join trade unions. Nevertheless,

Article 8 para. 2 which resembles the second sentence in Article 11 para. 2

(Art. 11-2) of the Convention now expressly includes the "members ... of the

administration of the State".

In the Commission's opinion these differences sufficiently

demonstrate that there can be no settled view under international law

as to the position of members of the "administration of the State" in

respect of trade union rights, and that these instruments cannot

therefore be of assistance to the Commission in the present case.

In interpreting the term "members ... of the administration of

the State" the applicants point out that the second sentence covers

police and army personnel and those who have a specific connection

with the exercise of official authority or who administer the basic

functions of the State, e.g. high-ranking civil servants. It should

not be construed to cover all persons working at GCHQ simply because

their work is directly or indirectly associated with national

security. Otherwise there would be no need for the phrase "in the

interests of national security" in the first sentence of Article 11

para. 2 (Art. 11-2).

In the Government's submissions, the words "members ... of the

administration of the State" are not limited to high-ranking civil

servants. This would be inconsistent with the practice in a number of

States of imposing restrictions on persons in the public service by

reference not only to their level of responsibility but also to the

nature of the services they perform. The function of GCHQ can be

defeated just as effectively by the radio officer or the teleprinter

operator. GCHQ can only operate as an integral whole. The phrase

thus also covers employees whose duties are necessary for the proper

performance of vital Government functions.

The Commission has examined whether the staff serving at GCHQ

fall under the terms "members ... of the administration of the State".

To a certain extent, the meaning and scope of these terms is uncertain

and the Commission will not attempt to define them in detail.

Nevertheless, the Commission notes that the terms are mentioned, in

the same sentence in Article 11 para. 2 (Art. 11-2), together with

"members of the armed forces (and) of the police". In the present

case, the Commission is confronted with a special institution, namely

GCHQ, whose purpose resembles to a large extent that of the armed

forces and the police insofar as GCHQ staff directly or indirectly, by

ensuring the security of the respondent Government's military and

official communications, fulfil vital functions in protecting national

security.

The Commission is therefore satisfied that the staff serving

at GCHQ can be considered as "members ... of the administration of the

State" within the meaning of the second sentence of Article 11 para. 2

(Art. 11-2) of the Convention. It must therefore examine whether the

further conditions of the second sentence of Article 11 para. 2

(Art. 11-2) have been met, in particular whether the restrictions at

issue were "lawful" within the meaning of that provision.

The applicants have pointed out that this must mean lawful

under the Convention, having regard to the aim of the latter to

prevent the interference with fundamental rights other than by means

which are prescribed by law and which are necessary in a democratic

society. They submit that the term "prescribed by law" in the first

sentence of Article 11 para. 2 (Art. 11-2) is not met in that Section

121(4) of the 1975 Act and Section 138(4) of the 1978 Act grant to the

State discretionary powers without any adequate indication how these

powers should be exercised. Moreover, the powers conferred by Article

4 of the Order in Council of 1982 do not adequately indicate the

conditions on which contractual terms and conditions may be regulated.

Further, no provisions are made for judicial control of the State

assertion that national security is at stake.

The Government submit that the measures imposed on GCHQ staff

were lawful restrictions within the meaning of the second sentence of

Article 11 para. 2 (Art. 11-2). Under the first sentence of Article

11 para. 2 (Art. 11-2) the Government contend that Article 4 of the

1982 Civil Service Order in Council expressly confers powers upon the

Minister for the Civil Service. The power of the Secretary of State

to issue certificates is expressly conferred by Section 121(4) of the

1975 Act and Section 138(4) of the 1978 Act. These provisions are all

sufficiently clear and precise in their terms to give those affected

an adequate indication as to the conditions in which certificates may

be issued, namely where the exception of civil servants from the

protection of the Acts is required for purposes of national security.

The Commission recalls that it has so far not expressed an

opinion in its case-law on the meaning of the term "lawful" in this

particular context. In the Commission's view, however, "lawful"

within the meaning of the second sentence of Article 11 para. 2

(Art. 11-2) means in the first place that the measures at issue must at

least have been in accordance with national law.

In the present case the Commission observes that, according to

Article 4 of the 1982 Civil Service Order in Council, the Minister for

the Civil Service may regulate the conditions of service of civil

servants. It is true that this order is rather broad in that it does

not specifically refer to the regulation of trade union membership.

However, these powers of the Minister must be seen in connection with

the two Employment Protection Acts of 1975 and 1978 which restrict the

exercise of the powers under the Civil Service Order in Council and on

the basis of which provisions the Foreign Secretary, on

25 February 1984, signed and issued certificates. In particular,

Section 138(4) of the 1978 Act and the corresponding Section 121(4) of

the 1975 Act expressly refer to the issuing of such certificates for

the purpose of safeguarding national security. The Commission finds

that the measures at issue met this condition in that the staff at

GCHQ were concerned with vital functions of national security.

Against this legislative background the Commission considers

that the relevant legal provisions provided an adequate and sufficient

indication to those employed at GCHQ as to the possibility of steps

being taken to regulate trade union membership. In this respect the

Commission notes, in addition, that the measures at issue were subject

to judicial control by the domestic courts. In the Commission's

opinion, the measures were, therefore, taken in accordance with

national law.

The applicants have also submitted that the "lawful

restrictions" of a right cannot imply its destruction. Furthermore,

the second sentence is also subject to the principle of

proportionality and, as an exception clause, should be narrowly

construed since a broad interpretation would remove millions of public

sector employees throughout Europe from the protection of Article 11

(Art. 11). In the context of the terms "necessary in a democratic

society" in the first sentence of Article 11 para. 2 (Art. 11-2) , the

applicants contend that the measures were disproportionate in that

there was no "pressing social need" for the Government to deny trade

union rights after 37 years, and to deny them only 2 1/2 years after

the industrial action occurred. The Government failed to consult the

trade unions before issuing the certificates, and failed to act on the

recommendations of the House of Commons Employment Committee, even

though the trade unions were willing to offer guarantees.

The Government submit that the term "lawful" in the second

sentence of Article 11 para. 2 (Art. 11-2) cannot be interpreted as

requiring that restrictions should also be "necessary in a democratic

society". In the context of the first sentence of Article 11 para. 2

(Art. 11-2) the Government submit that undoubtedly the industrial

action at GCHQ was intended to harm the Government who alone can

appreciate the effects of the action. The lapse of time until the

certificates were issued can be explained by the fact that the

Government undertook a full reappraisal of the measures required to

prevent a recurrence of the threat to national security. The

Government also found that the guarantees offered by the trade unions

were not adequate. A fair balance has now been secured between the

interests of national security and the rights under Article 11 (Art. 11)

by creating a departmental staff association at GCHQ.

The Commission has examined first the applicants' submission

that the term "restrictions" in the second sentence of Article 11

para. 2 (Art. 11-2) cannot imply complete suppression of the exercise

of the right in Article 11 (Art. 11). However, the Commission recalls

that the same term is also employed in the first sentence of Article

11 para. 2 (Art. 11-2). This provision has been interpreted by the

Commission as also covering a complete prohibition of the exercise of

the rights in Article 11 (Art. 11) (see e.g. Application No. 8191/78,

Rassemblement jurassien and Unité jurassienne v. Switzerland,

10.10.79, D.R. 17 p. 93). Accordingly, the term "restrictions" in the

second sentence of Article 11 para. 2 (Art. 11-2) is sufficiently

broad also to cover the measures at issue.

Second, the Commission notes the applicants' submissions that

the term "lawful" in the second sentence of Article 11 para. 2

(Art. 11-2) includes the principle of proportionality. In this

respect, the Commission finds that, even if the term "lawful"

("légitime") should require something more than a basis in national

law, in particular a prohibition of arbitrariness, there can be no

doubt that this condition was in any event also observed in the

present case.

The Commission recalls its case-law according to which States

must be given a wide discretion when ensuring the protection of their

national security (see Leander v. Sweden, Comm. Report 17.5.1985,

para. 68).

In the present case, the Commission has considered the

Government's position when issuing the certificates. In particular,

the Government had to ensure that the functioning of GCHQ would no

longer be vulnerable to disruption by industrial action. After

industrial action had occurred in 1981 and once the Government had

acknowledged the functions of GCHQ in May 1983, the time and means

were lacking for the Government to conduct substantial negotiations

with the trade unions. The guarantees offered by the latter were in

the Government's assessment not adequate. The Government were aware

that trade union officials outside GCHQ could organise industrial

action within GCHQ in which GCHQ staff would participate as loyal

trade union members. Thus, it could not be excluded that industrial

action could again occur at GCHQ at any moment. In this respect the

Commission notes in particular that the House of Lords, in its

judgment of 2 November 1984, unanimously accepted that the basis of

the Government's actions related to the interests of national

security.

The Commission considers that in this light and against the

whole background of industrial action and the vital functions of GCHQ

the action taken, although drastic, was in no way arbitrary. The

measures would therefore also be "lawful" within a wider meaning of

that term in the second sentence of Article 11 para. 2 (Art. 11-2).

The Commission is thus satisfied that the measures at issue,

while interfering with the applicants' rights under Article 11 para. 1

(Art. 11-1), were justified under the second sentence of Article 11

para. 2 (Art. 11-2) as being "lawful restrictions (imposed) on the

exercise of these rights by members ... of the administration of the

State". Therefore, there is no further need to examine the measures

in relation to the conditions of the first sentence of Article 11

para. 2 (Art. 11-2). It follows that this part of the application is

manifestly ill-founded within the meaning of Article 27 para. 2

(Art. 27-2) of the Convention.

2. The applicants complain that there was no effective remedy

under domestic law for the alleged breach of Article 11 para. 2

(Art. 11-2), by which a municipal court can judge the validity of a

particular administrative action. No remedy was available to them

which was sufficient and effective. No remedy allowed an assessment

of whether the Government acted in response, or proportionately, to a

pressing social need, or whether the powers exercised were prescribed

by law. The Convention is not incorporated into English law and

English courts have no power to determine whether the Convention has

been breached. Judicial review applies criteria much less onerous for

the State to satisfy. The applicants rely on Article 13 (Art. 13) of

the Convention which states:

"Everyone whose rights and freedoms as set forth in this

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."

The Government submit that Article 13 (Art. 13) does not

require the incorporation into domestic law or imply that domestic

courts enjoy the same scope of examination as provided for in the

Convention. Both the issue of the certificates and the giving of

instructions under the Order in Council are subject to judicial review

by the English courts. The decision of the House of Lords clearly

demonstrates the effectiveness of the remedy of judicial review. In

fact, in the present case, English courts had regard to substantially

the same considerations as confront the Commission. Moreover, the

material and evidence before the Commission are also identical to that

placed before the domestic courts.

The Commission recalls the case-law of the Convention organs

under Article 13 (Art. 13) of the Convention according to which an

individual, who has an arguable claim to be the victim of a violation

of the rights set forth in the Convention, should have a remedy before

a national authority in order both to have his claim decided and, if

appropriate, to obtain redress. However, neither Article 13 (Art. 13)

nor the Convention in general lays down for the Contracting States any

given manner for ensuring within their internal law the effective

implementation of any of the provisions of the Convention (see Eur.

Court H.R., judgment of Silver and others of 25 March 1983, Series A

no. 61, para. 113 p. 42).

In the present case the Commission, which considers that the

applicants had an arguable claim, observes that they were able to

bring the case before the High Court, the Court of Appeal and the

House of Lords. In dealing with the case, these courts examined

whether the measures at issue fell under the 1982 Civil Service Order

and the 1975 and 1978 Acts. The courts also examined the rights of

trade union members as well as the manner in which the measures were

taken, for instance, whether the Government should first have

consulted the trade unions. Moreover, the courts reviewed the

justification of the measures, in particular on grounds of national

security.

The Commission has also taken account of the fact that, since

the Convention is not part of the domestic law of the United Kingdom,

the High Court, the Court of Appeal and the House of Lords, as the

"national authorities" referred to in Article 13 (Art. 13) of the Convention,

did not decide upon arguments which were made with express reference

to the Convention. However, the Commission concludes that in the

present case the relevant rights were substantially relied upon by the

applicants in the domestic proceedings and that the national authorities

were capable of affording the complainants an "effective remedy" within the

meaning of Article 13 (Art. 13) (see No. 9261/81, Dec. 3.3.82, D.R. 28 p. 177).

In particular, the Commission considers that the Court of

Appeal and the House of Lords were able to consider the essence of the

applicants' present complaints under Article 11 (Art. 11) of the Convention.

The courts would have been able to quash the action taken by the Prime Minister

under the 1982 Civil Service Order, had they found for the applicants in the

proceedings in question. In fact, this course was followed by the High Court

in its decision of 16 July 1984 which was subsequently set aside, on appeal, by

the Court of Appeal.

The Commission concludes that effective remedies were in fact

available to the applicants and that the proceedings concerned

satisfied the requirements of Article 13 (Art. 13) of the Convention. It

follows that this part of the application is also manifestly

ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the

Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)