



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

THIRD SECTION

**CASE OF LUSTIG-PREAN AND BECKETT v. THE UNITED
KINGDOM
(Article 41)**

(Applications nos. 31417/96 and 32377/96)

JUDGMENT

STRASBOURG

25 July 2000

FINAL

25/10/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form.

In the case of Lustig-Prean and Beckett v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Sir Nicolas BRATZA,

Mrs H.S. GREVE,

Mr K. TRAJA, *Judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 July 2000,

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

PROCEDURE AND FACTS

1. The case originated in two applications (nos. 31417/96 and 32377/96) against the United Kingdom lodged on 23 April 1996 and 11 July 1996, respectively with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two British nationals, Mr Duncan Lustig-Prean and Mr John Beckett (“the first and second applicants”).

2. In its judgment of 27 September 1999 (“the principal judgment”), the Court held that there had been a breach of Article 8 of the Convention as regards the investigations conducted into the applicants’ sexual orientation by the armed forces and as a result of their subsequent discharge from the armed forces on the grounds of their homosexuality in pursuance of the Ministry of Defence policy against homosexuals in the armed forces. No separate issue was found to arise under Article 14 of the Convention (*Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27.9.99, §§ 105 and 109). On the same day, the Court delivered judgment in two similar applications challenging the same policy of the Ministry of Defence, the Court concluding, *inter alia*, as to a violation of Articles 8 and 13 of the Convention (*Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, 27.9.99, §§ 112 and 139).

3. Claims for just satisfaction pursuant to Article 41 of the Convention had been submitted by the applicants in April and August 1999 and the Court had agreed to provide time to the parties to make further submissions in this respect. Accordingly, in the principal judgment the Court found that the question raised under Article 41 was not ready for decision and that it was necessary, account being taken of the possibility of an agreement

between the parties, to reserve the question of just satisfaction (the principal judgment at § 113 and part 3 of its operative provisions).

4. On 7 October 1999 the first applicant submitted a report of an Occupational Psychologist dated 21 September 1999. On 3 February 2000 the Government's observations on the applicants' claims under Article 41 were received and the applicants' comments on those observations were received on 1 and 29 March 2000, respectively.

5. The Chamber constituted within the Section to consider the question of just satisfaction under Article 41 of the Convention included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, President of the Section (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

6. Having consulted the parties, the Chamber decided not to hold a separate hearing on this issue.

AS TO THE LAW

7. Article 41 of the Convention reads as follows:

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

8. The applicants submitted that the Court's finding of a violation could not compensate them for the losses sustained. Both claimed compensation for pecuniary and non-pecuniary losses and reimbursement of legal costs and expenses, the second applicant also requesting reinstatement. They argued that the Court should seek to put them, in so far as possible, in the position in which they would have been had they not been discharged, such an approach being consistent with that of the European Court of Justice and of the domestic courts in discrimination cases, as well as with the principles flowing from Articles 13 and 41 of the Convention.

9. The Government accepted, in principle, a monetary award in the case but contested the applicants' assessments. They also considered that, while the Court's jurisprudence acknowledges the principle of *restitutio in integrum*, it also provides for a broader and more flexible approach to compensation, particularly where the Court is invited to speculate as to what might occur in the future.

A. Non-pecuniary loss

10. The applicants submitted that the investigation conducted was a serious and insulting intrusion into an intimate aspect of their private lives and they pointed out that they were deprived of their chosen careers in a profession in which they excelled, in which they were destined for further promotion and from which they derived considerable job satisfaction. They underlined that they were discharged, not because of their conduct or service records, but because of a private and intrinsically unobjectionable characteristic which they desired to keep private.

The first applicant claimed 22,500 pounds sterling (GBP) compensation for the non-pecuniary loss suffered, together with interest at 8% per annum. He submitted a report of an Occupational Psychologist as evidence of the devastating psychological effect on him of the investigation and his discharge. He was particularly offended by the termination of his commission which severed all his links with the service and by the fact that he cannot wear his uniform or use his rank in the future.

The second applicant claimed compensation of GBP 25,000 for non-pecuniary loss and GBP 20,000 compensation for “aggravated damages”, together with interest on those amounts at 8% per annum. He emphasised the prurient detail in which he was questioned by the service police, recalled that his locker was searched and his personal belongings seized, argued that the conduct of the service police was homophobic, grossly unprofessional, oppressive and voyeuristic, and noted that the Government accepted during the oral hearing before this Court that certain questions put to him could not be defended.

He further referred to the fact that he was sent to the Surgeon Commander Psychiatrist where aversion treatment and electric shocks were mentioned, the applicant submitting that the treatment of his sexual orientation as a form of mental illness was deeply distressing for him. Aggravated damages were requested given the “high-handed” manner of his discharge which caused him profound anxiety, the inappropriate nature of his referral to a psychiatrist and the late concession by the Government as to the indefensible nature of certain questions put to him. He also submitted extracts from his medical records (from April 1994 to February 1995) attesting to his psychological difficulties subsequent to discharge.

11. The Government considered the amounts claimed by the applicants to be excessive and suggested an award in the region of GBP 10-15,000, interest not being required to achieve fair compensation, as it does not reflect sums spent or lost by the applicants.

12. The Court recalls that, in its principal judgment, it found that the investigations and consequent discharges constituted “especially grave” interferences with the applicants’ private lives (paragraph 83 of that judgment) for three reasons. In the first place, the Court considered that the

investigation process was of an “exceptionally intrusive character”, noting that certain lines of questioning were “particularly intrusive and offensive”. Secondly, the Court considered that the discharge of the applicants had a “profound effect on their careers and prospects” and, thirdly, it found the absolute and general character of the policy striking, leading as it did to the discharge of the applicants on the grounds of an innate personal characteristic irrespective of their conduct or service records (paragraphs 84, 85 and 86). The principal judgment also noted that the High Court, in its judgment delivered on 7 June 1995 in the domestic judicial review proceedings, had described the applicants’ service records as “exemplary” (paragraph 85), and had found that the applicants had been “devastated” by their discharge (paragraph 23).

The Court considers it clear that the investigation and discharges described in the principle judgment were profoundly destabilising events in the applicants’ lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. The Court therefore awards, on an equitable basis, GBP 19,000 to each applicant in compensation for non-pecuniary damage. It does not consider an award of interest on this sum to be appropriate given the nature of the loss to which it relates. In addition, the Court does not, in the circumstances of the present case, accept the second applicant’s claim for aggravated damages (*Cable and Others v. the United Kingdom* [GC] nos. 24436/94 *et seq.*, 18.2.99, § 30, and *Selçuk and Asker v. Turkey* judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, no. 71, § 119).

B. Pecuniary loss

13. Both applicants claimed compensation for past and future pecuniary loss, the second applicant adding reinstatement as his first option. Their pecuniary loss claims related to the difference between their civilian income and benefits (past and future) and their service income and benefits had they not been discharged. The past pecuniary losses are claimed to have accrued over the periods January 1995 to April 1999 and July 1993 to May 1999, respectively, after which periods future pecuniary loss began to accrue. These submissions were detailed and reasoned but the applicants recognised the need for expert evidence which they could not afford to obtain.

14. The first applicant, currently self-employed and managing his own property company since November 1997, claimed a figure of GBP 61,518.86 (before tax) in compensation for past loss of earnings. He also claimed GBP 4,875 in compensation for the promotion bonus that was recouped on his discharge because that bonus was conditional on his remaining in service for three years after promotion. He submitted that, as a result of the short notice of discharge given, he could not use the armed forces’ resettlement services, he had to find work quickly to fund his

mortgage and living expenses and he could not, therefore, pursue further qualifications. He also argued that, despite this, he had made real attempts to obtain civilian employment, making 300 job applications and attending 50 interviews. The Occupational Psychologist's report submitted by him emphasised the psychological impact of the discharge, the inherent differences between service and civilian life, together with the unavailability to the first applicant of the armed forces' resettlement services, which factors explained his significantly less successful employment record since discharge when compared to his prior naval career.

The second applicant, employed by the police since June 1996, claimed GBP 69,610.18 (net of tax) in compensation for loss of earnings in the past. He also claimed GBP 6,000 in respect of two open engagement bonuses which were due in 1993 and 1996. He maintained that he would already have been promoted to Mid-Shipman (Petty Officer). He submitted that his attempts to find civilian employment were hampered by the psychological impact of losing his chosen career (referring to the extracts from his medical file noted at paragraph 10 above), by his lack of access to the armed forces' resettlement services and by the length of time the Admiralty Board took to decide on his petition against discharge, pending which he sought essentially temporary civilian positions as he continued to hope that he would return to service.

15. The applicants also claimed GBP 204,650 (before tax) and GBP 17,024 (it is not clear whether this is net of tax or not), respectively, by way of compensation for future loss of earnings.

The first applicant's calculations were based on the assumptions that he would have stayed in service at least until 2014, and that there was a 90% chance that he would have been promoted to commander in 1999 and to captain in 2004, with his retirement being consequently at 55 years of age or later. He submitted that his assumptions were fair given his commitment to his naval career, his excellent work history, his good health and his extremely positive service evaluations. He also assumed significant growth in his property business, including a 6% growth rate from 2005. He argued that all his calculations were set conservatively, making assumptions most favourable to the Government.

The second applicant maintained that, after his Mid-Shipman (Petty Officer) promotion, he would probably have gone on to reach officer status. This would, in turn, have led to his eligibility for transfer to the general list, in which case the likelihood was that he would have stayed in service until his retirement at 55 years of age or later. He stated that he was completely committed to his naval career and to achieving the promotion that would prolong his engagement and that, given his exemplary work history and evaluation reports, there was an 80 % chance of his being retained in service until retirement. Despite these predictions, the second applicant's calculations were based only on his promotion to Mid-Shipman (Petty

Officer), on completion of the initial 22 year engagement, on an annual rise of 3% in his service salary and on his police salary exceeding his service earnings in the year 2003-2004 when he would probably be promoted to police sergeant. His calculations also took account of added accommodation expenses as a civilian.

16. Furthermore, the applicants also claimed to have suffered past and future damage with the loss of the non-contributory service pension scheme, basing their calculations on the same service and civilian career prospects.

The first applicant claimed GBP 494,119.98 compensation in this respect. He emphasised the value of a non-contributory pension scheme and he pointed out that, as a self-employed person, he would have to make large contributions to a pension scheme to achieve the same pension benefits on retirement, for most of which contributions he would not obtain tax relief. The compensation claimed related to the service terminal grant (lump sum) he would have obtained on retirement together with pension payments for 15 years thereafter.

The second applicant transferred his pension benefits to the police pension scheme in September 1996. However, that latter scheme is a contributory scheme to which he pays almost 11% of his salary and he, accordingly, claims compensation for his past and future pension losses. He could not quantify this because of the need for expert assistance which he could not afford.

17. Finally, both applicants claimed interest at 8% per annum from the dates of their discharge on all past pecuniary loss sums claimed.

18. The Government accepted that there may be cases where it would be appropriate to award some compensation for pecuniary loss in this sort of context. However, they disagreed with certain principles, assumptions and calculations underlying the applicants' assessments and, accordingly, with the levels of compensation claimed by the applicants. They did not comment on the second applicant's request for reinstatement.

19. As to the past loss of earnings claimed by the first applicant, the Government were prepared to accept his civilian earnings since discharge as submitted, and they also accepted the earnings of a naval lieutenant commander relied on by him. However, they took issue with his past employment choices, submitting that he could not claim that all past earnings' losses flowed directly from his discharge. They accepted that the discharge would have had an emotional impact on him but argued that there was nothing to suggest that he could not have overcome this to better readjust to civilian life within a relatively short period of time. Referring to the transferable skills the first applicant obtained in service, the Government argued that his progress since discharge had not mirrored that of other officers of similar rank who had left the Royal Navy.

As to the future loss of earnings claimed by the first applicant, the Government relied on a service career forecast completed in respect of the

first applicant by the armed forces in May 1999. They contested his career and length of service assumptions, arguing that these are not easy to reconcile with his service record, his job history since discharge and his personality traits which his own Occupational Psychologist described. They accepted a likely termination of service date of 2012, suggested his chances of promotion to commander were 70% in 2001, and considered that he only had a 3% chance of onward promotion to captain. The first applicant's business was relatively new and, according to the Government, there was therefore unlimited scope for growth or disaster. However, the property market and economic conditions were stable so that there was no reason to assume that the revenue from that business would not, in the future, outweigh the sums he would have earned in service. The Government would limit the causal connection between the first applicant's discharge and loss of earnings to five years, and submitted that no award should be made in relation to future earnings, given the large number of imponderables involved in its assessment.

As to the first applicant's pension, the Government confirmed that, on discharge, he had accrued a terminal grant of GBP 16,057.97 and a pension of GBP 5,350.80 per annum, such sums being indexed-linked and payable at 60 years of age. Had the first applicant served until 2009, those sums would have amounted to GBP 46,473.69 and GBP 15,491.23, respectively. The above submissions on his service prospects were repeated in relation to his claim of pension losses after the date of discharge. The Government added that pension loss should be treated as future loss and should be calculated on the basis of contributions the armed forces would have made to the service pension scheme on the first applicant's behalf, and not on the basis of the loss of a lump sum and annual payments on retirement. The Government considered, moreover, that the first applicant had the opportunity to fund a pension up to the level of benefits which would have been provided by the service pension scheme.

20. As to the second applicant, the Government relied on their submissions on the first applicant's claims. They contested his assumptions about his service prospects, submitting that the rate of voluntary discharge of persons of the applicant's rank and position was such that there was only a 23% chance of he remaining in service after 2000. However, if he had remained in service, it was likely that he would have been confirmed as Leading Weapons Engineering Mechanic by 2001 and as a Petty Officer Weapons Engineering Mechanic by 2008, his chances of promotion thereafter to Chief Petty Officer being assessed at only 10%. In addition, they questioned the second applicant's attempts at finding employment before June 1996. As to his pension claim, they confirmed that on discharge he had accrued a terminal grant of GBP 2,275.77 and a pension of GBP 758.59 per annum, which benefits were transferred to the police pension

scheme. They added that there was no reason to suppose that his pension benefits would be significantly different in the police.

21. In sum, the Government submitted that, given the uncertainty involved in the above assessments, a broad approach to the applicants' claims for pecuniary loss was both inevitable and desirable. Maximum awards for any pecuniary damage sustained were proposed by the Government in the sum GBP 20,000-25,000 for the first applicant, and in the sum of GBP 15,000-20,000 for the second applicant.

22. The Court recalls that, in principle, a judgment in which the Court finds a violation of the Convention imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*Papamichalopoulos and Others v. Greece* judgment (former Article 50) of 31 October 1995, Series A no. 330-B, p. 58-59, § 34).

However, in the present case, a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain character of the damage flowing from the violation (*Young, James and Webster v. the United Kingdom* judgment (former Article 50) of 18 October 1982, Series A no. 55, p. 7, § 11). While the Court does not accept the Government's contention that no award should be made in respect of future losses given the large number of imponderables involved in its assessment, it is, nevertheless, the case that the greater the interval since the discharge of the applicants the more uncertain the damage becomes.

23. Accordingly, the Court considers that the question to be decided is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (*Sunday Times v. the United Kingdom* judgment (former Article 50) of 6 November 1989, Series A no. 38, p. 9, § 15).

24. The Court recalls, in particular, paragraph 85 of the principal judgment where it explained why it considered that the discharge of the applicants "had ... a profound effect on their careers and prospects". It referred to the applicants' "relatively successful service careers in their particular field", to their length of service, to their rank on discharge and to their "very positive" service records prior to and after discharge. In this latter respect, the Court noted that the Government had accepted that neither of the applicants' service records nor their conduct gave any grounds for complaint, and that the High Court in the domestic judicial review proceedings described their service records as "exemplary". That domestic court had also pointed out that there was no reason to doubt that, had the applicants not been discharged, they would have continued to perform their

service duties entirely efficiently and with the continued support of their colleagues (paragraph 23 of the principal judgment).

The Court then went on to note (also in paragraph 85 of the principal judgment) the unique nature of the armed forces, a matter which had been underlined by the Government in their pleadings before the Court, and the consequent difficulty in directly transferring essentially military qualifications and experience to civilian life. It recalled that one of the reasons why it considered Mrs Vogt's dismissal from her post as a school teacher to be a "very severe measure", was the finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt v. Germany judgment of 26 October 1988, Series A no. 142, p. 29, § 60).

The Court is of the opinion that the significant differences between service and civilian life and qualifications, the emotional and psychological impact of the investigations and the consequent discharges (see paragraph 12 above), together with the lack of access to the armed forces' resettlement services, rendered it difficult for the applicants to find civilian careers which were, and would continue to be, equivalent to their service careers.

25. The parties disagreed on the assumptions upon which the assessment of the pecuniary loss claims depended and, in particular, on the applicants' service and civilian career prospects after discharge.

However, it is not disputed that the first applicant began his career in the armed forces in 1982 when he was 23 years old, that after more than 12 years' service the armed forces had become his principal career and that he was a lieutenant-commander when discharged in January 1995, earning a gross annual salary of approximately GBP 30,000. The Government also accepted that the first applicant's transfer to the "general list" in 1989 meant, in principle, a likely naval career until 2012, and that he had a 70% chance of promotion to commander in 2001, although the parties are divided on the chances of potential promotion thereafter to captain. He was unemployed for just over a year in total since discharge, having worked in a number of positions prior to November 1997 when he became self-employed. His property management company showed a profit of GBP 7,135 (before tax) for the financial year ending in March 1999.

It is also not disputed that the second applicant joined the armed forces in 1989 when he was 18 years old, enlisting for 22 years. In 1991 he became a Weapons Engineering Mechanic (Radio) and on discharge in July 1993 he was in receipt of a gross annual salary of approximately GBP 17,000. While his service prospects were disputed, the Government accepted that, if he had not voluntarily left service, his termination date would likely have been 2011 prior to which he would likely have been confirmed as a Leading Weapons Engineering Mechanic by 2001 and as a Petty Officer Weapons

Engineering Mechanic by 2008. Since discharge, he had essentially two six-month paid positions prior to his employment by the police in June 1996. He remains in the police force and accepted that his likely promotion to sergeant would mean that his police earnings would probably exceed his potential service earnings by 2003-2004.

26. Moreover, the Court considers significant the loss to the applicants of the non-contributory service pension scheme.

The lump sum and service pension which the first applicant will receive on retirement are substantially less than the amounts he would have received had he not been discharged, even if he had not achieved his predicted promotions before retirement. Although no precise figures have been provided, the Court accepts that the contributions which would be required in order to achieve an equivalent level of pension from a private pension scheme are likely to be considerable. While the second applicant was able to transfer the accrued benefits of his service pension to the police pension scheme, the latter scheme, unlike the former, is a contributory scheme into which the applicant pays almost 11% of his salary.

The Court is of the view that the applicants can reasonably claim some compensation for the loss associated with the termination of their participation in the non-contributory service pension scheme from the date of their discharges on 17 January 1995 and 28 July 1993, respectively. The amount of the loss is necessarily speculative, depending as it does on, *inter alia*, the period during which the applicants would have remained in service and on their rank at the time of leaving service.

27. The Court further notes that the applicants' claims as regards the promotion bonus and the two open engagement bonuses are not disputed by the Government, and that these payments were to become effective prior to the agreed likely dates of the applicants' retirement from service.

28. Finally, the Court considers that interest can be claimed from the dates on which each element of past pecuniary damage accrued.

29. In such circumstances, and making an award on an equitable basis, the Court awards compensation (inclusive of interest) to the first applicant in the sums of GBP 39,875 in respect of past loss of earnings, GBP 25,000 for future loss of earnings and GBP 30,000 in respect of the loss of the benefit of the non-contributory service pension scheme, making a total award of compensation to the first applicant for pecuniary loss of GBP 94,875.

On the same basis, the Court awards compensation (inclusive of interest) to the second applicant in the sums of GBP 34,000 in respect of past loss of earnings, GBP 7,000 as regards future loss of earnings and GBP 14,000 for the loss of the benefit of the non-contributory service pension scheme, making a total award of compensation to the second applicant for pecuniary loss of GBP 55,000.

C. Costs and Expenses

1. *The domestic proceedings*

30. The first applicant claims reimbursement of the costs of the domestic judicial review proceedings (see paragraph § 22-33 of the principal judgment) prior to the grant of legal aid in September 1995, in the sum of GBP 30,970.48 (inclusive of Value Added Tax - “VAT”).

As well as the costs of the instructing solicitors, invoices were submitted from two Queen’s Counsel in the sums of GBP 10,100 and GBP 200 (exclusive of VAT), respectively. A third (and the leading) Queen’s Counsel did not charge the first applicant for work done in the High Court and thereafter his costs were covered by legal aid. The first applicant submitted that the hourly fee charged by his solicitor was towards the lower end of the recommended scale, and that the proceedings were important for his career, raised a matter of public importance and were complex. He states that the Civil Legal Aid (Regulations) 1989 and the Legal Aid Board’s Notes for Guidance obliged him to bear a proportionate amount of the costs of those proceedings, even though two other applicants in the same proceedings were legally aided (namely, the second applicant herein and Ms Smith - see this Court’s judgment cited at paragraph 2 above).

31. The Government pointed out that the first applicant’s domestic proceedings concerned the same matters as those raised in the proceedings brought by the second applicant and by Ms Smith, to whom it was evident at the early stages of the proceedings that legal aid would be granted. Accordingly, the Government submitted that the first applicant should have restricted his legal costs to a minimum. They also argued that the costs charged are unreasonable as to quantum and that no award, or only a small award, should be made.

32. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25.3.99, § 79).

It considers that the applicant was entitled to instruct such lawyers as he chose and it further notes that legal aid regulations also obliged him to bear a proportionate amount of the overall costs of the judicial review proceedings. Nevertheless, the four applicants in those judicial review proceedings were represented by a total of two Queen’s Counsel, four junior counsel and three firms of solicitors whereas the issues raised by each applicant were substantially the same. Given the potential for efficient co-ordination between those legal representatives, the charges for the services of the total number of fee earners representing the first applicant cannot all be considered to have been “necessarily incurred” or to be “reasonable as to

quantum” (Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 37, § 80).

33. Having regard to the foregoing, and deciding on an equitable basis, the Court awards to the first applicant, in respect of the legal costs and expenses of the domestic judicial review proceedings, the sum of GBP 18,000 (inclusive of VAT).

2. *The Convention proceedings*

34. The first applicant requested reimbursement of GBP 42,954 (inclusive of VAT) as regards the costs and expenses of the Convention proceedings leading to the principal judgment, and of an estimated sum of GBP 8,584.16 (inclusive of VAT) in respect of the Article 41 submissions (which includes GBP 2,137.91 for the cost of the Occupational Psychologist’s report). The second applicant claimed GBP 45,567.09 (inclusive of VAT), together with an unspecified sum for the legal costs of the preparation of his Article 41 submissions. Each applicant claimed for the costs of two Queen’s Counsel (one Queen’s Counsel was common to both applicants) and of a firm of solicitors.

35. The Government accepted some reimbursement of legal costs and expenses. However, they suggested some proportionate reduction to take account of the finding that the complaint under Article 14 of the Convention did not give rise to a separate issue. In addition, they argued that the evidence and issues raised in the domestic proceedings largely mirrored those in the Convention proceedings, so that the bulk of the Convention work was done prior to the introduction of the present applications. Both applications, and the applications of Ms Smith and Mr Grady, clearly raised the same issues, yet the present applicants were represented by two different solicitors’ firms and in total by three Queen’s Counsel. Given the sums claimed for work done by counsel and the latter’s experience, the Government submitted that the costs and expenses claimed as regards representation by solicitors were unnecessary and unreasonable as to quantum.

36. The Court considers that its finding that an admissible complaint does not give rise to a separate issue does not, of itself, imply that the associated legal costs were not necessarily incurred or were unreasonable as to quantum (*Jordan v. the United Kingdom*, no. 30280/96, 14.3.2000, § 42). This is particularly so when the submissions of the parties on that complaint were not extensive.

In addition, the Court does not accept the Government’s contention that the nature of the applicants’ submissions to the domestic courts in the judicial review proceedings and to this Court under the Convention were substantially the same. It also recalls that the voluminous report of the Homosexuality Policy Assessment Team (described in the principal judgment at paragraphs 51-62) was published after the domestic

proceedings had terminated. That report formed the basis of the Government's core arguments before this Court in favour of the armed forces' policy against homosexuals (see paragraphs 95-99 of the principal judgment) and was reasonably the subject of substantial submissions by the applicants.

37. However, the Court considers, in agreement with the Government, that the issues in the applicants' cases were very similar. In addition, by far the greater part of counsels' fees claimed related to the Queen's Counsel common to both applicants who carried out a significant amount of the legal work associated with the Convention proceedings. The Court does not consider that the resulting similarity and overlap between the main written and oral submissions of both applicants has been taken adequately reflected in the costs claimed by them in respect of that legal representative.

Moreover, and even accepting that the applicants were entitled to be represented by separate firms of solicitors, the Court considers that the costs claimed as regards the work done by the solicitors do not take sufficient account of the similarity of the cases and the potential for efficient co-ordination between those legal representatives.

Furthermore, the form of the applicants' initial Article 41 submissions, together with the general principles expressed therein, were sufficiently similar to indicate that they resulted from substantial co-operation between the legal representatives. Given this, the costs claimed by the first applicant in this respect appear excessively high. The Court has also taken into account in its assessment the fact that the second applicant claimed, but did not specify a particular sum for, the legal costs and expenses of his Article 41 submissions. However, given the similarity between these submissions of the applicants, the Court considers that it can assess the second applicant's costs and expenses in this respect from the sums claimed by the first applicant.

38. Accordingly, the Court concludes that the legal costs and expenses for which the applicants claim reimbursement, pursuant to Article 41 of the Convention, cannot all be considered to have been "necessarily" incurred or to be "reasonable as to quantum" (see the above-cited Observer and Guardian judgment, also at § 80).

39. Taking the above into account, and deciding on an equitable basis, the Court awards GBP 16,000 to the first applicant for the costs and expenses of the Convention proceedings. GBP 15,000 is also awarded to the second applicant in this respect. These sums are inclusive of any VAT which may be chargeable and are to be paid to the applicants less the amounts paid to them by the Council of Europe in legal aid.

D. Default interest

40. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

- GBP 19,000 (nineteen thousand pounds sterling) in respect of non-pecuniary damage;
- GBP 94,875 (ninety-four thousand eight hundred and seventy five pounds sterling) in respect of pecuniary damage;
- GBP 18,000 (eighteen thousand pounds sterling) for the costs and expenses of the domestic proceedings (inclusive of value-added tax);
- GBP 16,000 (sixteen thousand pounds sterling) for the costs and expenses of the proceedings before the Convention organs (inclusive of value-added tax), less amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

2. *Holds* by six votes to one

(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

- GBP 19,000 (nineteen thousand pounds sterling) in respect of non-pecuniary damage;
- GBP 55,000 (fifty-five thousand pounds sterling) in respect of pecuniary damage;
- GBP 15,000 (fifteen thousand pounds sterling) for the costs and expenses of the proceedings before the Convention organs (inclusive of value-added tax), less the amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 25 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J.-P. C.
S. D.

PARTLY DISSENTING AND PARTLY CONCURRING OPINION OF JUDGE LOUCAIDES

I beg to differ from the judgment of the Court on just satisfaction under Article 41 of the Convention. In that judgment, the majority based their award of compensation to the applicants on all of the violations found in the principal judgment of 27 September 1999. However, my view was that there had not been a violation of Article 8 as a result of the applicants' dismissal from the armed forces on the grounds of their homosexuality. Moreover, that dismissal element was, in my opinion, the most substantial part of the applicants' cases. I cannot, therefore, agree with the Article 41 judgment. Furthermore, I do not think that, in these circumstances, it would serve any useful purpose for me to separately estimate the just satisfaction to award to the applicants for those violations in respect of which I did agree with the majority.

I should, however, add that in my opinion the assessment of non-pecuniary loss in this case should have taken account of the fact that, on their enlistment, the applicants were aware of the risk of they being discharged from the armed forces on grounds of their homosexuality in pursuance of the relevant official policy of the Ministry of Defence which had been brought to their attention. In so far as this prior knowledge was not taken into account by the majority, I consider the amount awarded in respect of non-pecuniary loss to be excessive. Even apart from this latter point, I am of the view that the award for non-pecuniary loss is, in any event, excessive.