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

CASE OF KINGSLEY v. THE UNITED KINGDOM

(Application no. 35605/97)

JUDGMENT

STRASBOURG

28 May 2002

In the case of Kingsley v. the United Kingdom,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mr GAUKUR JÖRUNDSSON,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr A. KOVLER,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 7 November 2001 and 17 April 2002,

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

PROCEDURE

1. The case originated in an application (no. 35605/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Max Myer Kingsley ("the applicant"), on 23 December 1996.

2. The applicant alleged that he had been deprived of a hearing before an independent and impartial tribunal, in breach of Article 6 § 1 of the Convention.

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

4. The applicant was represented before the Court by Mr N. Valner, a lawyer practising in London. The United Kingdom Government ("the

Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office, London.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 14 September 1999 it was declared admissible by a Chamber of that Section ("the Chamber"), composed of the following judges: Mr J.-P. Costa, President, Mr L. Loucaides, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Sir Nicolas Bratza, Mrs H.S. Greve and also of Mrs S. Dollé, Section Registrar.

6. On 7 November 2000 the Chamber delivered its judgment in which it held, unanimously, that there had been a violation of Article 6 § 1 of the Convention [*Note by the Registry*. The judgment is available from the Registry]. The Chamber decided, by six votes to one, that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant and, apart from a unanimous award of 13,500 pounds sterling in respect of Strasbourg legal costs and expenses, it dismissed the remainder of the applicant's claims for just satisfaction. Mr Loucaides's partly dissenting opinion was annexed to the judgment.

7. On 14 December 2000 the applicant requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted his request on 17 January 2001.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed written observations concerning the issues under Article 41 of the Convention (see paragraph 33 below). In addition, third-party comments were received from Liberty, a non-governmental organisation based in London (Article 36 § 2 of the Convention and Rule 61 § 3).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 November 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Lord GOLDSMITH QC, Attorney-General,
Mr P. SALES,
Mr M. SHAW, *Counsel*,
Mr J. ROBINSON,
Mr L. HERBERG,
Mr C. HARPER, *Advisers*;

(b) *for the applicant*
Mr C. GREENWOOD QC, *Counsel*,
Ms J. STRATFORD,
Ms S. PLAYLE, *Advisers*.

The Court heard addresses by Lord Goldsmith and Mr Greenwood, and also their replies to questions from its individual members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. Between 1984 and 1992 the applicant was the sole managing director of London Clubs Limited ("LCL"), a company which owned and controlled six of the twenty casinos licensed to operate in London. LCL was a subsidiary company of London Clubs International PLC ("LCI") of which the applicant was also managing director. Both companies will hereafter be collectively referred to as London Clubs.

12. In June 1991 a raid took place at the various premises of LCL. The raid was carried out by the police in the presence of officials of the Gaming Board for Great Britain ("the Gaming Board"), a statutory body which regulates and monitors the gaming industry. A large quantity of documents was seized. In March 1992 the Gaming Board lodged objections with the clerk to the Licensing Magistrates with regard to LCL's annual application for renewal of the licences it held in respect of each of its casinos. The Gaming Board also made cancellation applications in respect of the existing licences held by LCL.

A meeting was held between the Gaming Board and the non-executive directors of LCL and their legal advisers on 26 March 1992. As a result of that meeting, the applicant and the other executive directors (with the exception of the finance director) resigned with effect from 30 April 1992, on the understanding that such resignation was involuntary and constituted dismissal by London Clubs.

Subsequently an agreement was reached between the Gaming Board and London Clubs, whereby LCL would apply for new licences for the casinos via reconstituted operating companies, to which applications the Gaming Board would not object. If the applications were successful and new licences were granted by the Licensing Magistrates, LCL would undertake to surrender its existing licences, thereby avoiding the necessity for the applications for cancellation or renewal to be heard.

The Gaming Board issued LCL with certificates of consent, which LCL was statutorily obliged to obtain from the Gaming Board as a prerequisite to making an application to the Licensing Magistrates for new licences. Objections to the issuing of new licences were made by a rival casino owner. However, these objections were rejected and new licences were granted in October 1992, after a three day hearing before the Licensing Magistrates. The Gaming Board was represented at the hearing and expressed to the Licensing Magistrates its support for the application of LCL, explaining the grounds on which the Gaming Board itself had granted LCL certificates of consent in the following terms:

> "In determining that it should issue certificates of consent the Board took into consideration, amongst other relevant factors, the degree to which LCI had addressed the Board's grave concerns at the matters of complaint referred to above, and in particular had in mind the following:
>
> Those executive directors of LCI and of [LCL] who in the Board's view carried the principal responsibility for the matters of complaint ... [the applicant was named along with nine others] have left the company and relinquished their management shares.
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> ...
>
> The Board and Police viewed the matters raised in their cancellation applications extremely seriously. However they are satisfied that the practices that were unacceptable have now been eradicated and that those individuals responsible for encouraging or tolerating them have been removed."

13. In November 1992 the Chairman of the Gaming Board, Lady Littler, addressed the British Casino Association at its annual luncheon. Her speech referred to London Clubs and commented:

> "We [the Gaming Board] satisfied ourselves that the practices we and the Police had regarded as unacceptable had ceased, that persons regarded by the Board and Police as not fit and proper had been removed ..."

14. As a result of this speech, the applicant's legal advisers entered into correspondence with the Gaming Board's solicitors, on the basis that the speech was defamatory. The Gaming Board alleged that the "persons" referred to were minority shareholders and no reference to the applicant was intended. The applicant did not accept this explanation, but did not institute defamation proceedings.

15. By a letter of 22 December 1992, the applicant's legal advisers received written notice that the Gaming Board was considering whether the applicant was a fit and proper person to hold the Board's certificate of approval, as required by section 19 of the Gaming Act 1968 ("the 1968 Act") in order to hold a management position in the gaming industry. By a letter dated 23 April 1993, the Gaming Board informed the applicant formally that it was "minded to revoke" the applicant's section 19 certificates and that the applicant would be given the opportunity to state his

case against revocation either in writing or orally at an interview before the Gaming Board ("a section 19 hearing").

The letter detailed the matters which the Gaming Board wished to discuss with the applicant and also referred to the particulars of the Gaming Board's complaints in the application for cancellation of LCL's licences (the hearing of which had, in fact, never taken place). In these complaints, numbered B1 to B9, it was claimed, *inter alia*, that there had been breaches of section 16 of the 1968 Act, in that cheques had been accepted without any expectation that they would be met promptly (B1); that the applicant had been involved in granting cheque-cashing facilities to members without proper investigation of their creditworthiness (B2); that cheques had been accepted which exceeded the authors' cheque-cashing facility (B3); that third-party cheques had been accepted in a way which would permit circumvention of the 1984 Guidelines of the British Casino Association (B4); that Japanese players had been assisted in breaching Japanese exchange-control regulations (B5); that gifts or hospitality had been made to substantial players in breach of further 1984 guidelines (B7); and that the method for computing the "cash drop" in casinos produced inaccuracies, and was open to abuse (B9). Examples were given.

16. The applicant's legal advisers objected to the Gaming Board presiding the section 19 hearing, suggesting that an independent tribunal be set up as an alternative. The applicant's principal objection was based on the fact that the Gaming Board had already publicly expressed the view (at the hearing before the Licensing Magistrates) that the applicant was not a fit and proper person to remain an executive director of London Clubs. As such, the applicant contended, the Gaming Board could not be considered an impartial tribunal appropriate to consider the issue of whether the applicant's section 19 certificates should be revoked.

17. The Gaming Board rejected the request for an independent tribunal and the section 19 hearing opened on 11 April 1994 before a panel of three, all members of the Gaming Board ("the Panel"). The hearing was conducted in private and lasted for seven and a half days. The applicant was represented by senior counsel. The Gaming Board's solicitors, a senior Gaming Board official and a representative of the Gaming Board's accountants also attended the hearing.

By a letter dated 28 May 1994, the applicant was informed that the Gaming Board did not consider the applicant to be a fit and proper person to continue to hold the Board's certificates of approval and that, accordingly, the Board would revoke his section 19 certificates within twenty-one days of receipt of the letter. This letter detailed the matters which had been of concern to the Gaming Board and the complaints that it deemed established against the applicant.

18. The effect of the revocation of the section 19 certificates was that the applicant was unable to obtain employment in any sector of the gaming

industry in the United Kingdom or in any jurisdiction which had a relationship with the United Kingdom gaming authorities.

19. By an application dated 23 August 1994, the applicant sought leave to apply for judicial review of the decision of the Gaming Board to revoke his section 19 certificates. The decision was challenged on the grounds that the Panel was biased, or had the appearance of bias, and that its findings were vitiated by errors of law and were irrational.

20. In the course of the judicial review proceedings, a document entitled "Confidential Annex to Minutes of the 281st Board Meeting of the Gaming Board for Great Britain", dated 21 January 1993, was produced, attached to an affidavit sworn by the Chairman of the Gaming Board. This document recorded that the Gaming Board had decided at its meeting on 21 January 1993 that it had

> "sufficient evidence before it to conclude that [the applicant] ... was not a fit and proper person to be a director of a casino company".

21. All the members of the Panel before which the section 19 hearing took place had been present at the Board meeting and were parties to this decision, which had been taken prior to the hearing itself.

22. The application for judicial review was dismissed on 11 January 1996 by Mr Justice Jowitt after a hearing lasting over sixteen days. He delivered three separate judgments in respect of the applicant's appeal. The first judgment dealt with the scope of the phrase "a fit and proper person" in Schedule 5 of the 1968 Act. The second judgment considered the applicant's claim that he had a "legitimate expectation" that the Gaming Board would be precluded from taking account of any breaches of its guidelines unless the breaches were unlawful. The third judgment, which dealt with "Wednesbury" challenges and allegations of bias, ran to 165 pages. Mr Justice Jowitt stated that the scope of the judicial review was such that he was not concerned to review findings of fact, as for an appeal, but rather to assess whether the findings of the Panel disclosed illegality, irrationality ("Wednesbury unreasonableness") or procedural impropriety.

23. On pages 28 to 93 of the third judgment, Mr Justice Jowitt dealt with the applicant's "Wednesbury" challenges to the findings in respect of the various complaints made of him.

24. By way of example, it was accepted that cheques drawn by one player, a Mr S., on a Spanish and a Swiss bank were not cleared within twenty-one days after payment into a British bank, as would be the normal course of events. Rather, the average time for clearance was 179 days. The Board found that this practice breached section 16 of the 1968 Act, which prohibits credit betting save when a cheque is exchanged for tokens. The applicant alleged that the cheques he accepted were not shams, as none of the Spanish cheques was ever dishonoured. The judge found that the Board's conclusion – that what took place amounted to an agreement

between Mr S. and LCL, such that section 16 was breached – was a conclusion it was entitled to reach.

25. Fifty-seven pages of the third judgment were devoted to the issue of bias. Mr Justice Jowitt described the test of bias under English law in the following terms (pp. 93-96 of the judgment):

> "[Counsel for the applicant] submits that the decision to revoke the applicant's section 19 certificates of approval should be quashed because the Panel was biased. The grounds on which leave to move for judicial review were granted asserted firstly that the Board could not and did not approach its decision with objectivity and impartiality. Secondly, it was asserted that whether or not there was actual bias the applicant reasonably believed there was and that the Board should have had regard to the appearance of bias which had been created by its actions ...
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> There was no disagreement between the parties as to the approach the court should adopt when bias is alleged. It is a two-stage test. The applicant has first to show from the evidence that there is an appearance of bias (*R. v. Inner West London Coroner*, *ex parte Dallaglio* [1994] 4 All England Law Reports 139). [Counsel for the Gaming Board] properly and realistically accepts that in the light of the available evidence the applicant has surmounted this hurdle. Having done so, he has to go on to show that on a proper examination by the court of the evidence before it there is demonstrated a real danger of injustice having occurred as a result of bias ... [The analysis in that case of] the decision of the House of Lords in *R. v. Gough* [1993] Appeal Cases 646 ... illuminates my task in relation to this second stage.
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> '(1) Any court seised of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts.
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> ...
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> (3) In reaching its conclusion the court "personifies the reasonable man".
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> (4) The question on which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By "real" is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.
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> (5) Injustice will have occurred as a result of bias if "the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him". I take "unfairly regarded with disfavour" to mean "was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue".
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> (6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased.
>
> (7) ... the court is [not] concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias.

...

(9) It is not necessary for the applicant to demonstrate a real possibility that the ... decision would have been different but for the bias; what must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decide the merits, unfairly.' "

26. Mr Justice Jowitt then applied the test of bias which he had set out to the facts of the case, and concluded that, on the evidence before him, he could not say that the applicant had established that there was a real danger of injustice having occurred as a result of bias. He concluded that there was no unconscious bias on the part of any of the Panel members.

27. Mr Justice Jowitt stated further that if, contrary to his finding, there was unconscious bias on the part of the Panel, the "doctrine of necessity" fell to be considered. He said:

"When a body is charged by statute with the power or duty, which cannot be delegated, to make a decision in circumstances in which a question of bias arises because:

(i) in pursuance of that statutory power or duty an initial view has been formed upon a matter affecting the interests of someone in respect of whom the body in the exercise of its statutory power or duty has thereafter to make a decision, or final decision, after receiving and considering representations which he is entitled to make or

(ii) in the exercise of a statutory power or duty to make a decision a conflict arises between the interests of another or others which have to be taken into account and the body's own interests:

the decision will not be liable to be impugned on account of bias provided that:

(i) if only some of those charged with the power or duty to decide are potentially affected by bias such of them as can lawfully withdraw from the decision-making do so, and

(ii) those of the decision-makers who are potentially affected by bias but cannot lawfully withdraw use their best endeavours to avoid the effect of bias and, consistently with the purpose for which its decision has to be made, the body takes what reasonable steps are open to it to minimise the risk of bias affecting them ..."

Mr Justice Jowitt indicated that if, contrary to his finding, there was unconscious bias on the part of the Panel, the doctrine of necessity would apply, and the decision of the Panel would stand. Counsel for the applicant submitted before Mr Justice Jowitt that the Board had failed to take the reasonable step of appointing an independent body to hear evidence and report to the Panel. Mr Justice Jowitt rejected the submission, on the grounds that no useful reference could have been made to an independent tribunal which did not involve an impermissible delegation.

28. In respect of all other allegations brought by the applicant, Mr Justice Jowitt concluded that the applicant had failed to establish that the Panel's decision was irrational or unreasonable or to make out any sufficient ground for judicial review. Mr Justice Jowitt noted that, by trying to frame his allegations in terms of "Wednesbury unreasonableness", the applicant was in fact making an impermissible attempt to re-argue the case as though on appeal in order to have the factual merits of the case re-examined.

29. The Court of Appeal, after an oral hearing on 4 July 1996, refused an application for leave to appeal from Mr Justice Jowitt's decision. Lord Justice Morritt (with whom Lord Justice Hobhouse agreed) held, on the "doctrine of necessity," as follows:

> "I am prepared to assume in favour of [the applicant] that he would have an arguable case sufficient to justify leave to appeal, that there was a real risk that the decision of the tribunal had been actuated by bias even though they were not in fact biased against him. That would leave the question of how the doctrine of necessity would be applied to the facts of the case.
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> [Counsel for the applicant] did not seek to suggest that the propositions of law which [Mr Justice Jowitt] enunciated, and which I have quoted, were not accurately formulated by him, but he sought to challenge the final conclusion, to which I have just referred, that there could have been [no] useful reference to an independent tribunal which did not involve an impermissible delegation. The question of bias, therefore, depends on the very limited point of whether it is arguable that [Mr Justice Jowitt] was wrong in that respect. I am bound to say that, on that limited point, I think he was manifestly right. The decision for the Board was, at the end of the day, whether or not Mr Kingsley was a fit and proper person. That could not be delegated to an independent panel and if they were actuated by bias, apparent or real, then the decision would still have to be made by them. Therefore, on the doctrine of necessity, which is accepted, there could have been no meaningful independent panel and the decision would stand because the decision has to be made by the Board and could not be delegated to the independent tribunal. It seems to me that there is no arguable point, susceptible on this part of the case, which would justify giving leave to appeal."

II. RELEVANT DOMESTIC LAW

30. The Gaming Board for Great Britain ("the Gaming Board") is a statutory body, established under section 10 of the Gaming Act 1968 ("the 1968 Act") to regulate and monitor the gaming industry. In order for any company to obtain the requisite gaming licence for premises, a certificate must first be issued by the Gaming Board consenting to the company applying for such a licence (Schedule 2, paragraph 3(1), of the 1968 Act).

31. Under section 19 of the 1968 Act the Gaming Board issues certificates to individuals in order that they be permitted to hold certain positions in the gaming industry. A certificate, once issued, continues to be in force unless and until it is revoked. The Gaming Board may revoke the certificate at any time if it appears to the Board that the person to whom it

relates is not a fit and proper person to perform the specified function or act in the specified capacity (Schedule 5, paragraph 6, of the 1968 Act). Twenty-one days' written notice of the revocation must be given to the certificate holder. The Gaming Board has developed a procedure whereby an individual is sent a letter in which the Board states that it is minded to revoke his certificate. This is followed by the submission of written representations and/or an oral hearing.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. In its judgment of 7 November 2000, the Chamber found that the proceedings before the Gaming Board, the High Court and the Court of Appeal determined the applicant's civil rights and obligations, so that Article 6 § 1 was applicable (see paragraphs 42-45 of the judgment).

In connection with the question whether the Panel of the Gaming Board was an "independent and impartial tribunal", the Chamber held, as a preliminary point, that, since the applicant had not pursued an allegation of actual bias before the domestic courts, it was not open to him to raise such a complaint before the Chamber (see paragraph 48).

The Chamber considered that the Panel did not present the necessary appearance of impartiality at the section 19 hearing in April 1994 given that it had already decided in January 1993 that the applicant was not a fit and proper person to hold a gaming certificate (see paragraphs 49-50). The Chamber observed that, according to the case-law, even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1, there is no breach of the Convention if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1". On the question whether the High Court and the Court of Appeal satisfied the requirements of Article 6 § 1 as far as the scope of their jurisdiction was concerned, the Chamber observed:

> "52. In *Bryan* [*v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A], the Court gave examples of the matters which were relevant to assessing the adequacy of the review on a point of law in that case: 'the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal' (loc. cit., p. 17, § 45).
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> 53. The Court notes that the present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular monitoring. In

the United Kingdom, the monitoring is undertaken by the Gaming Board pursuant to the relevant legislation. The subject matter of the decision appealed against was thus a classic exercise of administrative discretion, and to this extent the current case is analogous to *Bryan*, where planning matters were initially determined by the local authority and then by an inspector, and to ... *X v. the United Kingdom* [no. 28530/95, Commission decision of 19 January 1998, unreported], in which the applicant was held by the Secretary of State not to be a fit and proper person to be the chief executive of an insurance company. The Court does not accept the applicant's contention that, because of what was at stake for him, he should have had the benefit of a full court hearing on both the facts and the law. Even though the members of the Panel were not experts in the gaming industry, they were advised by officials who were experts, and the Court finds administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure.

54. The Court further notes that the Panel's decision was arrived at after quasi-judicial proceedings with a seven-and-a-half-day hearing at which evidence was called by the applicant, who was throughout the proceedings represented by senior counsel. The applicant was given ample opportunity to consider the various elements of the case against him, and to comment on the way in which the proceedings should take place. Further, it was open to the applicant to make a wide range of procedural complaints in the context of the judicial review proceedings which he subsequently brought.

55. The question remains, however, whether, in a case such as the present one where the applicant's primary complaint was that the Board, as the sole decision-making body, was actuated by bias, the extent of the High Court's review was sufficient to amount to 'subsequent control by a judicial body that has full jurisdiction ...'. In determining this question, the Court must consider the way in which the case developed on judicial review.

56. On the question of bias, Mr Justice Jowitt noted the acceptance by counsel for the Gaming Board that there was an 'appearance of bias'. However, he went further to examine whether this appearance of bias was such as to give rise to a real danger of injustice. Having examined the evidence in detail and having, in particular, drawn attention to the preparations made to give the applicant a fair and open-minded hearing, to the time devoted to the hearing, to the findings in favour of the applicant on certain issues and to the way in which the Panel distinguished between the different impact of their various findings on the 'fit and proper person' issue, as well as to the calibre and experience of the Panel members, it was his view that no real danger of injustice arose in the present case. Mr Justice Jowitt further concluded that, even if there had been unconscious bias on the part of the Panel, the Panel's decision had to stand because of the application of the doctrine of necessity (see paragraphs 24 and 26 above for the manner in which the domestic courts described and applied the doctrine).

57. The Court of Appeal, for its part, was prepared to assume that the applicant had an arguable case, sufficient to justify leave to appeal, and that there was a real risk that the decision of the Panel had been actuated by bias but, applying the doctrine of necessity, held that the decision had to stand, since the decision had to be made by the Board and could not be delegated to an independent tribunal.

> 58. The Court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' implies that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body.
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> 59. In the present case the domestic courts were unable to remit the case for a fresh decision by the Board or by another independent tribunal. The Court thus finds that, in the particular circumstances of the case, the High Court and the Court of Appeal did not have "full jurisdiction" within the meaning of the case-law on Article 6 when they reviewed the Panel's decision."

The Chamber therefore found a breach of Article 6 § 1 of the Convention and, under Article 41, awarded a sum only in respect of the applicant's legal costs and expenses in the Strasbourg proceedings (see paragraph 6 above).

33. The applicant, in his letter of 14 December 2000 requesting that the case be referred to the Grand Chamber, referred only to issues under Article 41 of the Convention and did not raise any question relating to the Chamber's findings on the merits of the case under Article 6 § 1. In their written observations the Government confirmed that they accepted the Chamber's ruling on the violation of Article 6 § 1.

34. The Grand Chamber reiterates that cases referred to it embrace all aspects of the application previously examined by the Chamber in its judgment, and not just the issues disputed by the parties (see *K. and T. v. Finland* [GC], no. 25702/94, § 140, ECHR 2001-VII). It sees, however, no reason to depart from the Chamber's findings in connection with Article 6 § 1 of the Convention in the present case and it therefore concludes that, for the reasons indicated by the Chamber in its judgment, there has been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

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

A. Damage

36. In his letter requesting that the case be referred to the Grand Chamber, the applicant stated that the first of the two issues arising under Article 41 was "[w]hether the Court should award non-pecuniary damage ...

in a case where the Court has found a violation of Article 6 due to lack of impartiality, where there is no remedy or reparation available in domestic law, and where the applicant has provided the Court with evidence of distress, anxiety and frustration which the unfair proceedings have caused him".

37. In his written observations and at the hearing before the Grand Chamber the applicant claimed compensation for loss of procedural opportunity and for stress, loss of reputation and other psychological and emotional damage sustained as a result of the breach of Article 6 § 1.

He submitted that the principle underlying Article 41 is *restitutio in integrum* and that where the amount of a loss cannot be quantified precisely, the assessment of compensation should be governed by equity. He pointed out that the Court had made an award for loss of procedural opportunity in the past, for example, in *de Geouffre de la Pradelle v. France* (judgment of 16 December 1992, Series A no. 253-B), where the Court declared itself unable to speculate as to the outcome had the applicant been afforded access to court and awarded 100,000 French francs for loss of opportunity. In the applicant's submission, an award for loss of opportunity should be assessed having regard to the total sums lost by him and the likelihood that they would not have been lost had the domestic proceedings been conducted in compliance with Article 6 § 1. He contended that if the section 19 proceedings had been decided by an impartial tribunal, he would have been exonerated and would not have lost his certificates. The loss of these certificates resulted in substantial loss of earnings (1,868,000 pounds sterling (GBP)), loss of pension entitlement (GBP 2,500,000) and the loss of profits on shares in London Clubs which he was forced to relinquish at their purchase price.

In addition, the applicant claimed that as a result of the Gaming Board's decision he lost his reputation and his savings, and his marriage broke up. He suggested that the Court could derive guidance as regards the appropriate amount of compensation for the ensuing mental suffering from damages awarded in English libel cases.

38. The Government disputed that the applicant should be compensated for losses caused by the removal of his section 19 certificate, since it would be impossible and inappropriate for the Court to try to "second guess" the outcome of the domestic proceedings had the violation of Article 6 § 1 not occurred.

In the Government's submission the Court should, moreover, be slow to depart from its usual practice of declining to award a sum of money as just satisfaction for stress caused by proceedings before a tribunal not in compliance with Article 6 § 1; the stresses and strains of dispute resolution were part of the ordinary exercise of citizenship and the Convention did not create any obligation on the State to protect citizens in that respect. The applicant had not adduced any independent evidence to suggest that the

stress he had suffered was unusual or was specifically caused by the breach of Article 6 § 1, rather than by the loss of his section 19 certificate.

The Government suggested that the cases in which the Court had awarded compensation for the undue length of the proceedings could be distinguished from cases such as the applicant's by reason of the exacerbation of stress suffered by parties to litigation which continues for an unreasonably long period, together with the need to provide a financial disincentive to States tempted to under-fund their domestic legal systems.

39. Liberty, in its third-party intervention, expressed the view that, generally, in cases of violation of Article 6, while it was impossible to speculate as to what the outcome would have been had Article 6 not been violated, the applicant should be given the benefit of the doubt and the Court should award an amount in respect of non-pecuniary damage to compensate him or her for all the losses flowing from the impugned domestic proceedings. This would provide an incentive to States to ensure compliance with the Convention.

40. The Court notes that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements (see *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12). The Court will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found (see the authorities cited in paragraph 43 below), since the State cannot be required to pay damages in respect of losses for which it is not responsible.

41. In the present case, the basis of the Chamber's finding of a violation of Article 6 § 1, which finding was accepted by the applicant and the Government in the present proceedings and has been adopted by the Grand Chamber (see paragraphs 33-34 above), was that the Panel of the Gaming Board lacked objective impartiality and that the reviewing courts' jurisdiction was too limited to put right that deficiency.

42. This finding of a violation of Article 6 § 1 does not entail that the Board's decision to revoke the applicant's section 19 certificate was not well-founded or that a differently constituted tribunal would have found for the applicant. The applicant has not complained of real (subjective) bias on the part of the members of the Panel, but only of apparent (objective) bias (see paragraphs 25, 29 and 32 above). Moreover, apart from the matters which gave rise to the finding of violation, he does not contend that the proceedings before the Board and in the High Court and the Court of Appeal were unfair. It must be recalled that the applicant had legal representation at all stages of the proceedings, that the Board heard seven and a half days of evidence and argument and that, in addition to the question of bias, the underlying merits of many of its findings were the

subject of judicial review. After a hearing in the High Court lasting sixteen days and the delivery of three lengthy and fully reasoned judgments, Mr Justice Jowitt decided that the Board's conclusions had not been unreasonable and should be upheld.

43. Having regard to all the circumstances, and in accordance with its normal practice in civil and criminal cases as regards violations of Article 6 § 1 caused by a lack of objective or structural independence and impartiality, the Court does not consider it appropriate to award financial compensation to the applicant in respect of loss of procedural opportunity or any distress, loss or damage allegedly flowing from the outcome of the domestic proceedings (see, *inter alia*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 24, § 58; *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 19, §§ 49 and 51; *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 20, § 48; *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 17, § 36; *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 284, § 88; *De Haan v. the Netherlands*, judgment of 26 August 1997, *Reports* 1997-IV, p. 1394, §§ 59-60; *Coyne v. the United Kingdom*, judgment of 24 September 1997, *Reports* 1997-V, p. 1856, § 64; and *Hood v. the United Kingdom* [GC], no. 27267/95, § 86, ECHR 1999-I).

44. The Court therefore rejects the applicant's claim in respect of non-pecuniary damage.

B. Costs and expenses

1. Domestic costs

45. The parties agreed that the Court should award domestic legal costs only where such costs were actually and necessarily incurred to prevent or redress the breach of the Convention found by the Court. They disagreed, however, as to the proportion of the applicant's costs that were incurred to prevent or redress the violation in the present case.

46. The applicant claimed that he should be reimbursed the totality of the costs of the domestic proceedings: GBP 526,017.48 (GBP 231,277.70 for the section 19 hearing before the Board, GBP 254,982.72 for the judicial review proceedings in the High Court and Court of Appeal, and GBP 39,757.06 paid towards the costs of the Gaming Board in the judicial review proceedings). His solicitors raised the problem of bias prior to the hearing before the Board, and it was the first issue considered in the judicial review proceedings. In his submission, but for the violation of Article 6 § 1, he would either not have had to bring judicial review proceedings (because the section 19 hearing would have been fairly conducted before an impartial tribunal) or he would have been successful in the judicial review

proceedings and been awarded costs. He certainly would not have been ordered to pay anything towards the Board's costs.

47. In the alternative, the applicant sought an award of at least those costs directly attributable to the lack of impartiality arguments made in the domestic courts. The applicant's solicitor estimated that half of the correspondence (costing GBP 3,750) exchanged with the Gaming Board prior to the section 19 hearing concerned the issue of bias and that counsel's fees of GBP 2,500 were also incurred advising on this issue prior to the hearing.

He claimed that approximately a third of the judicial review proceedings in the High Court concerned the issue of bias. The total High Court costs were GBP 254,982.72, inclusive of value-added tax (VAT), and the applicant claimed that he should be reimbursed at least a third, that is, GBP 84,994.24. Similarly, a third of the Board's costs in the High Court which the applicant was required to pay related to the issue of bias, and he asked to be reimbursed at least GBP 13,252.32. The applicant claimed that the totality of the proceedings in the Court of Appeal concerned the issue of bias. However, the cost to him of these proceedings was small, since he was not charged solicitors' fees in the Court of Appeal, but was required to pay only the firm's disbursement of GBP 211.01, inclusive of VAT.

48. The Government submitted that the applicant's real purpose in the section 19 hearing and the judicial review proceedings was to seek to retain his certificates of approval and to assert his fitness to continue to practise in the gaming industry. No part of the hearing before the Gaming Board concerned the breach of the Convention later identified by the Court, and of the judicial review proceedings, probably only 10% to 15% of the legal costs were incurred to prevent or redress this breach. The Government conceded that the same could not be said of the Court of Appeal hearing, but pointed out that the costs in relation to that hearing were relatively small.

49. The Court reiterates the established principle in relation to domestic legal costs, namely, that an applicant is entitled to be reimbursed those costs actually and necessarily incurred to prevent or redress the breach of the Convention, to the extent that the costs are reasonable as to quantum (see, for example, *I.J.L. and Others v. the United Kingdom* (just satisfaction), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001).

50. The Court considers that the hearing before the Gaming Board in April 1994 was concerned with the issue whether the applicant was a “fit and proper person” to hold a gaming certificate. The costs of these proceedings were not incurred to prevent or redress the breach of Article 6 § 1 complained of by the applicant, and the Court does not, therefore, make any award in relation to them.

51. Whilst the Court has not seen a full transcript of the hearings in the judicial review proceedings, it is clear from the judgments delivered by the

High Court and the Court of Appeal that a proportion of the proceedings in the High Court, and all the proceedings in the Court of Appeal, were devoted to the question whether the Panel of the Gaming Board was biased and whether, given the doctrine of necessity, it was possible to rectify this defect. The applicant contends that a third of the costs in the High Court were incurred to redress the violation of Article 6 § 1, while the Government estimate that the true figure was between 10% and 15%.

Deciding on an equitable basis, the Court awards the applicant, in respect of domestic legal costs and expenses, GBP 50,000, together with any VAT that may be chargeable.

2. Costs of the proceedings before the Commission and the Court

52. In its judgment of 7 November 2000, the Chamber awarded the applicant GBP 13,500 in respect of his costs and expenses before the Court and Commission. Neither the applicant nor the Government have called this award into question and the Grand Chamber considers that the sum awarded was reasonable and should stand.

53. The applicant claimed GBP 28,471.80 in respect of the Grand Chamber proceedings, including travel expenses, solicitors' costs of GBP 3,828.50 and counsels' fees of GBP 15,000 (Mr Greenwood) and GBP 7,500 (Ms Stratford).

54. The Government commented that the costs claimed were too high, and that GBP 16,000, inclusive of VAT, would be more reasonable.

55. The Court notes that the applicant requested that the case be referred to the Grand Chamber in connection with two claims under Article 41: non-pecuniary damage and domestic legal costs (see paragraph 36 above). The issues before the Grand Chamber were not extensive or complex, and in the event the applicant succeeded only as regards his claim for domestic costs (see *Welch v. the United Kingdom* (Article 50), judgment of 26 February 1996, *Reports* 1996-II, p. 392,§ 22).

56. In these circumstances, and having regard to the Government's view as to the reasonable figure for costs before the Grand Chamber, the Court considers that it would be equitable to award a total of GBP 25,000 in respect of all the costs before the Commission and the Court, together with any VAT that may be chargeable.

C. Default interest

57. 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 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* by ten votes to seven that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) GBP 50,000 (fifty thousand pounds sterling) in respect of domestic costs and expenses, together with any value-added tax that may be chargeable;
      (ii) GBP 25,000 (twenty-five thousand pounds sterling) in respect of costs and expenses before the commission and the Court, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* by ten votes to seven the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 May 2002.

Luzius WILDHABER
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar

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

(a) partly dissenting opinion of Mr Rozakis;

(b) partly dissenting opinion of Mr Ress joined by Mrs Tsatsa-Nikolovska and Mr Levits;

(c) partly dissenting opinion of Mr Casadevall joined by Mr Bonello and Mr Kovler.

L.W.
M.B.

PARTLY DISSENTING OPINION OF JUDGE ROZAKIS

In this case I am unable to follow the majority of the Court in their decision not to award compensation for non-pecuniary damage to the applicant. I share the opinion of Judge Casadevall with regard to the principles that should govern the award of compensation for non-pecuniary damage, and the analysis of Judge Ress on the specific circumstances of this case.

PARTLY DISSENTING OPINION OF JUDGE RESS JOINED BY JUDGES TSATSA-NIKOLOVSKA AND LEVITS

1. In this case I share the opinion of the majority that there was no causal link between the appearance of bias on the part of the Panel of the Gaming Board and the pecuniary losses incurred by the applicant because of the withdrawal of his licence. I also agree with the decision regarding the costs. The only point where I disagree is the question whether an award for non-pecuniary damage should be made. It is true that it is not in every case where a violation is found that compensation for non-pecuniary damage should be awarded under Article 41. There may be cases where the mere statement that a violation has occurred is sufficient to outweigh the frustration of the applicant, in particular when this statement may have consequences at the domestic level. That is the case when the applicant is able to seek redress of the violation found by the European Court of Human Rights through national proceedings or where he can seek compensation for non-pecuniary damage on the basis of such a finding at the national level.

2. These prospects of redress at the national level do not exist in the applicant's case. The applicant, confronted with the legal regulations in England, found himself in a rather difficult position. He could of course have argued that the Panel of the Gaming Board was biased or gave the appearance of being biased. In the course of the judicial review proceedings, Mr Justice Jowitt, dealing with the applicant's "Wednesbury" challenges, dealt quite extensively with the problem of bias. Counsel for the applicant submitted that the decision to revoke the applicant's section 19 certificates should be quashed because the Panel was biased. Mr Justice Jowitt then stated that, even if there was unconscious bias on the part of the Panel, its decision would nevertheless stand because of the doctrine of necessity. This judge therefore gave the impression that the whole endeavour to look more deeply into the question whether unconscious bias was established was futile, as it was not decisive for the outcome of the case because the doctrine of necessity prevented any challenge in this respect to the decision of the Panel. The Court of Appeal came to the same conclusion, even if it assumed in favour of the applicant that he would have an arguable claim sufficient to justify leave to appeal that there was a real risk that the decision of the Panel had been actuated by bias. If the decision whether Mr Kingsley was a fit and proper person could not be delegated to an independent court, the decision of the panel under the doctrine of necessity could not be revoked or quashed. When domestic law does not provide any remedy to a situation where a biased board cannot be replaced by an independent tribunal or any other body, the situation of the applicant or any other person in his position becomes rather desperate.

3. Since the applicant could not and cannot seek redress for the damage caused by the procedure before a Panel which gave the impression of being

biased, I wonder how Britain will be able to provide redress for such grievances when it comes to deciding on how to execute this judgment. The situation is rather similar to that in Kudła v. Poland ([GC], no. 30210/96, § 147, ECHR 2000-XI), where the Court stated that besides a violation of Article 6 a separate violation of Article 13 is possible in cases of length of proceedings if there is no effective remedy at the domestic level. There is only an overlap of the two Articles where the Convention right asserted by the individual is a civil right recognised under domestic law. In such circumstances the safeguards of Article 6 § 1 implying the full panoply of a judicial procedure are stricter than, and absorb those of Article 13. But here the right asserted was the right to have an impartial tribunal. That is a separate legal issue from whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. In the present case a violation of Article 6 has been found by the Court and no effective remedy at the domestic level is available. Such a situation should either lead to a recomposition of the Panel of the Gaming Board or to a delegation of power to the High Court or to the Court of Appeal. The doctrine of necessity cannot justify in my view a perpetuation of the situation of violation. Under these circumstances, an exception to the doctrine of necessity has to be made with the result that a delegation of power from the Panel to the courts is acceptable. In such a situation, the only possible reparation is to grant the applicant a certain sum in respect of non-pecuniary damage, not for loss of opportunities but on an equitable basis for being in a position where he cannot find any redress under domestic law for this kind of violation of Article 6.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL JOINED BY JUDGES BONELLO AND KOVLER

(Translation)

1. I do not share the decision of the majority not to award financial compensation, by way of just satisfaction, for the non-pecuniary damage sustained by the applicant.

2. Proceeding from the principle, constantly reiterated by the Court, that the Convention is a living instrument which must be interpreted in the light of present-day conditions, that its intention is to guarantee rights that are not theoretical or illusory, but practical and effective, and in accordance with "*... the principle that the applicant should as far as possible be put in the position he would have been in had the requirements of [the Convention] not been disregarded*" (see *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12), the construction of Article 41 which – to my mind – is the correct one inclines me to the view that, in principle, a mere finding of a violation cannot constitute in itself adequate just satisfaction. Applicants are entitled to something more than a mere moral victory or the satisfaction of having contributed to enriching the Court's case-law.

3. Where the Court concludes that there has been a violation of one of the provisions of the Convention, and mindful that the domestic law affords only partial redress (or all too often none whatsoever) for the consequences of that violation, an award of just satisfaction in compensation for non-pecuniary damage ought to be the *rule*. A decision that the finding of a violation constitutes in itself just satisfaction ought to be the *exception* and reserved for cases with minor consequences. Indeed, some breaches of procedural rules, of a kind known as "technicalities", or other cases which have not significantly affected an applicant's situation can always constitute exceptions [In *Dudgeon v. the United Kingdom* (Article 50), judgment of 24 February 1983, Series A no. 59, the Court held (pp. 7-8, § 14): "... Mr Dudgeon should be regarded as having achieved his objective of securing a change in the law of Northern Ireland. This being so and having regard to the nature of the breach found, the Court considers that in relation to this head of claim the judgment of 22 October 1981 constitutes in itself adequate just satisfaction ..." See also, for a decision based on very special grounds, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 63, § 219]. The Court will of course exercise care and take account of the circumstances of the case in determining the amount of compensation.

4. In the instant case the Court held that the hearing before the three-member Panel did not present the necessary appearance of impartiality to constitute an Article 6 § 1 tribunal (see paragraph 50 of the Chamber

judgment) and concluded that, since the domestic courts were unable to remit the case to the Board or another tribunal, the High Court and the Court of Appeal did not have "full jurisdiction" within the meaning of the case-law on Article 6 § 1 (see paragraph 59 of the Chamber judgment). With regard to breaches of procedural guarantees, the almost invariable practice of the Court is to refuse to award compensation for pecuniary damage on the ground that it cannot speculate as what the outcome of domestic proceedings would have been had the breach not occurred. I agree with such a conclusion. However, where a violation of the Convention is found, it is that violation itself which – beyond any possible pecuniary damage – causes the applicant non-pecuniary damage, irrespective of the outcome of the proceedings. That is my view.

5. As there was no causal connection between the violation and the alleged pecuniary damage, and in order to avoid any speculation as to the possible outcome of the proceedings, the solution consisting in acknowledging that the applicant sustained non-pecuniary damage in the form of "loss of real opportunities", which has been adopted by the Court in a number of cases [See, among other authorities, *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89; *Bönisch v. Austria* (Article 50), judgment of 2 June 1986, Series A no. 10; *de Geouffre de la Pradelle v. France*, judgment of 16 December 1992, Series A no. 253-B; *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A; and, more recently, *Pélissier and Sassi v. France* [GC], no. 25444/94, ECHR 1999-II, and *Dulaurans v. France*, no. 34553/97, 21 March 2000, the last two concerning specifically the guarantees of a fair trial (Article 6 § 1 of the Convention)], seems to me to be an adequate and fair solution. In *Doustaly v. France*, judgment of 23 April 1998, *Reports of Judgments and Decisions* 1998-II, despite the lack of a causal connection between the violation of Article 6 § 1 and the alleged pecuniary damage, the Court awarded the applicant a substantial sum under the head of loss of clients and an amount in compensation for non-pecuniary damage. Otherwise, if the Court does not want to follow the "loss of opportunity" approach, it can always acknowledge the existence of non-pecuniary damage arising from uncertainty (see *Guincho v. Portugal*, judgment of 10 July 1984, Series A no. 81), anxiety (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290), feelings of helplessness and frustration (see *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B) or damage to the applicant's reputation (see *Doustaly*, cited above) caused by the violation.

6. Since Mr Kingsley's rights, as protected by Article 6 § 1 of the Convention, were violated and domestic law did not provide him with any means of redress for the non-pecuniary damage he had sustained, he should have been awarded just satisfaction. In any event, in the light of the decision

adopted by the majority, I have difficulty understanding why the panel of five judges agreed to refer this case to the Grand Chamber (see paragraphs 36 and 37 of the present judgment).